



Realizing Refugee Rights  
in Africa, Asia and Latin America

## The Nairobi Code: A Discussion Leader's Guide

**Time:** About 1 hour (to take place *after* the participants have seen the Nairobi Code slide show and all of the video clips).

### Materials:

- A copy of the Nairobi Code for each participant
- A copy of each hypothetical situation (without the answers) for each participant
- A copy of the this discussion leader's guide for the discussion leader
- A copy of the answer to each question

### Goals:

- For participants to learn the intricacies of the Nairobi Code and its principles
- For participants to learn to apply the Nairobi Code to variety of fact patterns
- For participants to understand that if they believe they have an ethical conflict with a client, they should seek advice!

### Implementation:

- I. This discussion is to take place *after* the participants have seen the Nairobi Code slide show and the video.
- II. Choose one of the participants to read the first hypothetical aloud
- III. Follow the discussion questions
  - a. Note: Every discussion and group takes on a nature of its own. Therefore, each group leader should use his/her discretion to facilitate the conversation. Use the discussion questions as a guide to leading the conversation, and try to point the group in the direction of the correct answer by asking pointed follow-up questions.
- IV. Hand the participant who read the hypothetical aloud the answer key and have him/her read it to the group.
- V. Ask the group to compare the "correct" answer to their answers by identifying the strengths and weaknesses of each answer and the similarities between the scripted responses and their responses.
- VI. Ask another participant to read the next hypothetical. Repeat this process until all questions have been discussed thoroughly.

**Discussion Questions for Each Hypothetical** (About 10 minutes for each question, but be flexible):

- I. Hypothetical 1: A man comes to you wanting to seek asylum here, claiming persecution by the political group currently in power in his country. He also claims that his government will persecute him if he is forced to return and that some embassy officials are even looking for him in this country. You get some details from him and ask him to come back for a follow up meeting so you can look further into the situation. Before you meet with him again, you do some human rights research and realize that members of this man's political party are human rights violators, and



it is likely that he committed atrocities against others. When he comes in, you inform him of what you learned and advise him that it would not be a good legal decision for him to apply for asylum because his application will be rejected. He responds that he did participate in human rights violations, including rape, but tells you he was justified because he was acting in self-defense. He tells you that therefore he should be eligible for asylum.

- a. **Take a moment to flip through the Nairobi Code. What are the relevant sections that address this situation?**
  - i. Although participants may bring up a variety of sections, make sure that the conversation covers the Duty of Integrity, particularly 7.1 and 7.2. You may also want to discuss Advisor-Client Relationships, particularly 3.1.
- b. **Does this man have an asylum claim? Why or why not?**
  - i. Probably not. The key information here is that the man admits to participating in human rights violations, including rape, which generally cannot be committed in “self-defense”. This makes him subject to the exclusion clauses of the 1951 Convention.
  - ii. The only gray area as far as exclusion is the self-defense claim. If the man was forced to commit rape, for example against family members, under immediate threat of death, then he may not be subject to the exclusion clauses. (Example: Children who are forced to become child soldiers are often first forced to rape or kill family members.)
  - iii. **Followup Question:** You ask the man what he means when he says he committed human rights violations, including rape, in “self-defense.” He says he only committed human rights violations against members of an ethnic group that has a history of discriminating against his ethnic group, and that he had to act preemptively to stop members of the other ethnic group from continuing to persecute him and others like him. Now ask again: Does this man have an asylum claim?
- c. **Should you represent this man even though you know he has no claim? Why or why not?**
  - i. You can not ethically represent him if you believe he has no claim to asylum.
- d. **Are you required to report these human rights violations to the authorities?**
  - i. Make sure the conversation turns to the Confidentiality provisions. And make sure that the answer to this question is “No!” Although you are not representing this man, anyone who seeks your legal assistance is entitled to confidentiality. The duty of confidentiality applies to all communications with prospective clients, as well as actual clients.
- e. **So what do you tell this man? Why?**
  - i. Ask participants pointed follow-up questions based on their responses, i.e. Are there any potential problems with this response? What steps can you take to minimize these problems?



