Playing a Dangerous Game of Telephone: The Role of Court Interpreters and Interpretation Error in Immigration and Other Court Proceedings

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PLAYING A DANGEROUS GAME OF TELEPHONE: THE ROLE OF COURT INTERPRETERS AND INTERPRETATION ERROR IN IMMIGRATION AND OTHER COURT PROCEEDINGS

By

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# TABLE OF CONTENTS

List of Figures ........................................ Page vi
Abstract .............................................. Page vi
INTRODUCTION ........................................ Page 1

1. THE COURT INTERPRETER AND FEDERAL AND STATE PROCEEDINGS................................. Page 3
   Definition of Court Interpreter .................. Page 5
   Increasing Awareness of Need for Interpreters  Page 8
   Due Process and Court Interpretation ........... Page 10
   Application of Due Process in Criminal Cases  Page 17
   As Opposed to Immigration Proceedings ......... Page 17

2. THE INTERPRETER AND IMMIGRATION PROCEEDINGS..... Page 20
   Overview of Asylum Proceedings ................. Page 20
   The Role of the Interpreter ..................... Page 24
   Law on the Presence of an Interpreter .......... Page 24
   Law on Interpretation Error: Competency and Accuracy ........................................... Page 26
   Interpreter Competency.......................... Page 27
   Interpreter Accuracy......................... Page 33

3. THE ANATOMY OF INTERPRETATION ERROR:
   A STUDY INVOLVING RUSSIAN AND OTHER LANGUAGES... Page 40
   Dialect ........................................... Page 43
   Second Languages .................................. Page 43
   Technical Language ............................... Page 45
   Translation Technique ......................... Page 47
   Syntax: Word Order ............................. Page 51
   Word Choice ..................................... Page 52
   Meta-linguistic Error ............................. Page 55

CONCLUSION ......................................... Page 59

BIBLIOGRAPHY ....................................... Page 63

BIOGRAPHICAL SKETCH ............................... Page 68
ABSTRACT

Playing a Dangerous Game of Telephone: the Role of Court Interpreters and Interpretation Error in Immigration and Other Court Proceedings analyzes the role of the court interpreter in immigration and other types of court proceedings. Like the game of Telephone, court proceedings are inherently acts of communication. Unlike Telephone, however, the communication chain is rather complicated. At their most basic level, court proceedings generally involve one judge, two attorneys, and a court reporter. When the chain is expanded to include parties, juries, or interpreters, the chain becomes more and more tenuous and subject to failure. In cases where court interpretation is involved, breakdowns along the chain of communication lead to discrepancies between the original and the interpretation, which are certainly not comical. In fact, these errors may actually result in fundamental injustice. In the worst cases, errors in interpretation result in the incarceration of the innocent or in improper deportations.

The first two chapters introduce the reader to the topic, explaining the structure of the U.S. court system and how state and federal courts approach the use of court interpreters. Additionally, these chapters examine developing case law involving court interpretation outside of immigration proceedings, with an explanation of the difference between them vis a vis the concept of due process. The last two chapters focus on the immigration law setting. Concentrating on credibility hearings, this thesis analyzes case law regarding
interpretation error in immigration proceedings and offers a practical guide to legal practitioners for anticipating where errors may occur through examples drawn from Russian and other languages.
INTRODUCTION

As children, most of us probably played the game Telephone. The rules are simple. Everyone sits in a row and the first person thinks of a phrase to whisper into the ear of the player sitting next to him. Each successive person passes the phrase along until the final player announces what he heard. Generally, the final product differs from the original whispered phrase, often significantly. The game Telephone illustrates fundamental issues involved in court interpretation. On the simplest level, the game symbolizes the chain of communication, demonstrating the relationship between the speaker, the listener, the audience, and the speech act. In playing the game, one observes various external and internal influences that may affect the communication chain, and where the weakest links exist. When a link snaps, the result is evident in the garbled message that is finally spoken aloud. In the game of Telephone, these very miscommunications render the game comical.

Court proceedings are inherently acts of communication. Unlike Telephone, however, the communication chain is rather complicated. At their most basic level, court proceedings generally involve one judge, two attorneys, and a court reporter. When the chain is expanded to include parties, juries, or interpreters, the chain becomes more and more tenuous and subject to failure. In cases where court interpretation is involved, breakdowns along the chain of communication lead to discrepancies between the original and the interpretation, which are certainly not comical. In fact, these errors may actually result in fundamental injustice. In the worst cases, errors in
interpretation result in the incarceration of the innocent or in improper deportations.

Playing a Dangerous Game of Telephone: the Role of Court Interpreters and Interpretation Error in Immigration and Other Court Proceedings analyzes the role of interpretation in court proceedings, drawing on examples from immigration and other types of court proceedings. The first chapter introduces the reader to the topic, explains the structure of the U.S. court system and describes how state and federal courts approach the use of court interpreters. Additionally, this chapter examines developing case law involving court interpretation outside of immigration proceedings, with some preliminary explanation as to how non-immigration proceedings differ because of their focus on due process. The last two chapters focus on the immigration law setting. Concentrating on credibility hearings, this thesis examines case law on interpretation error in immigration proceedings and offers a practical guide to legal practitioners for anticipating where errors may occur through examples drawn from Russian and other languages.
CHAPTER ONE
THE COURT INTERPRETER AND FEDERAL AND STATE PROCEEDINGS

For the purposes of this thesis, the United States legal system may be divided into two basic categories: administrative and judicial. In the administrative realm, legal conflicts arise when agency rules and regulations are applied to a particular set of facts. These conflicts are resolved through an administrative process overseen by administrative officers, such as administrative law judges or hearing officers. Administrative proceedings may be held internally or by an outside adjudicatory authority, such as a special division of administrative hearings.¹ On the federal level, most administrative hearings are held within the agency. For instance, the Bureau of Immigration Services, formerly known as Immigration and Naturalization Services (INS), decides matters pertaining to immigration law through the use of adjudication officers and appeals boards.² Judicial proceedings, on the other hand, are held before courts founded on the basis of either federal or state constitutional mandates.³

Judicial proceedings and administrative proceedings often intersect through the means of an appeals process. The majority

¹ In Florida, for example, the Department of Administrative Hearings (DOAH) adjudicates formal administrative proceedings arising from agency action conducted by executive agencies. Some Florida legislative agencies, such as the Public Service Commission, hold their own administrative hearings overseen by a board of commissioners.
² This paper will use INS and BIS interchangeably as all of the immigration law decisions rendered at the administrative level were decided during the existence of INS.
of immigration cases discussed in this paper, for instance, arose at the administrative level and were subsequently resolved in the appropriate federal court. The appeals process varies greatly depending on the court involved and the particular matter being appealed; however, one may draw the following broad conclusions. When a party in an administrative case seeks to appeal an administrative decision, it must first exhaust all of the administrative remedies provided by law. If a satisfactory resolution is not forthcoming, a party, within certain constraints, may appeal the decision to the appropriate state or federal judicial court.

Court interpreters serve in both judicial and administrative proceedings, at the trial level and in the appeals process. Court interpreters may be appointed by the judge or hired by counsel. They may be employed by the plaintiff, the court, or the defendant. Depending on which rules a particular court follows, these interpreters may be required to be certified. They may even be pulled off the street, with little or no verification of their qualifications. Daniel Sherr, a professional interpreter, recounts one such incident that occurred in traffic court. While Mr. Sherr was awaiting adjudication of his own case, a Russian defendant’s case came up for hearing. The defendant’s did not speak English, however, so the judge addressed the courtroom and inquired whether anyone spoke Russian. One individual, a taxi driver, raised his hand and was sworn in as the interpreter, without judicial establishment of his credentials. Regardless of the manner in which interpreters are chosen, however, they all serve the same function: to preserve due process rights and facilitate the fairness of the proceeding at hand.

Court interpreters serve this role by effectively relaying what occurs during a court proceeding to the participants.

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4 Daniel Sherr, Anyone Here Speak Russian?, PROTEUS Vol IX, No. 3 (2000),
Generally, court interpreters use a technique called “simultaneous interpretation,” in which the interpreter orally conveys the meaning of words from the language of the proceeding into a target language and back. A court interpreter may also occasionally be called on to sight translate important documents that have not been translated prior to use in the proceeding. However, court interpreters are not translators in the traditional sense.

**Definition of Court Interpreter**

A number of states have sought to define the term “court interpreter” and have done so in a variety of ways. California, on a website dedicated to its court interpreter program, defines the term as “...anyone who interprets in a civil or criminal proceeding (e.g., arraignment, motion, pretrial conference, preliminary hearing, deposition, trial) for a witness or defendant who speaks or understands little or no English.” Maryland has defined interpreter by rule as “...an adult who has the ability to render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written and without explanation.” Utah’s court website defines a court interpreter as “...a person who

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5 Until recently, interpreters in immigration proceedings were only allowed to conduct summary interpretation. Summary interpretation occurs when the interpreter merely summarizes the content of testimony. Summary interpretation is often limited to witness testimony, direct questions to the defendant and his answers. Simultaneous interpretation ostensibly involves complete interpretation of all aspects of the proceeding into and from the native language simultaneously.

6 Note, however, that Utah specifically states that a court interpreter is to render a complete and accurate interpretation (oral) or translation (written). While this blurs the traditional line between interpreter and translator, at least Utah distinguishes between the acts of translation and interpretation. See http://www.utcourts.gov/resources/interp/faq.htm (last visited October 24, 2004).


8 Maryland Rules of Procedure, Title 16 “Courts, Judges, and Attorneys, Chapter 18 Miscellaneous, Rule 16-819 Court Interpreters (a) (2)
interprets from English to another language and vice versa in a court proceeding.” 9 These definitions are interesting because they address specific qualities that each state has determined to be the most important for its courts. Maryland specifies that interpreters must be adults. While one might believe this language to be superfluous, immigration courts for instance, on occasion have enlisted interpreters under the age of majority. California limits the role of the interpreter to serving the needs of witnesses and defendants. California appears to be concerned primarily with ensuring due process for defendants. Interpreters, however, perform an equally important function for the presiding judge, jurors and other participants—a fact clearly recognized by Utah, which likens a court interpreter to a bridge. 10

California and Utah also outline the types of skills an interpreter must have and in which types of situations an interpreter may be required. California states, “Court interpreters must accurately interpret for individuals with a high level of education and an expansive vocabulary, as well as persons with very limited language skills, without changing the language register of the speaker. Interpreters are also sometimes responsible for translating written documents, often of a legal nature, from English into the target language and from the target language into English.” 11 Utah advises that “… court interpreting services may be needed for a criminal defendant, a witness, a party in a lawsuit, or another person involved in court who speaks or understands little or no English.” 12 Utah’s court website, notable for its comprehensive explanation of many

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10 See id.
12 See id.
aspects of court interpretation, describes the role of the court interpreter in great detail:

The interpreter's role is to render a complete and accurate interpretation (oral) or translation (written), without altering, omitting, or adding anything to what is stated or written, and without explanation. In essence, the interpreter serves as a bridge between whoever is speaking—the judge, attorney, witness, etc.—and the non-English speaking person, so that the non-English speaking person hears in his own language everything that is being said in English. If a non-English speaking person testifies in court, it is also the interpreter's job to interpret everything that person says into English so that everyone in the courtroom hears it in English.

"Interpret" in this context does not mean explain. It means providing an equivalent meaning in the target language as the one stated in the source language. It is not the job of the interpreter to explain anything independent of what is being said by participants in the courtroom proceedings. It is not the interpreter's job to give advice to or otherwise counsel the non-English speaker in court, and it would be unethical for the interpreter to provide services other than interpreting from one language to another.¹³

By answering questions regarding a court interpreter’s qualifications, expected duties, and use in court, states and courts are attempting to develop a systematic approach to court interpreting. Nonetheless, many states lag far behind. Florida and Texas, states with huge non-English speaking populations for instance, have yet to develop statewide regulations regarding the
court interpreter qualifications. Florida, however, is making an effort to redress the problem by instituting a small court interpreter certification program. At present, only Russian, Spanish, Haitian Creole, and Italian are supported.

Increasing Awareness of the Need for Interpreters

Over the past decade a number of states, including California, Minnesota, and Florida, have chaired task forces on racial and ethical bias, which in part, have addressed linguistic issues involving non-English speaking litigants. The Florida State Supreme Court’s task force concluded, “To a minority for whom English is not the primary language, language barriers only heighten the desperation that justice is simply beyond reach, no matter what the truth or consequences...[The prosecution of a non-English-speaking defendant without the aid of an interpreter] loses its character as a reasoned interaction...and becomes an invective against an insensible object.” Minnesota, a state that one does not immediately connect with high immigration levels, also understands the important role that court interpreters play in the provision of justice. The Minnesota Supreme Court Task Force on Racial and Ethnic Bias in the Judicial System stated that the issue “…has become a stepchild of the justice system: understudied, under funded, and in terms of its ultimate impact, little understood.”

California, probably more than any other state, has championed the use of court interpreters, a view apparently derived from the results of studies commissioned by the California Judicial Council Advisory Committee on Racial and

\[^{13}\text{http://www.utcourts.gov/resources/interp/faq.htm (last visited October 25, 2004).}\]
\[^{14}\text{http://www.flcourts.org/ (last visited October 25, 2004).}\]
\[^{15}\text{See id.}\]
\[^{16}\text{http://www.ncsconline.org/D Research/ Courtinterp.html (last visited October 25, 2004)}\]
\[^{17}\text{See id.}\]
Ethnic Bias in the Courts. By law, the Judicial Council of California is required to conduct a study of spoken language need and interpreter use in the state’s trial courts every five years. The latest report, “2000 Language Need and Interpreter Use Study,” provides invaluable insight into the issue of court interpretation in the most linguistically diverse state in the United States. The study analyzed the current demand for interpreter services by language, and projected future demand. Not surprisingly, Spanish topped the top-ten list of languages, with interpreter service needed on 145,661 occasions during the period studied. Russian made the list with 1,957. Studies such as this one illustrate the growing demand that immigrants place on the U.S. court system; and they aid courts in understanding how to properly manage their resources to meet this demand.

States also address the growing need for qualified interpreters through legislation and rulemaking. Some states, and the federal government, have adopted Court Interpreter Acts, which may set forth certification and testing procedures, employment requirements, salaries and so forth. Other states have adopted codes that define the court interpreter’s role, set ethical standards and educational requirements for interpreters, and govern their use in legal proceedings.

One important resource for state courts is the National Center for State Courts, which has published a Model Guide for Policy and Practice in the State Courts. The publication is an excellent overview of the role of the interpreter and problems associated with judicial interpretation.

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19 See id.
21 See National Center for State Courts, Court Interpretation, Court Interpretation: Model Guides for Policy and Practice in the State Courts (2002).
As of 2002, twenty-two states have appointed committees to study racial, ethnic and linguistic issues in state court systems.\textsuperscript{22} The published studies of these commissions raise serious concern with the judicial system’s ability to ensure due process for non-English speaking litigants.\textsuperscript{23} It is interesting to note that state courts appear to be the most proactive in addressing the problem of court interpretation on an institutional level, while the most proactive case law is being developed in federal courts.

\section*{Due Process and Court Interpretation}

Increased attention to due process for non-English speaking litigants on the institutional level is spurring greater attention to the importance of adequate court interpretation within the legal community as a whole. Case law, albeit slowly, appears to be developing in a manner that would provide non-English speaking participants with greater protection under the Fifth, Sixth, and Fourteenth Amendments. Evolving due process jurisprudence may eventually allow these individuals to engage the legal system on a fair playing field.

At this time, participants in federal courts, and perhaps state courts through various institutional means, are reaping the greatest benefits of this newly emerging body of case law. In contrast, parties involved in immigration proceedings are not yet provided the same level of protection. The difference lies in the fact that the majority of federal and state cases emphasize due process of law in the criminal arena.

Due process, both procedural and substantive, is guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States. As commonly understood, due process of law prevents us from being deprived of our life, liberty, or property. However, at issue in cases involving court

\textsuperscript{22} See id.
interpreters is the concept of procedural due process, which for this paper will simply be referred to as the right to a full and fair proceeding. This right is guaranteed at both the federal level, through the Fifth Amendment, and at the state level, through the Fourteenth Amendment. Both amendments ostensibly limit the scope of this protection to only those persons born or naturalized in the United States. In fact, the Fourteenth Amendment specifically limits due process within the language of the amendment itself:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{24}

Practically speaking, however, courts extend these protections to resident aliens and even other aliens, illegal or not, in criminal contexts. For instance, Judge Moody, a United States District Court Judge with the Middle District of Florida, regularly grants foreign criminal defendants access to court interpreters in order to eliminate the lack of an interpreter as a grounds for appeal.\textsuperscript{25}

Interpretation in criminal proceedings is particularly important because of the ramifications of a defendant’s inability to understand his trial on due process. The Sixth Amendment to the United States Constitution asserts that defendants have the right to meaningful presence during their own legal proceedings.

\textsuperscript{23} See id.
\textsuperscript{24} U.S. Const. amend. XIV, § 1.
\textsuperscript{25} Telephone interview with the Honorable James. S. Moody, Jr., United States District Court Judge for the Middle District of Florida, September 9, 2004 (stating that he provided foreign shipmen with interpreters in order to promote fairness in their criminal trials).
Presence means not only physical presence, but also meaningful participation. In order for a criminal defendant to receive a fair trial he must have the ability to understand the charges and evidence against him. For non-English speakers, this means that the defendant must have access to certain materials in his native tongue and have proceedings relayed to him in his own language. Modern case law on due process for non-English speaking defendants addresses issues such as whether all documents must be translated, or whether every word of a proceeding should be interpreted. The line between sufficient due process and something less than a fair trial, however, is not easily demarcated. One seminal case, United States v. Martinez, opines that the use of court interpreters involves a balance between the defendant’s constitutional right to confrontation and due process and the public’s interest in the economical administration of justice.\(^2\)

While the Supreme Court of the United States has never directly addressed the right to an interpreter in any proceeding, it is a well-settled principle that the total lack of any translation or interpretation renders a criminal trial fundamentally unfair.\(^3\) In U.S. ex rel. Negron State of New York, an indigent criminal defendant spoke no English and his attorney spoke no Spanish. With the exception of a few summary translations provided by the prosecution’s interpreter, the trial was not translated for the defendant, nor was the defendant afforded any means of communicating with his attorney.\(^4\) This landmark case was the first federal case to hold that such a trial violated the due process clauses of the Fifth and Fourteenth Amendments.\(^5\)

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\(^2\) United States v. Martinez, 616 F.2d, 185, 188 (5th Cir, 1980).


\(^4\) See id.

The law on interpreters in federal courts is by no means settled and differs significantly from circuit to circuit. Cases such as United States v. Mosquera, however, indicate the direction in which most courts are heading.

The Mosquera case involved eighteen Spanish-speaking defendants who were accused of money laundering and narcotics. The presiding judge drafted an order in which he discussed the difficulties facing non-English speaking defendants in understanding court proceedings. He found, for instance, that one interpreter for all defendants was not sufficient due to the sheer volume of evidence and testimony. The judge therefore ordered that the government supply Spanish translations of all documents, except motion papers and original evidence. The government filed a motion for reconsideration, which the judge denied based on the 5th, 6th, and 14th amendments to the United States Constitution, the Court Interpreters Act, Federal Rule of Criminal Procedure 28, and the inherent power of the federal courts. The resulting opinion held that in order for a non-English speaking defendant to stand equal with others before the court requires translation. Just as importantly for this paper, the judge also demonstrated an understanding that misinterpretations in oral discourse are difficult to identify.

While not all federal circuits have followed the Mosquera court’s lead, the case clearly indicates that judges have actively participated in the debate on the importance of competent interpretation during legal proceedings. Until the Supreme Court definitively answers this question, however, each federal court must follow the precedent set by that district.

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32 See id.
33 Mosquera et al, 816 F.Supp. 168 (March 16, 1993); 1994, WL 593977 1(EDNY)
One facet of court interpretation upon which all courts apparently agree is that determinations as to whether fairness requires the appointment of an interpreter and whether an interpreter is qualified are solely within the trial court’s discretion.\textsuperscript{34} As such, defendants must jump high procedural hurdles when challenging the trial court’s decision. In order for a defendant to appeal a judge’s failure to appoint an interpreter, the defendant must show that the trial court “abused its discretion” or that the failure to appoint was “plain error.” These two standards present extremely high thresholds, and any appeal asserting them is likely to fail.

To show abuse of discretion, defense counsel must first preserve the issue for appeal by objecting in a timely manner on the record, prove to the court that the failure to appoint is truly prejudicial, and give the court the opportunity to correct the deficiency. A demonstration that a defendant cannot speak English at all would be an instance when defense counsel may successfully challenge a trial court’s decision not to appoint a court interpreter.

To preserve the matter for appeal, counsel must bring the matter to the judge’s attention, in order to provide the judge with the opportunity to correct his oversight. A prudent judge would probably respond by questioning the witness to determine the extent of the defendant’s English language proficiency. The court would then rule whether the request to appoint an interpreter was warranted. Erring on the side of caution, many judges would generally grant the request to prevent an appeal based on this issue.\textsuperscript{35} For the same reason, many judges may even authorize a court interpreter in cases where the defendant was granted access to counsel who spoke the same language.\textsuperscript{36} These

\textsuperscript{34} Benmaman at 2.
\textsuperscript{35} Telephone interview with the Honorable James S. Moody, Jr., United States District Court Judge for the Middle District of Florida, September 9, 2004; see also Giraldo-Rincon v. Dugger, 707 F.Supp. 504, (MD Fla. 1989).
\textsuperscript{36} See id.
judges clearly recognize that the attorney’s primary role is to effectively defend his client, a role which would be impaired if the attorney was charged with the dual role of interpreter-lawyer. When questioning a witness on the stand, for instance, the attorney cannot be expected to interpret for the benefit of the client, the court, and potential jurors. Secondly, proactively appointing an interpreter in these circumstances protects the attorney by preventing the defendant from asserting ineffectiveness of counsel on appeal.\footnote{See id.}

If the judge refuses to appoint an interpreter, and the attorney in the above scenario has objected on the record, the attorney has ensured that he has met the procedural requirements to file an appeal. Nevertheless, a favorable appellate outcome is not guaranteed. If the appeals court determines that the evidence against the accused was so overwhelming that the failure to appoint would not have affected the outcome, the trial court’s decision will be upheld. If the trial judge corrects the error once it is brought to her attention, the appeal will fail. Even the fact that cross examination was conducted and no further objection was raised may render the appeal unsuccessful.\footnote{Benneman at 2-3.} Clearly, defendants are severely challenged when arguing that the trial court abused its discretion in denying the appointment of an interpreter.

Appeals based on plain error, while not requiring the preservation of an objection at the trial, are even harder to argue successfully.\footnote{See id.} A few cases have succeeded, however, and as a result there are a number of conclusions that may be drawn. A defendant cannot unknowingly waive the right to an interpreter, and must do so intelligibly and on the record if it appears an interpreter may be necessary.\footnote{State v. Rodriguez NJ 1996} A defendant’s guilty plea may not
stand if it is demonstrated that the plea was made unknowingly since no interpreter was appointed to interpret the proceedings.\textsuperscript{41} Lastly, trial judges may not out of hand refuse to inquire into a defendant’s need for an interpreter even if the defendant’s attorney speaks the same language as the defendant.\textsuperscript{42}

The same procedural hurdles that exist when a court fails to appoint an interpreter exist when a defendant seeks an appeal based on interpretation error. In these cases, however, defense counsel must not only raise the issue at trial, but also must inform the court of the nature of the error, how the error prejudices the client, and how the error may be corrected. Interpretation error may occur inside or outside the courtroom, and counsel may challenge either. For example, counsel may challenge the interpreter’s rendering of answers during a police interview prior to indictment, or he may challenge an interpreter’s word choice during witness testimony.

According to Judge Moody, one of the most commonly challenged interpretation errors takes place outside the courtroom during arrest proceedings. Defense attorneys often assert that interpretation errors occur when the defendant was read or when he signed the translation of the Miranda warning.\textsuperscript{43} The Miranda warning informs arrestees of their right to an attorney, their right to the provision of an attorney if they cannot afford one, their right to remain silent, and the fact that anything they say may be used against them. Criminal defendants must be informed of these rights in a manner they can understand. If a court finds that Miranda warnings were not given, or that he defendant did not have the capacity to understand them (whether because of

\textsuperscript{41} \textit{New York v. Serna}, 1999, NY AD.3 Dept (WL 357316)


mental incapacity or language difficulty), the arrest is procedurally defective.

Judge Moody shared with the author the way he approaches Miranda-based challenges. When defense counsel raises Miranda-based challenges, Judge Moody proceeds by allowing the defense present testimony from expert witnesses regarding the sufficiency of the interpreter’s interpretation or the written translation. According to Judge Moody, most Miranda-based challenges are denied. Even if the Mirandizing was not perfect, the defendants generally understood enough to be adequately apprised of their rights.

Application of Due Process in Criminal Cases as Opposed to Immigration Proceedings

As discussed above, most case law regarding interpretation centers on the right of a criminal defendant to a full and fair hearing and how to ensure fairness when a defendant speaks little or no English. For aliens who have never been naturalized or granted residency status in the United States, the application of procedural due process is more restricted. Deportation proceedings are not criminal proceedings, and therefore are not accorded the greater protection of the Sixth Amendment to the U.S. Constitution. While it is true that immigration proceedings must also be fair, and an alien is entitled to some measure of due process, there are notable legal and practical differences between the application of due process in criminal and immigration proceedings.

One primary difference lies in what constitutes a full and fair proceeding in a criminal trial as opposed to immigration proceedings. In entry proceedings, the mere decision of an administrative officer whether to admit or deny an alien entry
into the United States constitutes due process in immigration proceedings. A hearing is not guaranteed, and the decision may even be made on secret, undisclosed information. These individuals, then, are not guaranteed the right to confront their accuser, as guaranteed to criminal defendants through the Sixth Amendment. Aliens undergoing deportation proceedings appear to have access to a few more twigs in the bundle of due process rights, however. For instance, while findings of fact made during a deportation hearing are generally conclusive, hearings should be impartial.

Secondly, in criminal cases defendants have easier access to the appeals process. While these defendants must properly preserve issues for appeal and while appeals based in interpretation error may be hard to win, there is substantial value in the fact that the appeals process is readily available. For asylum seekers, access to an appeal is almost impossible. On the one hand, establishing error procedurally is challenging. On the other, once an application is denied, the government initiates deportation proceedings. Therefore, the asylee’s access to the appeals process is further hampered by the lack of time.

Thirdly, there is a marked difference between the developing institutional value placed on court interpretation in state and federal courts and the lack thereof in immigration proceedings. Understanding that qualified court interpretation is central to the defendant’s right to meaningful participation in a full and fair trial, federal courts are defining the role of the court interpreter through case law. State courts are also leading the way by developing institutional controls and promoting legislation on the matter.

In contrast, as of this writing, neither BIS, nor its predecessor INS, require certified interpreters in its

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proceedings, and agency rulemaking on this issue has been woefully insufficient. If, according to the Florida Supreme Court, “language barriers only heighten the desperation that justice is simply beyond reach, no matter what the truth or consequences...”\(^{46}\) for criminal defendants, imagine the sense of desperation asylum seekers must have when facing deportation back to a country in which they fear for their very lives.

\(^{46}\) \url{http://www.ncsconline.org/D Research/ Courtinterp.html} (last visited October 24, 2004).
CHAPTER TWO
THE INTERPRETER AND IMMIGRATION PROCEEDINGS

In order to remain in the United States an applicant for asylum or withholding of deportation must adequately express a credible fear of persecution upon return to his native country. Once an asylee files a petition for asylum, he is granted a hearing before an immigration judge or an asylum officer. The majority of asylum seekers speak little English, yet, the applicant must rely on written and oral testimony to communicate with the immigration judge or hearing officer. As testimony is more often than not the sole basis for a decision, a successful resolution depends on whether the interpretation or translation of testimony accurately reflects the articulation of the petitioner’s fear.

The following chapters seek to illustrate the danger arising from interpretation error in credibility hearings. The first defines the nature of the credibility hearing in asylum cases and the role of the interpreter or translator therein. The second outlines the current law on interpretation error in immigration jurisprudence. The third illustrates how and when errors in interpretation may occur.

Overview of Asylum Proceedings

Generally, to be eligible for asylum in the United States a petitioner must ask for asylum at the port-of-entry or file an application within one year of arrival in the United States. A
petition may be filed whether or not the applicant legally resides in the United States or illegally entered the country.\textsuperscript{47} In order for a petition to move forward, the petitioner must qualify as a refugee as defined by U.S. law. The Immigration and Nationality Act defines "refugee" in Sec. 101(a)(42) as:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Information provided on the application for asylum and during an interview with an asylum officer or immigration judge determines whether the applicant qualifies as a refugee.\textsuperscript{48} This interview, often termed a credibility hearing or credibility interview, is the most important step in the application for asylum or withholding of deportation for two reasons. The purpose of the interview is to "elicit all relevant and useful information bearing on the applicant's eligibility for asylum."\textsuperscript{49} In addition, the Immigration and Naturalization Service (INS) "has exclusive jurisdiction to make credible fear determinations, and the Executive Office for Immigration Review has exclusive jurisdiction to review such determinations."\textsuperscript{50} If the immigration judge or asylum officer finds that the applicant's testimony presents a credible fear of persecution based on one of the enumerated grounds, the applicant is eligible for withholding

\textsuperscript{47} 8 C.F.R. § 208 (LEXIS through all of 2001).
\textsuperscript{48} 8 C.F.R. § 208.12(a) (LEXIS through all of 2001).
\textsuperscript{49} 8 C.F.R. § 208.9(b) (LEXIS through all of 2001)
\textsuperscript{50} 8 C.F.R. § 208.30(a) (LEXIS through all of 2001).
of removal or asylum. While a positive credibility finding is not
dispositive of the end result, a negative credibility finding is quite likely to terminate the petitioner’s case.⁵¹

Whether an immigration judge or an asylum officer presides over the initial interview depends on whether the proceedings are affirmative (initiated by the petitioner while legally seeking entry into or already in the United States) or defensive (in response to an order of removal or in expedited removal proceedings).⁵² In affirmative proceedings, an asylum officer interviews candidates and decides eligibility. An asylum officer will grant asylum, deny asylum, or refer the case to an immigration judge for final decision. If asylum is denied and the petitioner is in the United States illegally, the asylum officer places the petitioner in removal proceedings and refers the application to an immigration judge for a final decision. The applicant may request that an immigration judge review negative credibility findings.⁵³ On review, the judge either upholds or vacates the orders of an asylum officer.⁵⁴ If the judge concurs with the officer’s credibility determination, the case is returned to INS for removal of the alien. Upon finding that the alien posses a credible fear of persecution, the immigration judge vacates the order of an asylum officer, allowing the alien to file an application for asylum and withholding of removal in accordance with 8 C.F.R. § 208.4(b)(3)(i).

A defensive petition for asylum, other than in expedited removal proceedings, occurs when a petitioner faces removal proceedings and claims asylum as a defense to removal after receiving notice of removal. Such petitions proceed directly to Immigration Court, where a judge determines credibility and

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⁵² Interview with Terry Coonan, Assoc. Professor at Florida State University in Tallahassee, FL (March 21, 2002) (describing the difference between affirmative and defensive proceedings). Procedures for expedited removal and petitions for asylum in such cases are not discussed in this paper.
⁵³ 8 C.F.R. § 208.30(g)(1) (LEXIS through all of 2001).
decides the case.\textsuperscript{55} If the immigration judge denies the asylum petition, the petitioner may appeal to the Board of Immigration Appeals, which has authority to conduct de novo review and arrive at its own decision.\textsuperscript{56} De novo review is a legal concept, which stands for the proposition that the court reviewing a lower court’s decision is not bound by the findings of fact of the lower court. Generally, when a case is appealed the higher court is bound by finings of fact made by the trier of fact (a judge or jury) at the lower level. In de novo review cases, the appeals court is authorized to look at all aspects of a case anew. Which cases are granted de novo review depends on case law and precedent. At the administrative level, however, BIA has determined that it has the right to review decisions under this standard. If BIA’s decision remains unfavorable, a petitioner may seek to appeal his case to the federal court serving the district in which the case arose. When a case is appealed to federal court, precedent in that district will govern the result (unless the judge finds that change is warranted).

Courts, however, have the ability to distinguish between cases to depart from an established principle of law. For example, one district may hold that defendants in criminal trials are entitled to certified court interpreters and all evidentiary documents and pleadings must be translated. Because the principle applies to criminal defendants, a court reviewing an immigration proceeding may distinguish the facts of the cases and rule that the due process requirement for the criminal defendant stems from the Sixth Amendment of the U.S. Constitution, which does not apply to the asylum petitioner. Similarly, federal courts do not have to defer to sate court rulings. For example, a state court may mandate the use of qualified court interpreters

\textsuperscript{54} 8 C.F.R. § 208.30(g)(2) (LEXIS through all of 2001).
\textsuperscript{55} 8 C.F.R. § 208 (LEXIS through all of 2001).
\textsuperscript{56} Karen Musalo et al., \textit{REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH} 789 (2002)
in legal proceedings; however the federal court residing in that state is not bound to comply with the state’s requirement.

**The Role of the Interpreter**

Given that in many asylum cases the judge, or the asylum officer, and the petitioner are not able to communicate directly in English, the parties use interpreters to facilitate effective communication. Just as with criminal cases, it is long-settled in INS jurisprudence that a competent translation is fundamental to a full and fair hearing. If an alien does not speak English, proceedings must be translated into a language the alien understands.  

Moreover, a full and fair hearing requires that the interpreter be competent, for “[t]ranslation services must be sufficient to enable the applicant to place his claim before the judge.” After all, “A hearing is of no value when the alien and the judge are not understood.” Despite these fundamental “truths”, however, the requirement to appoint an interpreter is a matter within INS hearing officer’s discretion. Furthermore, INS has not established a procedure to ensure that an interpreter is qualified. Therefore, the role of the interpreter in immigration law encompasses two issues: interpreter presence and interpreter competency.

**Law on the Presence of an Interpreter**

The Immigration Law Services’ treatise unequivocally states “it is clearly unfair to conduct a deportation hearing without an interpreter in cases where the alien can neither understand nor speak English.”  

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59 See id.
lack of an interpreter may be unfair does not necessarily translate into a de facto right to an interpreter. Rather, access to an interpreter is limited: INS is not required to provide interpreters in all proceedings, and the presence of an interpreter is not always mandatory.

Firstly, whether the proceeding is affirmative or defensive determines which party must provide the interpreter. In affirmative proceedings before the asylum officer the applicant must provide an interpreter. In defensive proceedings in immigration court the government secures the interpreter.\(^61\) Despite the fact that the government and courts concur that the presence of an interpreter is essential to the ability of an immigrant to participate in the case, failure to provide an interpreter does not necessarily rise to the level of error if the alien had a reasonable opportunity to provide his own interpreter.\(^62\) Secondly, as with criminal defendants, the decision as to whether an alien requires an interpreter is a decision within the discretion of the immigration judge. This decision will not be overturned unless the petitioner demonstrates abuse of discretion.\(^63\) In one instance, for example, although an immigration judge in Drobny failed to provide an interpreter in deportation proceedings, it was found that the alien received due process because the judge ascertained that the alien understood English well enough to proceed and the alien did not object to the lack of interpreter.\(^64\) A judge, however, may not simply enter a deportation order. In Nazarova, an alien relied on INS assertions that an interpreter would be provided for her deportation hearing. The interpreter was late, and the alien chose to wait for the interpreter rather than go to a hearing where she would understand nothing. The immigration

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\(^61\) Interview with Terry Coonan, (March 21, 2002).
\(^62\) See El Rescate Legal Services, Inc. v Executive Office of Immigration Review, 941 F.2d 950 (9th Cir. 1991).
\(^63\) See Drobny v INS, 947 F.2d 241 (7th Cir. 1991).
\(^64\) See id and Cakmar v. Hoy, 265 F.2d 59 WL 16153, at *61 (9th Cir. 1959).
officer entered a deportation order in *absentia*. The appeals court held that such an order constituted an abuse of discretion, which in light of the circumstances deprived the alien of the meaningful opportunity to be heard guaranteed by the Due Process Clause.\(^{65}\)

**Law on Interpretation Error: Competency and Accuracy**

The law not only contemplates the necessity of an interpreter’s presence, but also insists upon the interpreter’s competency and an interpretation’s accuracy. Competency and accuracy, while interrelated, are not identical. Competency refers to the overall ability of an interpreter or translator to perform within a certain level of skill. Accuracy refers to how well the interpretation or translation reflects what was actually written or spoken. An interpreter may be competent, yet commit grave errors in accuracy. The evolution of case law emphasizes the importance of this distinction.

Early cases tended to find error only when an interpreter was absent or when an interpreter clearly could not understand the language of the petitioner. Beginning with the Ninth Circuit in the mid-1990’s, however, courts began to recognize that error in translation or interpretation may occur in less obvious instances.\(^{66}\)

Secondly, despite the fact that common parlance blurs the line between “translator” and “interpreter,” there is a difference: a translator works with written materials and an

\(^{65}\) Nazarova v. INS, 1999 U.S. App. LEXIS 4574, at *16 (7th Cir. 1999). Interestingly, the opinion in this case likens Nazarova’s experience to that of the character played by Richard Gere in Red Corner, a film about an American charged with murder and forced to stand trial in China where little due process is accorded and translation was inadequate. See id at *4.

\(^{66}\)See Gonzales v. Zubrick, 45 F. 2d 934 (6th Cir. 1930) (involving a French-speaking interpreter for a Spanish-speaking alien) and Augustin (involving an interpreter that could not speak Haitian Creole), *as opposed to*, Kostaz v. INS, 31 F. 3d 847, 850 n.2 (9th Cir. 1994) (where the court recognized that mistranslated word may detrimentally affect a hearing).
interpreter works with oral materials. Recently, this distinction has been given greater importance. At least one court has remarked upon the fact that the severity of interpretation error is greater than translation error due to the fact that the latter is easier to ascertain.

Also aiding in the confusion is the fact that the work product of each is commonly referred to as a “translation”. An interpreter’s work product should be called an interpretation and many state interpreter programs correctly make the distinction. However, there is danger in using the word interpretation. When one commonly thinks of an “interpretation” of something, one is focusing on the how the person making the interpretation transmitted his particular understanding of the work to the audience. In court interpretation, individual perception is exactly what is to be avoided. Interpreters must strive only to transmit what is said into and from the target language, without adding to or subtracting information. INS regulations successfully distinguish between the terms. However, case law appears to treat them interchangeably.

**Interpreter Competency**

American jurisprudence has long recognized the importance of language in judicial proceedings and the centrality of linguistic principles in understanding the meaning of words. Our canons of statutory interpretation attest to this fact: plain meaning, *noscitur a sociis* (indicating that the meaning or usage of a word may be determined from surrounding words), and *in pari materia*, are several of the most common. While these canons describe extrinsic tools of interpreting the written word, as early as 1930 courts recognized that the spoken word, too, requires interpretation in order to be given meaning.
In Gonzalez, a seminal case before the Sixth Circuit Court of Appeals, the court determined that in order for a proceeding to provide a non-English speaking immigrant the opportunity to be heard, her spoken testimony must be adequately transmitted in a language understandable to both parties. The court also held that an interpreter “unable to interpret the Mexican speech in a manner calculated to insure the alien a fair hearing” violated basic due process requirements. While the alien in Gonzalez faced deportation because she was charged with prostitution, a number of subsequent cases expanded the idea that due process required competent translation in non-criminal contexts, as well. Most notably, the INS recognized the role competent interpreters play in providing fair adjudications of asylum proceedings in cases such as Matter of Exilius.

INS regulations also demonstrate a concern that interpreters and translators are competent. Statements attesting that the translator is qualified to translate must accompany all document translations. While no similar attestation requirement applies to interpreters, INS requires non-government interpreters to swear an oath to interpret accurately. If doubt arises as to an interpreter’s ability to provide qualified translations during the course of proceedings, INS regulations empower the immigration judge to allow questioning regarding an interpreter’s competency. INS regulations also limit the scope of who may function as an interpreter in proceedings. Interpreters must be 18, cannot be the petitioner’s attorney, and cannot be a family member or witness. Other regulations attempt to control bias.

67 Gonzalez v. Zubrick, 45 F.2d 934, 937 (6th Cir. 1930).
69 See e.g. Matter of Exilius, 1982 BIA LEXIS 22, at *4 (BIA 1982).
70 8 C.F.R. § 3.33 (LEXIS through all of 2001).
71 8 C.F.R. § 3.22 (LEXIS through all of 2001).
72 8 C.F.R. § 3.21 (LEXIS through all of 2001).
73 8 C.F.R. § 208.9(g) (LEXIS through 2002).
by disallowing members of the government from which the petitioner seeks asylum to serve as interpreters.  

However, while INS and courts pay homage to the principle that equity and fairness demand a competent interpreter, given the current state of jurisprudence in this area, it appears that the goal of competent translation is aspirational. For example, while the courts hold that a competent translator or interpreter is central to providing an applicant with a meaningful opportunity to be heard, INS has not published guidelines for determining an interpreter’s competency. Rather, INS merely asserts that competency has not been “major problem.” 

Apparently, INS has determined that an oath to swear to interpret accurately and a notarized statement that the translator is qualified are sufficient evidence of competency. Oddly enough, even the minimal oath requirement drops for federal employees serving as interpreters on the assertion that the procedure is time-consuming.

The requirement that interpreters undergo testing as a requisite to hiring provides little assurance, then, that the interpreter is indeed competent. As case law will show below, INS has even provided interpreters that do not speak the

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74 Reform of Asylum Policy, 22 U.S.C.A. § 6473 (LEXIS through 12-18-01). On December 18, 2001, the U.S. Legislature approved a statute requiring the Attorney General and the Secretary of State to develop guidelines to “ensure that persons with potential biases against individuals on the grounds of religion, race, nationality, membership in a particular social group, or political opinion, including interpreters and personnel of airlines owned by governments known to be involved in practices which would meet the definition of persecution under international refugee law, shall not in any manner be used to interpret conversations between aliens and inspection or asylum officers.” The revision reflects awareness that only unbiased and trustworthy interpreters serve the interests of providing fair and just resolution of asylum claims.

75 Rules for Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931 (1987)(stating that competency has not been a “major problem”), INS does require testing of INS employees, however.

76 See id. and 8 C.F.R. § 3.22 (regarding interpreters); 8 C.F.R. § 3.33 (regarding translation). However, case law determined that INS employees are also free of the oath requirement. See Couto v. Shaughnessy, 218 F.2d 758 (2d Cir. 1955), cert. denied, 349 U.S. 952 (1995).

77 8 C.F.R. § 242.12 (LEXIS through all of 2001).
petitioner’s language. Additionally, the testing standards, subject matter covered in the tests, and analyses of competence complaints are not readily available to enable this author to assess whether the tests adequately assess the interpreter’s specialized knowledge of legal terminology. In contrast to the INS assertion that competency has not been a major problem, competency greatly concerns a number of legislators. While the Refugee Protection Act of 2001 was being debated, a few legislators sent staff to investigate the use of interpreters in INS facilities. Staff members concluded that interpreters were not readily available in many locations, denied in many proceedings, and not trained in the necessary languages.\footnote{Refugee Protection Act of 2001, 147 Cong Rec S 8709 (daily ed. August 2, 2001) (Statement by Senator Leahy (D) of Vermont regarding staff accounts of violations of procedure by INS during expedited removal).}

Apart from the aforementioned regulations, the only institutional safeguards for competency in INS proceedings appear within the hearing itself, in which an immigration judge may ascertain the interpreter’s competency or require an oath, \textit{sua sponte}.\footnote{See Rules for Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931 (1987).} Otherwise, the burden for ascertaining incompetence rests squarely on the shoulders of the attorney. Even worse, the asylee, the person least able to determine whether the interpreter is performing her function, may have this responsibility. If incompetence is discovered before the proceedings, a petitioner may act proactively and locate another more qualified interpreter. However, if errors are discovered during a hearing, the petitioner will be left in the unenviable position of appealing any negative credibility findings on the grounds that errors in translation were violative of the due process requirement for a fair hearing. At the administrative level, only one out of every five petitioners from asylum have their negative credibility determinations overturned by
immigration judges. The BIA, the internal INS appeals board that hears appeals from immigration judge decisions, provides little additional protection as it defers to the original adjudicator’s decisions. Clearly, favorable administrative remedies are difficult to obtain.

If an appeal makes it to the BIA and is further appealed to a federal court, the petitioner’s burden increases even more. For an appeal of credibility determinations predicated on translation or interpretation error to rise to the level of a due process violation, the asylum petitioner must jump through a number of hurdles similar to the ones earlier discussed for criminal defendants. The petitioner must preserve the error for appeal at the administrative level by objecting to incompetent translation and offer alternative translations for what he deems is in error, or ask for a continuance to secure an interpreter. Lastly, the petitioner must decisively demonstrate on appeal that the error is prejudicial. This requirement effectively requires the petitioner to show that had the translation been correct, the credibility hearing would have resulted in a different decision. Unlike criminal defendants, however, immigration petitioners have an additional procedural hurdle after successfully preserving an error for appeal. The petitioner must exhaust all administrative remedies before an appeals court will assert jurisdiction and review the substantive issues in the claim. While this legal requirement for administrative cases is not unique to immigration law, it surely complicates matters for someone who could be deported at any moment. The longer the

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81 See e.g., Kotasz v INS, 31 F.3d 847 (9th Cir. 1994) (dismissed due to attorney’s failure to object); Matter of Exilus at ¶4 (holding that the petitioner failed to specify a particular injury from an alleged error), but see Gonzalez and Augustin, (upholding petitioner’s claim of procedural due process where interpreter has no knowledge or flawed knowledge of the petitioner’s language).
82 See Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980; Hartooni v INS, 21 F.3d 336, 340 (9th Cir. 1994) (stating that Hartooni “must show that incompetence prejudiced the outcome of her hearing.”
process takes, the less likely an applicant will be successful. Furthermore, given the nature of the asylum process, where many applicants have little access to legal representation anyway (such as in expedited removal), such a bar to review leaves an applicant practically without legal recourse in the event of error. Clearly, even though there are apparent procedural similarities between criminal and immigration appeals based on interpretation error, these types of appeals differ significantly in practice due to the asylum process and its time constraints. Furthermore, asylees are often left without attorney representation, while criminal defendants are guaranteed the right of counsel through application of Miranda rights. This practical reality illustrates how important it is for immigration services to develop clear regulations on the qualification of interpreters. Until such regulations are developed, however, immigration practitioners must shoulder a portion of the burden by preventing errors when possible and preserving them for appeal when not.

The primary difficulty in establishing interpretation error as a ground for appeal lies in the reluctance of INS and courts to recognize mistakes in translation or interpretation as prejudicial. For this reason, this study distinguishes between interpreter competency and interpretation accuracy. A petitioner will have greater recourse if an interpreter clearly cannot perform the functions of the job. For instance, if a French speaker is brought in to interpret for a Spanish-speaking person the petitioner will be more likely to win the appeal.

The law on competency is fairly straightforward. By and large, pre-1990’s decisions issued both by courts and the INS stand for the proposition that an interpreter is incompetent only when unable to function in the language of the petitioner, and there are a number of examples. In the afore-mentioned \textit{Gonzalez}

\textsuperscript{83} \textit{Mentor v. INS}, 834 F.Supp. 133, 139 (E.D. Penn 1993).
case, the court found reversible error when the interpreter provided for a Mexican alien spoke only French. In Agustin, a French-speaking interpreter’s inability to interpret the testimony of a Creole-speaking Haitian deprived the petitioner of the right to a meaningful opportunity to be heard. A Guatemalan who spoke only Kanjobal could not present their case through a Spanish interpreter in Matter of Tomas. The foundation of this line of cases is based on the proposition that an interpreter absolutely lacking in the language spoken cannot provide an alien due process required by law because there is no ability for the INS officer and the alien to interact on any meaningful basis. In other words, it is as if there were no hearing at all. However, such an interpretation of incompetence is crude. As will be demonstrated in subsequent sections, the potential for translation error covers a wide-spectrum of situations. Limiting the ability of a refugee to demonstrate prejudicial error solely on the basis that there was an actual or de facto lack of an interpreter eviscerates the spirit of the Gonzales’ holding that due process requires a meaningful opportunity to be heard. Nor does such a simple understanding of the interpreter’s role in providing a fair hearing indicate the developing recognition in other areas of U.S. jurisprudence that language is a powerful tool for justice.

Interpreter Accuracy

Until the early 1990’s, it appears that immigration law effectively limited redress to only those situations that

84 See Gonzalez, at 45 F.2d 934.
85 Id.
86 See Agustin v. Sava, 735 F.2d 32, (2d Cir. 1984).
88 See Hartooni, at 21 F.3d 340; Agustin v. Sava, at 735 F.2d 32, 37(“Translation services must be sufficient to enable the applicant to place
substantially mirror the fact pattern in the Gonzalez case. In short, incompetent translation occurred only when interpreters could not speak the same language as the petitioner, or when they were not present at all. In 1974, the Ninth Circuit found in Haidar that a Lebanese alien seeking withholding of deportation was accorded a fair hearing even when the interpreter spoke a different dialect of Arabic.\textsuperscript{89} The court clearly failed to grasp the peculiar nature of linguistic reality in modern Arabic speaking nations. While dialects are often mutually intelligible, at sufficient distances Arabic speaking communities do not understand each other.\textsuperscript{90} In some instances, a speaker may be diglossic (speaking a standardized form of Arabic and the national or regional variant), but diglossia generally depends upon the educational level of the speaker and the topic to be discussed.\textsuperscript{91} For example, even if two individuals from the Arabic speaking nations are able to conduct conversations on a basic level, there should be little certainty that that level of conversation rises to the sophistication needed to carry out a legal discussion. Once the petitioner objected to the interpreter’s competency, the Haidar court should have ascertained whether the parties were speaking standardized Arabic or communicating cross-dialectically. To do so the court could have conducted \textit{voire dire} of the interpreter and the non-English speaking participants. The court should have inquired into both parties’ educational level, and tested the interpreter’s knowledge of the legal lexicon and terms that may have been particular to the refugee’s claim (tribes, geography, religion). A similar problem existed in a Tenth Circuit case where an interpreter was unable to translate military terms, which were

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\textsuperscript{90} Peter Mathews, \textsc{The Concise Oxford Dictionary of Linguistics} 23 (1997).
\textsuperscript{91} Id. at 98.
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key to the petitioner’s claim. Despite repeated objections by the petitioner and the interpreter, the court held that inaccurate translation did not violate procedural due process. These decisions are hardly equitable, and are certainly not in-line with the modern understanding in state and federal courts that the interpreter’s ability to function in the target language is of utmost importance in providing due process.

Earlier, it was stated that the credibility hearing provides the cornerstone for a decision to grant asylum or withholding of deportation. In order to determine an applicant’s credibility, an asylum officer or immigration judge reviews oral and written testimony. The adjudicator looks for internal inconsistencies within testimony or among various accounts. He observes the demeanor of the candidate, defined by INS as “all those subtle aspects of a person’s self-presentation that affect one’s judgment of that person’s statements.” He also weighs corroborative evidence against the applicant’s claims. While case law clearly indicates that a positive credibility determination may rest on the applicant’s credible fear alone, jurisprudence favors the additional value of objective outside evidence such as country reports, eyewitness accounts, documents, medical reports, etc. Given the peculiar position of the refugee, the applicant often fails to gather or simply cannot gather corroborative evidence for his claim, so that the decision rests merely on an applicant’s testimony. When testimony serves as the sole underpinning of an asylum case, inconsistencies

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92 Hadjmehdigholi v. INS, 9 F.3d 642, 650 (10th Cir. 1995)
93 In re A-S-, Interim Decision. 3336, at 5-7 (BIA) (citing both types of inconsistencies).
94 BASIC LAW MANUAL, at 109, as quoted in LAW OF ASYLUM IN THE UNITED STATES 160 (Deborah Anker, ed. 1999).
95 Matter of S-M-J-, 21 I. & N. Dec 722 (BIA 1997); Matter of Y-B-, 21 I. & N. Dec. 1136 (BIA 1998) (stating respectively that when reasonable, corroborative evidence should be supplied; and further, that the weaker the testimony, the greater the need for corroboration).
within an applicant’s oral and written accounts signal a lack of credibility.\textsuperscript{98} Often, the adjudicators find inconsistencies involving specificity and detail, such as time gaps,\textsuperscript{99} or the applicant’s lack of knowledge about particularized information, such as the meaning of acronyms.\textsuperscript{100}

In 2002, PBS broadcasted “Well-Founded Fear,” a documentary that followed several asylum applicants through their interaction with INS. In one vignette, a hearing officer denied an Albanian asylum on the basis that there were inconsistencies in his testimony regarding his fear of persecution. During the credibility hearing the Albanian asserted several times that two policemen beat him while traveling in the back of a van driven by a third policeman. The viewer sees a sub-titled translation of the Albanian’s actual responses to the officer’s questions and is also able to listen to the interpreter’s version, which differed significantly. On one occasion the interpreter excised the Albanian’s testimony regarding the driver, making it appear as though his stories were inconsistent regarding the number of police officers present during the event. The interpreter’s failure to transmit exactly what the Albanian said led to the failure of his petition. The asylum officer, we find out, did not find the Albanian’s story credible because of the “discrepancies” regarding whether two or three policemen were present.\textsuperscript{101} Like most asylum seekers, the Albanian had no other corroborative evidence to substantiate his claim, and his case perfectly illustrates the premise that accurate interpretation is just as important as ensuring that a competent interpreter is available.

\textsuperscript{99} See id.
\textsuperscript{100} See id.
\textsuperscript{101} Well-Founded Fear, PBS Documentary broadcast June 5, 2000.
On the bright side, an analysis of the Ninth Circuit’s jurisprudence on translation/interpretation error between 1974 and 2002, illustrates a shift from a strict, doctrinal, unyielding adherence to the idea that incompetence is limited to complete inability to communicate towards a more liberal policy. Interestingly, the seeds of the Ninth Circuit’s current approach lie in Gonzalez.

Upon a closer reading of Gonzalez, it becomes clear that subsequent courts either misread the case, or consciously limited the holding. Gonzalez does not stand merely for the proposition that incompetence means total lack of ability. Rather, the court held that Ms. Gonzalez’ inability to understand the word “prostitution” led to inconsistent statements regarding her guilt, that the decision to deport her was predicated on these statements, and that the lower court’s reliance on these statements without allowing Ms. Gonzalez to explain the inconsistencies was prejudicial and violated her right to a full and fair hearing. The Gonzalez court, then, recognized that a single word mistranslated could fundamentally alter an alien’s case in deportation proceedings, a far cry from the more constricting view that only when an interpreter is absent or de facto absent is there prejudicial error.

In Perez-Lastor v. INS, the Ninth Circuit re-establishes these principles by synthesizing post-1990 decisions into a three-part analysis of types of evidence that tend to prove that a translation was incompetent. Direct evidence of incorrectly translated words is persuasive evidence of an incompetent translation. Unresponsive answers by the witness provide

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102 See Gonzalez, at 937, 938.
104 See Kostaz v. INS, 31 F. 3d 847, 850 n.2 (9th Cir. 1994) (suggesting that petitioners might have prevailed if they had "specified which, if any, word would have been translated differently, given a more competent interpreter"); and Hartooni, 21 F. 3d at 340 (stating that it is "inappropriate for [the alien's] interpreter to substitute the interpreter's words for those said by [the alien]").
circumstantial evidence of translation problems.\textsuperscript{105} Lastly, the witness’ difficulty understanding what is said to him establishes a third indicator of an incompetent translation.\textsuperscript{106} All three types of evidence were present in the instant case and were discussed in \textit{Gonzalez}, as well.

The Sixth Circuit applied the \textit{Perez-Lastor} test in \textit{Amadou v. INS}, 226 F 3d 724 (6\textsuperscript{th} Cir. 2000), and reversed a BIA decision finding that an interpreter’s inability to translate specific dialect of a West African language did not demonstrate the lack of a fair hearing. Rather the petitioner provided direct evidence of incorrectly translated words. He established that he was unable to understand the interpreter’s question regarding the petitioner’s home country. He pointed to a number of unresponsive answers to other questions, and he repeatedly informed the judge of his inability to understand the interpreter. Similarly, in \textit{Perez}, the petitioner effectively established that faulty interpretation played a significant role in the denial of his application because it was likely that petitioner’s inconsistent statements provided the basis for the immigration judge’s determination that the petitioner lacked credibility. As a result, the \textit{Perez} court held that as per \textit{Gonzalez} the petitioner was denied a fair hearing.\textsuperscript{107}

The Sixth and Ninth Circuits lead the way in moving away from the original strict interpretation of \textit{Gonzalez} toward recognizing that translation error is far more pervasive. Nevertheless, no matter which approach to the interpretation and application of \textit{Gonzalez} a court takes, the petitioner must still surmount the procedural barriers to bringing a case before any judicial court. To re-iterate, a showing that translation error is prejudicial still requires preservation of the error and a

\textsuperscript{105} Kovac \textit{v. INS}, 407 F.2d 102, 208 (9\textsuperscript{th} Cir. 1969), See \textit{Augustin}, 735 F. 2d at 35.
\textsuperscript{106} \textit{Acewicz}, 984 F.2d at 1063; \textit{Cheo v. INS}, 162 F.3d 1227, 1229 (9\textsuperscript{th} Cir. 1998).
\textsuperscript{107} \textit{Amadou v. INS}, 2000 U.S. App. LEXIS 5808, at *727, 728 (6\textsuperscript{th} Cir. 2000).
demonstration that the error, indeed, led to the court’s erroneous credibility findings.

In reality, for a refuge whose life may be in danger if she is forced to return home, any error should be considered potentially prejudicial. Theoretically, one could argue for development of new INS regulations, demand more challenging testing procedures of all interpreters used in immigration proceedings, require that interpreters commit to an interpreter’s code, or a myriad of other academic solutions. In point of fact, none of the above will ever solve the very real dilemma of a refugee whose case is pending tomorrow. Agencies require time to develop regulations and policy guidelines, stari decisis hampers great judicial leaps, ethics codes are aspirational, and testing procedures cannot protect from a wealth of factors such as bias and fatigue. Thus, the best way to protect a refugee from interpretation error is for her attorney to prevent it.
In as far as an attorney is able, he should act proactively on the client’s behalf to ensure that interpretation error does not occur. To act proactively, however, an attorney must determine where communication between the asylum officer/immigration judge, interpreter, and applicant breaks down. The following chapter illustrates generally where common interpretation and translation errors occur, such as in syntax, word order, lexicon, and so forth. A caveat: each language is unique and some problems, such as syntax, are more severe for one language than for another. In this paper, examples will be drawn primarily from my knowledge of Russian (which will be transliterated, rather than written in Cyrillic). Furthermore, many of the tips below fall under the assumption that a professional interpreter may not always be available in a particular language, and that the attorney should have a minimal level of ability to ensure even in these situations that the interpreter is qualified.

The key to understanding where translation errors occur is the recognition that the language is a system of signs. A word is a sign: it is made up of specific letters representing sounds, and those sounds together represent a concept.\footnote{Jonathan Culler, \textit{LITERARY THEORY: A VERY SHORT INTRODUCTION}, 57 (1997).} In English the letters d-o-g represent a particular four-legged animal. However,
those letters in themselves do not have meaning. Meaning derives from the concepts that the signs represent. However, concepts differ from one speaker to the next, and context also determines meaning. Take the word “dog.” If two people were asked to describe the concept behind the word dog, each description would be different. One image would be a ferocious beast, while another’s vision of dog would be a sweet, lolling-tongued, friendly Lassie look-alike. Which dog is really a dog? The answer is both. Both dogs are representations of someone’s conception of the word “dog.” Everyone would likely agree that d-o-g stand for a type of four-legged animal, but would everyone agree that all dogs are Lassie or all dogs are ferocious beasts? No. Words often have many layers of meaning, including the denotative meaning and various connotative meanings. In our example, four-legged animal is the denotative meaning for d-o-g. Connotative meanings depend on the surrounding words, or the context, in order to transmit meaning. If a speaker wants to convey that d-o-g looks like a drooling, fang-bared, black, snarling beast, the speaker must add additionally words to d-o-g. Otherwise, Speaker Two may not understand why Speaker One shivers at them mention of d-o-g because she thinks of Lassie, instead. Speaker One must encode her message to communicate with Speaker Two. Speaker Two must be able to decode the communication to understand Speaker One’s message. If either speaker cannot perform her function, communication fails.

Many breaks occur along the chain of communication, and such mistakes may interfere with the receiver’s ability to correctly interpret the sender’s message. In the credibility hearing the asylee, or the sender, endeavors to demonstrate a well-founded fear of persecution. Her effort often fails because neither the receiver (the immigration judge or “IJ”) nor the sender, speak

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109 Denotative meanings are generally the word’s dictionary meaning. Connotative meanings are inferential meanings. Peter Mathews, THE CONCISE OXFORD DICTIONARY OF LINGUISTICS 69, 91 (1997).
the same language. They require an interpreter to facilitate communication.

In an act of communication, each party usually performs one role, the process, for instance, of encoding the message or decoding the message. In an immigration proceeding, the interpreter must not only decode the message from the sender, but also re-encode it for transmission to the judge. Figure One below illustrates a number of factors affecting the interpreter’s ability to function in this role. Following the diagram are detailed explanations and examples illustrating interpretation problems.

**FIGURE 1: ENCODING AND DECODING CREDIBLE FEAR**
Dialect

Categorically, when an interpreter speaks a different dialect than the petitioner the proper decoding of any message intended for a judge fails. Designations such as “official language” or common perception may blind an attorney to the true linguistic landscape in a particular country. Both the Haidar case and the Amadou case illustrate examples of conflicting views of the court’s perception of dialect as affecting an interpreter’s ability to translate effectively.110 In Haidar the court found no prejudicial error when an Egyptian translated for a Lebanese petitioner, despite the fact that Arabic dialects often differ significantly.111 In Amadou the same circuit took the opposite view when it found while the petitioner and the interpreter spoke the same language, the dialectical differences were so great as to render the interpreter incompetent to translate.112 A careful practitioner will want to investigate whether the language his client speaks may be subject to similar problems. Especially look for countries with “official languages” (such as China where dialects are often mutually unintelligible), languages with “standard” forms (such as Arabic), and countries with patois or Creole (such as Haiti).

Second Languages

Countries with large ethno-linguistic minorities create a separate, but related problem in that the “official language” will likely be a second-language for many inhabitants. For example, the former Soviet Union presents an example of a country with over sixty ethno-linguistic minorities in fifteen culturally

110 See Haidar, at 722; Amadou, at 724.
111 Haidar, at 722.
112 Amadou at 724.
diverse republics. Even though Russian was the official language of the former Soviet Union for many former Soviet citizens Russian is a second language. Despite the fact that during the Soviet period, mandatory Russification occurred in culture, business and education, nationalism now pressures citizens of new republics to conduct business and education dually or exclusively in the native language. Even if an applicant speaks Russian as a second language the applicant’s level of Russian may not rise to native fluency. If one is fluent in a language, one functions in the language at a “near-native” capacity, which includes the ability to comprehend technical matters, such as basic legal terminology.

Practitioners working with clients from these areas should determine the applicant’s first language and should attempt to secure an interpreter in that language or an interpreter who speaks both languages. If none is available, practitioners should try to obtain an interpreter whose first language is the official language or a person specifically trained in that language. If one must resort to the use of an interpreter for the second language test both the ability of the applicant and interpreter in the second language, giving special attention to legal terminology or other terms that will specifically affect the applicant. In the best of all worlds, an attorney will provide an interpreter for each language. For example, if a client hails from Uzbekistan she may speak both Uzbek and Russian, and move freely from one language to the other as she feels comfortable, an interpreter that moves freely with her will keep the dialogue moving and will reduce any possibilities of confusion or exasperation on the part of the adjudicator.

114 Telephone Interview with Valentina Pichugina, Professor at the University of Chicago (March 28, 2002).
Secondly, even in instances where a speaker generally speaks English well, in stressful situations they may feel more comfortable if they can express themselves in their native language. In 2001, an Uzbek student, who was educated in Russian and spoke Russian in the home, called me from the county detention center requesting my help after he was arrested. He spoke English on a very sophisticated level; however, he was frightened and unable to communicate what transpired. I accompanied him to a local criminal attorney where I explained his options in Russian and related information in return to the attorney. After the student calmed down, he spoke on his own behalf. For just those few hours, however, he sought refuge from a difficult situation in a more comfortable language.

Technical Language

One area of prime importance for attorneys should be ensuring that the interpreter is familiar with terms that will directly affect a credibility determination. For instance, if a client claims asylum based on religion or membership in specific organizations, make sure the interpreter knows the proper words in English for such terms in the foreign language.

Two examples demonstrate how an attorney may prevent an error from destroying a client’s credibility. In the first example, a Russian Baptist sought asylum in Miami. During the hearing the judge asked whether the Baptist knew the significance of Good Friday. The petitioner did not. Several times the judge asked and several times the petitioner was unable to reply. The attorney, a Jewish Russian, realized that the interpreter, a non-religious Russian, had no knowledge of Russian religious holidays. In Russian, Good Friday translates to “Horrible Friday,” or

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115 An excellent sample questionnaire can be found in Joanne Moore and Ron Mamiya, “Interpreters in Court Proceedings,” IMMIGRANTS IN COURTS .36 (Joanne Moore, ed. 1999).
“Strastnaja Pyatnitsja.”\textsuperscript{116} In a similar incident, a Chinese Catholic was asked who the leader of the Catholic Church is. In Chinese, she replied “the Pope.” Her interpreter, unfamiliar with Catholicism and the word Pope in Chinese, misinterpreted her reply as “the Big Man.”\textsuperscript{117} These petitioners were lucky. Counsel quickly recognized the problems and corrected the errors before they negatively affected their respective clients. Others may not fair so well. When the purpose of credibility hearings is to elicit specific details to ascertain whether an applicant’s story rings true, the inability to answer the questions like those above strikes at the heart of an applicant’s credibility.

Attorneys should never assume that a person who speaks a language natively is automatically qualified to be an interpreter. Interpreters are professionally trained and generally have some type of certification, whether it is membership in a national organization such as the National Association of Judiciary Interpreters and Translators or certification by a court in the jurisdiction in which they work. Attorneys should also be cognizant of the fact that even certified interpreters may not be trained in the specialized field of law or in the particular area of law in which the attorney requires assistance. Dr. Launer, a leading Russian interpreter in the field of nuclear technology, recounted during one of our class meetings that he once attended a seminar offered for court interpreters by Agustin De La Mora, a court interpreter federally certified in Spanish. Mr. De La Mora provided participants with a list of approximately 800 Spanish translations of English phrases and words that reoccur in criminal cases and other legal proceedings. Dr. Launer, and another interpreter who is a native Russian, found that they

\textsuperscript{116} Telephone Interview with Valentina Pichugina, Professor at the University of Chicago (March 28, 2002).
\textsuperscript{117} Interview with Terry Coonan, Assoc. Professor at Florida State University in Tallahassee, FL (March 21, 2002).
could only render approximately 1/3 of the vocabulary list into Russian. These individuals, though they are highly trained and skilled interpreters, do not work in the legal field, or in the specialized area of criminal law.

Interpreters, just as attorneys, often specialize in particular fields. The conscientious attorney should interview a prospective interpreter and determine whenever possible whether the interpreter is familiar with legal terminology and procedure. Most importantly, the attorney should verify that the interpreter is able to work with specialized terminology at issue in the particular case.\textsuperscript{118} Interpreters should also be provided with basic information about the case to aid in preparation. This information should include the names of the main players, the locations involved, factual information key to the case and any other information for which an interpreter may ask. Context is key, and does not interfere with the interpreter’s neutrality.\textsuperscript{119}

**Translation Technique**

Attorneys should direct interpreters to translate everything that the client says. Details make or break the case. An interpreter transmits information. He does not choose what information is valuable and what information is not. Interpreters facilitate communication and the best interpreter is the invisible interpreter. In other words, if questions about the integrity or competency of the interpreter distract the judge, the interpreter has failed as a facilitator. The practitioner should discourage periods of dialogue between the interpreter and


client to avoid charges of coaching. He should also discourage the interpreter from lengthy translations when a petitioner’s answers are short, or from short translations when answers are long. Judges can and do notice these types of inconsistencies, and in response may call for a conference with counsel and the interpreter to determine whether interpretations are accurate. Finally, practitioners should discourage any impression that the interpreter has embellished the petitioner’s testimony. Adding to an account will not help the client and may affect credibility if the additional information contradicts an earlier account.

In those instances where an interpreter is also required to act as translator, the interpreter should remember that in interpretation as in written translation an interpreter needs to strike a balance between transmitting the sense and feeling of an account and strict adherence to the original. Depending on the language, strict interpretations or translations often appear nonsensical. In written Russian, for example, run-on sentences are commonplace and often present formidable challenges in determining verb/noun agreement, how a clause functions in the sentence, and what part of the sentence is the subject and where is the matching predicate.

Punctuation in written works or punctuation by intonation in oral interpretation play important roles in determining the meaning of a sentence and also aid in expressing emotion. For example, examine the difference in meaning between “He said, ‘I will kill you,” and “I will KILL you!” The latter creates a greater impact. The most famous example of the effects of punctuation on meaning is the following: Kaznit’, nel’zya pomylovat’ versus Kaznit’ nel’zya, pomylovat’. The first

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121 Telephone interview with the Honorable James S. Moody, Jr., United States District Court Judge for the Middle District of Florida, (September 9, 2004).
sentence means, “You must execute, not pardon,” the second states
“Do not execute, pardon instead.” One could make the same
distinction by pausing in the appropriate places.

The choice to translate individual particles demands special
attention in Russian. Speakers pepper their speech with particles
and wreak havoc on the meaning and emotive character of
sentences. Particles by themselves often have no meaning, but
combined with other words markedly alter a sentence. The particle
zhe denotes insistent affirmation, indignation, a precise place,
and impatience.\textsuperscript{123} The particle i could be translated “and.”
However, it also means “either”, “too”, or it may simply add
emphasis.\textsuperscript{124} Improper interpretation may render a phrase odd or
incomprehensible, and disrupt the flow of a narrative; often to
the detriment of the message one intends to transmit. For
example, “Da uzh i sama-to khorosha!” properly translated states
“She’s a fine one to talk!” If rendered word by word, the
sentence reads “Yes (da) and (i) she-something (sama-to) good.”
Uzh” has no dictionary equivalent in English.\textsuperscript{125} The entire
sentence depends on emotive language and has very little to do
with dictionary meanings. Context is key.

Verbs, pronouns, and reflexives are other grammatical forms
that affect a variety of issues important for credibility. Verb
forms in Russian are deceptively simple. Unlike many languages
Russian has only past and non-past. The form of the conjugated
verb relates future and past meanings. One word, “byl,” in
Russian relates the English forms “he was”, “he had been,” and
“he would have been.” On the other hand, the concept of aspect
dominates Russian. Modern Russian has two aspects: the
imperfective and the perfective. The imperfective may describe,

\textsuperscript{122} \textit{In re B---, Interim Decision} (BIA) 3251, 1995 BIA LEXIS 15, at *10 (BIA
1995).

\textsuperscript{123} Terence Wade, A \textsc{comprehensive} \textsc{russian} \textsc{grammar}, 513-515 (2000).

\textsuperscript{124} See id. at 514.

\textsuperscript{125} See id. at 516. The sentence, which consists of four particles a pronoun
and a predicate adjective, is very difficult to render into English.
among other things, an action in progress, or a repeated action. The perfective often denotes a single occurrence, or a series of completed actions. Unlike in English, depending on context, Russian may transmit the concept “he beat me over and over” with only verb, subject and direct object: on menya bil. “Bil” is the past masculine form of the imperfective verb denoting “to beat.” English requires additional words to transmit the same meaning. Similarly, verb forms evidence a single beating with a single verb: on menya pobil. “Pobil” is a prefixed perfective form of the verb “to beat” in the masculine past tense. One could even state “he beat him to death (on ego pribil)” with a different prefix added to the verb “to beat,” and still limit the sentence to only three words. The information inherent in the Russian verb form far outweighs the English counterpart, and in asylum cases repetition of beatings or torture or rapes often indicates a well-founded fear of future persecution.  

For a Russian petitioner, the evidence may lie in the verb he chooses, and understanding what the petitioner says depends solely on the interpreter’s knowledge of Russian aspect and prefixes. An interesting note on gender to remember is that for some inexplicable reason Russians often confuse pronouns such as he and she. Many a time I have held conversations with my former Russian professor where she referred to her husband by the pronoun she. With no other referent, i.e. a direct reference to his name or other gender markers, I would not know to whom she is referring. Imagine a scenario: “She threatened me and said she would kill me!” “Who said they would kill you?” “The policeman.” “I thought a woman threatened you.” Here, the mistake appears minor; however, it would be hard to explain away the inability to determine whether your persecutor was a he or a she.

126 See Korablina v. INS, 158 F. 3d 1038 (9th Cir. 1998)(re-iterating that a single incident may not rise to the level of persecution, while cumulative effects of several incidents may).

127 Telephone Interview with Valentina Pichugina, Professor at the University of Chicago (March 28, 2002).
The English language strictly controls syntax. English marks the relationship between subject and direct object in a sentence by word order. For instance, the only difference between “The policeman killed John” and “John killed the policeman” is the order of the words. Russian frees word order to a great extent because of the case system. The Russian language has six cases (or endings that can be added to words) that determine the role a word plays. In Russian, for instance, one can put the words book and Masha in almost any order and still come up with “Masha read the book”, or Masha chitala knigu (example one). In example one, Masha is the subject, chitala is the proper form of the verb, and knigu is the direct object. One could also say knigu chitala Masha (example two). In both examples Masha in the Russian would be in the Nominative case. The verb “to read” would be conjugated to reflect that the actor is singular and feminine and that the action was done in the past. Book would be in the Accusative case, indicated by the proper ending for a feminine singular noun in that case.

Thus, in these examples it is not word order that informs the listener the function of each word in the sentence, rather in which case the word appears. The meaning of the sentence, on the other hand, is derived from the grammatical function of each word (Masha read the book, not the book read Masha), the word order, and the logical possibilities of reality. Word order determines what question each example answers. Example 1 answers the question “Who read the book?,“ while example 2 answers the question “What was Masha doing?”

Understanding what questions a word order is intended to answer is important because it is syntax in Russian that marks new information or determines the most important information in a
sentence. Generally, information placed at the end of the phrase answers the question asked. If an interpreter mistranslates word order, the answer to a question may appear unresponsive. Interpreters have the additional challenge of correctly understanding intonation. For example, the above questions could have been answered in the exact same manner, with the only difference being the use of intonation to stress one of the words.

In English, the answers are always the same, and intonation is the only way to tell the difference between the two. We have to say “Masha read the book” to respond to either question. “The book read Masha” makes no sense. Subjects cannot come after verbs in normal English speech and narrative. In Russian, again, such a construction is possible because the word “book” looks different in the position of subject than in the position as direct object. Nonetheless, free word order affects the interpretation of Russian because such free word order makes it difficult to determine how verbs and nouns relate to one another in long sentences.

Word Choice

Word choice may be the most important tool in the interpreter’s arsenal. Words carry meaning on multiple levels, and choosing the right synonym changes the impact of a sentence. Choose words with a punch, rather than softer equivalents. For example, suppose Russian policemen detain and beat a homosexual, yelling “perderast” and “goloboj” at the victim. Both words stand for homosexual, but the first exhibits a greater level of hate than the second. The first word translates as “faggot,” while the second more closely resembles “gay.” Synonyms, thus, differ in terms of the emotive impact transmitted to the reader or listener. The interpreter does walk a fine line here, because
she is not supposed to add anything to the petitioner’s story, but the interpreter should choose the word with the closest meaning. If the interpreter is informed in advance of the facts surrounding the case, the interpreter will be able to choose the best word that will elicit the desired reaction.

Slang presents an interesting challenge in Russian given the wide range of linguistic communities in the former Soviet Union. In the above example, the word “goloboj” actually means “light blue.” In much the same way that the phrase “He is a Red” symbolizes a Communist in English, the word blue functions as a symbol for homosexuality in Russia. In other cases, slang may actually denote particularized experiences of the petitioner. For instance, Russian has a very rich underground criminal vocabulary in which certain words stand in for other words, and if used, would tell the listener certain things about the past of the person speaking. It would be important to recognize these dual meanings and choose the correct one. Particularly in political asylum cases, the government is usually interested in finding out the petitioner’s background in relationship to the governing majority in the home country. For Russian immigrants institutionalization in a gulag may present evidence of past persecution that may aid in the petitioner’s case. By the same token, evidence of criminal activity on the part of the petitioner may render the petitioner an undesirable element in this country.

One particular concern is the choice between passive and active voice. When working with Russians, especially seek to avoid passive voice and reflexives or third person verbal constructions that act as passives. Russians use passive voice to avoid naming actors in sentences or accepting responsibility for an action. For example, “ego ubili” literally means, “they killed him,” but the phrase lacks the word for “they,” and properly should be translated “he was killed.” The first
version clearly suggests a human aggressor, while one could infer from the latter any number of situations. Perhaps he was struck by a car or by lightening. The stress is on the fact that he is dead, not that someone caused his death.

The Spanish language also has the subject-less third person. In Spanish, the phrase “tocaron a la puerta”, should be rendered “there was a knock at the door”, not “they knocked on the door”. In a sterile environment such as this academic paper, the difference seems minor. In political and religious persecution case, however, identifying the aggressor and the fact that there is a human aggressor is very important. While the interpreter should render the sentence appropriately, the attorney should work with the client to ensure that the active voice is used whenever possible.

One implication of misinterpretation and improper word-choice lies in the nature of legal proceedings. During a hearing, a witness’ testimony elicits follow-up questions. A misinterpretation may lead counsel and the court on time-consuming and ultimately useless quest for additional information.

The following anecdote related to me by Mr. De La Mora illustrates this point well. During a trial involving an armed robbery, a Vietnamese witness was testifying before the court regarding the description of the assailants. The witness stated that the assailants were “black.” Surprised by this apparently new information, the attorney conducting the examination questioned the witness for approximately one hour before it became clear that the Vietnamese interpreter misinterpreted the meaning of “black” as the equivalent of African-American. In this case, the assailants were not African-American. The word “black” in Vietnamese, rather, connotes “ethnic minority” without being specific to African heritage. It is interesting to point
out that the Russian word “black,” also has the same connotation. Interpreters should be aware of words such as these and render their meaning according to the context in which they are used.

Meta-linguistic Error

Meta-linguistic error encompasses interpretation errors that may occur at the linguistic level due to factors that are not traditionally within the sphere of linguistics, or “beyond” linguistics. For example, an error in syntax is a traditional linguistic error. A failure to accurately interpret a proceeding based upon cultural differences is meta-linguistic. Nonetheless such an error affects the communicative value of language and impedes the sign from being decoded by the recipient. Bias presents the most insidious meta-linguistic challenge to fairness. Interestingly, INS has taken a very proactive role in comparison to courts in developing a legal framework to prevent bias and conflicts of interest.

The most obvious example of bias the author has encountered to date was found in a Tennessee criminal case where a Chinese immigrant was accused of three murders. The immigrant was unable to speak English, and the court appointed an interpreter. The immigrant was convicted of two murders, and he appealed based on the grounds that the trial court abused its discretion by not recusing the appointed interpreter due to bias. Apparently, the interpreter was related to a murder victim and a witness for the prosecution. Surprisingly, the appeal was denied on the grounds that the trial court did not abuse its discretion in finding that the interpreter was unbiased.129 Fortunately, changes in immigration law help to reduce the likelihood of anything like this occurring.

128 Telephone Interview with Agustin De La Mora, professional court interpreter (October 14, 2004).
At this time, obvious bias in immigration cases is relatively easy to avoid and prevented by law. For instance, immigration law specifies that it is inappropriate for an embassy employee to interpret for a refugee from the same country.  

Bias is not limited to current political conflict. Bias may also stem from history, culture, religion and sociology. To identify potential sources of bias, an attorney working with asylum cases must be familiar with the applicant’s history and that of his home country. The hypothetical case of applicants from the former Soviet Union illustrates this danger well. Imagine a situation where an applicant speaks Azeri and Russian. There are no competent Azeri interpreters so the applicant must rely on a Russian translator. Leaving aside the issue of whether the applicant’s understanding of Russian rises to the level necessary to meaningfully participate in the proceedings, determining the interpreter’s national heritage may be vital to curbing any potential negative bias. If the interpreter were Armenian one would question his ability to accurately relay information without negatively influencing the court. Firstly, the Armenians and Azeris fought a war in the recent past and tensions in the region still run high. Armenians are Christians. Azeris are Muslim. Potentially volatile combinations in the former Soviet Republics are seemingly endless: Uzbeks and Kyrgyz, Georgians and Armenians, Georgians and Chechens, Turkmen and Tajik, Muslim and Jew, Caucusus minorities and ethnic Russians. In each of these instances, one would not want to rely on accuracy from an individual who might very well be negatively predisposed to the applicant’s successful petition.

Bias is a very difficult area because in the United States, it is difficult for us to comprehend the extreme level of racial, ethnic, political and religious tension that exists in many areas of the world. The events of September 11, 2001, however, may

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focus greater attention to the realities of bias. It will be interesting to see how the U.S. government handles the issue of Arabic language interpretation in the trials of accused terrorists. Currently, there is a shortage of qualified Arabic interpreters, and these interpreters may have a range of ethnic and religious roots. As the United States becomes increasingly aware of the strife between Shi’ia and Sunni versions of Islam and between various Islamic nations, one can only wonder if this growing understanding of the Islamic world community will trickle down to the world of court interpretation.

In addition to measures aimed at preventing bias, other limitations found in Sec. 208.9(g) have been placed on the interpreter. Firstly, the interpreter must be at least 18 years of age. Establishing a minimum age is important for a number of reasons. Most states fix the age of majority and by analogy, responsibility, at this age. Furthermore, interpretation is tiresome. Youngsters may not have the stamina or the attention span to perform the job adequately.

Secondly, neither the applicant's attorney or representative of record, or witness testifying on the applicant's behalf may serve as the applicant's interpreter. This regulation likely encapsulates a policy decision regarding the appropriateness of having participants in the proceedings charged with dual roles. Furthermore, advocates, witnesses, and family members do not have the skills necessary to serve as an adequate interpreter in an asylum proceeding even if they speak the target language.

Limiting the attorney's role allows the attorney to perform his primary function—defend his client. The regulatory limitation also protects the attorney from the ethical implications of conflicts of interest, and charges of ineffectiveness of counsel. Currently, appellate courts differ with regards to attorneys serving as interpreters. Ohio and Texas have held that a defendant’s Fourteenth Amendment rights were
protected by an attorney’s bilingual competence.\textsuperscript{131} Florida and New Jersey disagree.\textsuperscript{132} At least one court has even addressed the appropriateness of judges serving as interpreters. Unfortunately, the Southern District of New York rejected a writ of habeas corpus sent to the court on this issue, refusing to find a Due Process violation when a bilingual judge interpreted the proceedings into Spanish for the defendant and the defendant’s own statements into English for the record.\textsuperscript{133}

\textsuperscript{133} Baez v. Henderson, 1992, SDNY (LEXIS 774)
CONCLUSION

Playing a Dangerous Game of Telephone: the Role of Court Interpreters and Interpretation Error in Immigration and Other Court Proceedings analyzes the role of interpretation in court proceedings. Court proceedings are basically lines of communication, with messages flowing on multiple paths among attorneys, witnesses, judges, juries, and defendants. When participants are unable to speak English adequately the services of an interpreter are required. However, the addition of an interpreter adds an additional level of complexity, with the communication chain becoming more and more tenuous and subject to failure. In cases where court interpretation is involved, breakdowns along the chain of communication that lead to discrepancies between the original and the interpretation may result in the incarceration of the innocent or in improper deportations.

The first two chapters of this thesis followed the developing understanding that court interpretation is essential to providing a criminal defendant with access to a full and fair hearing as guaranteed by the Sixth, Fifth, and Fourteenth Amendments to the U.S. Constitution. States and courts have responded by instituting interpretation programs, adopting statutes and rules, and making law through precedent, all of which answer important questions about the role of the interpreter. These questions are many and include the following: when should an interpreter be used, who decides, how is the decision made, what is a court interpreter, what is her role,
must she be certified, etc. While there is no single unified approach among state and federal courts, the debate continues, and progress is being made.

In immigration proceedings, however, the picture is not so bright. Immigration law similarly identifies that the inability of an immigrant to understand his hearing is a problem with due process; however, due process protections granted to citizens and naturalized aliens under the Constitution are not fully extended to the immigration realm. The development of law governing the use of interpreters outside of immigration proceedings has primarily stemmed from a criminal defendant’s right to due process. In contrast, immigration law stands in a world of its own. What constitutes a full and fair hearing is different. What constitutes a meaningful opportunity to participate is different, and the practical reality of access to the judicial system is different if one is deported before an appeal can be heard.

Lastly, the institutional controls in non-immigration contexts, which are beginning to ensure access to qualified interpreters, are far more advanced, even in states that have yet to develop standards, than in INS rules or regulations. Therefore, it is all-important that immigration lawyers act proactively to prevent as many problems as possible before they occur or immediately move to correct them on the record when they do occur.

As suggested by the practitioner’s guide to interpretation error included in this thesis there are innumerable ways that interpretation mistakes may negatively impact a credibility hearing. A prudent attorney will want to ensure that his client will not need to rely on proving grounds for reversal based on interpretation error in order to obtain asylum or withholding of removal. Rather, an attorney should behave proactively to ensure that error does not occur. Whether or not the government provides an interpreter, where feasible the attorney should provide an interpreter to ensure that all proceedings are
accurately translated. At a minimum, the interpreter should be accredited by a professional organization, preferably in legal translation or interpretation, or the interpreter should be approved by courts in the jurisdiction in which the case will proceed.\textsuperscript{134} In the event that short notice precludes securing an established interpreter, the attorney should prepare a list of questions testing the interpreter’s knowledge of legal terminology and special vocabulary required for the case. For example, if the case involves terrorist/political organizations, religious claims, acronyms, technical terms, military jargon or any uncommon term, the interpreter should be aware of the translations for such terms to and from English.\textsuperscript{135} The interpreter should also review the case and all written accounts of the petitioner’s story and should be instructed not to elaborate upon oral or written testimony.\textsuperscript{136} The interpreter should speak the precise language or dialect of the applicant where possible. An attorney searching for an appropriate interpreter must also ensure that the interpreter is unbiased by investigation the interpreter’s ethnicity, religion, employment history, and any other ground that may influence the interpreter’s performance.

Mitigation, while clearly less preferential than avoidance, may allow for an appeal of a negative decision if the attorney clears all procedural hurdles and preserves an error for appeal. To preserve an error for appeal, an attorney must object to the lack of an interpreter, if none is provided.\textsuperscript{137} Or, request

\textsuperscript{134} For instance, one such organization for translators is the American Translator’s Association accredits members who pass a written exam to or from English into another language. The exam may be general or geared toward legal translation. See http://www.atanet.org/bin/view.pl/17191.html (last visited October 25, 2004). Many jurisdictions, such as Arkansas, now provide a list of approved interpreters and have adopted an interpreter’s code of ethics. See http://courts.state.ar.us/courts/ci.html (last visited October 25, 2004).


\textsuperscript{136} Embellished and inconsistent testimony often provides a basis for negative credibility hearings. See In re B---, at *10.

\textsuperscript{137} See Drobny v INS, 947 F.2d 241 (7th Cir. 1991).
continuance to secure an interpreter.\textsuperscript{138} If an interpreter is present but lacks the ability to work in the petitioner’s language, the attorney must object to the interpreter’s competence.\textsuperscript{139} To object to an interpreter’s accuracy, the attorney should ensure that the record reflects where an interpretation was incorrect, and what the petitioner would have said otherwise.\textsuperscript{140} Having a second interpreter in the courtroom would facilitate this procedure.

Like a game of Telephone, the nature of interpretation and translation illustrates the fragility in a chain of communication. However, unlike a game, misunderstandings in credibility hearings are not comical, they are potentially dangerous to a client’s case and may result in a refugee’s return to a perilous situation in his native land.

\textsuperscript{138} See \textit{In re D-}, I&N Interim Dec (BIA 1994).

\textsuperscript{139} See \textit{Augustin}, at 38.

\textsuperscript{140} See \textit{Nsukami}, at 890 F.Supp.170.
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