- f. Hand the participant who read the hypothetical the answer and ask her to read it to the group.
    - i. **Answer:** A man comes to you wanting to seek asylum here, claiming persecution by the political group currently in power in his country. He also claims that his government will persecute him if he is forced to return and that some embassy officials are even looking for him in this country. You get some details from him and ask him to come back for a follow up meeting so you can look further into the situation.
    - ii. Before you meet with him again, you do some human rights research and realize that members of this man's political party are human rights violators, and it is likely that he committed atrocities against others. When he comes in, you inform him of what you learned and advise him that it would not be a good legal decision for him to apply for asylum because his application will be rejected. He responds that he did participate in human rights violations, including rape, but tells you he was justified because he was acting in self-defense. He tells you that therefore he should be eligible for asylum..
  - g. **How do your answers compare to the "correct" answer?** What are the strengths of this answer? Do you see any potential weaknesses in the answer?
  - h. **Followup Question:** Would your answer change if this man gave you the same information about fearing persecution, but instead of committing atrocities, he had been responsible for implementing the "One-Child Policy" in his village in China?
    - i. Note to leader: You may wish to explain to the participants that it has not yet been decided whether someone who otherwise fits the definition of a refugee would be excluded for implementing the one-child policy voluntarily, although a key question is whether the official was forced to implement the policy.
    - ii. Additionally, it may be worth noting that the Nairobi Code permits legal advisors to represent clients with weak claims (which might allow an advisor to represent the man who implemented the One-Child Policy), but also allows legal advisors to take only certain cases based on nondiscriminatory selection criteria (which would allow an advisor to refuse to represent the One-Child implementer as long as the refusal was based on nondiscriminatory screening criteria).
- II. **Hypothetical 2:** The following week, this man's wife requests legal assistance in filing her asylum claim for imputed political opinion based on her husband's political activities. She knows nothing about her husband's past and believes that he is a heroic freedom fighter.
- a. **What are the relevant sections in the Nairobi Code that address this situation?**





based solely on Country of Origin Information (COI) because it is independently verifiable.

- g. How do your answers compare to the “correct” answer? What are the strengths of this answer? Do you see any potential weaknesses in the answer?

- III. Hypothetical 3: A 21-year-old man was separated from his father and six siblings as a teenager when his house was attacked in his country of origin. His father and siblings fled to one country, and he fled to another, where he stayed for five years. After years in a refugee camp, his father and siblings have been resettled to the U.S. He has also been approved for resettlement through his father's refugee status. He had a hard time getting an appointment at the embassy in his first country of refuge, so he now came to this country to try his luck at the embassy here. He has been having a hard time getting through the embassy process.

You agree to help him and are able to arrange an appointment with the embassy for visa processing. In the course of assisting him, you learn that he was married and had a child in the second country. Married adults are not permitted to resettle under their parent's refugee status. You are aware that he will not return to his first country of refuge and will not see his wife and child again. You are also aware that the wife and child will be better off financially if he is working in the U.S. and not living as a self-settled refugee in this country.

- a. **What are the relevant sections in the Nairobi Code that address this situation?**
- i. Make sure that Duty of Integrity is thoroughly discussed. This is also a good time to bring up the Diligence provisions, particularly 4.1.
- b. **Can you continue to represent this client?**
- i. No. As a legal advisor, you cannot assist in a misrepresentation. But ask the participants to discuss the boundaries of this issue. Can you accompany this client to the embassy? Do you have to call the embassy and cancel his appointment?
- c. **What if you decide not to represent him and he asks if he can still bring his case to the embassy?**
- d. **So what do you tell your client? Why?**
- e. Hand the participant who read the hypothetical the answer and ask her to read it to the group.
- i. Answer: You have to advise him that he is not eligible for refugee resettlement because he is married. You also have to advise him to be truthful in his resettlement application. As a legal representative you cannot ethically present his claim to the embassy knowing he is ineligible for refugee resettlement. However, you can withdraw from representation and let him decide what to tell the embassy or what to tell his next legal advisor. You should not accompany him to the embassy, as this would involve assisting a misrepresentation. You are not obligated to cancel his appointment with the embassy, as you provided this assistance before you



knew of the misrepresentation. And, of course, you are not permitted to tell the embassy (or his new legal advisor) that he is married unless you have his express permission.

- f. How do your answers compare to the “correct” answer? What are the strengths of this answer? Do you see any potential weaknesses in the answer?
- IV. Hypothetical 4: You become aware that one of your interpreters is selling testimonies to refugees. Sometimes asylum seekers with valid claims believe that a testimony written by an experienced professional is more likely to achieve refugee status than their own testimony. Sometimes they are too ashamed to tell what really happened to them. You believe that your clients have valid claims and are not recipients of his fabricated testimonies. Even though your interpreter is selling testimonies, he is a good interpreter, and you do not have any other way to communicate with your clients. He is also a recognized refugee himself and you do not want to cause legal problems for him.
- a. **What are the relevant sections in the Nairobi Code that address this situation?**
    - i. Bring up Diligence (4.1) and the Duty of Integrity.
  - b. **What do you do with the interpreter?**
    - i. If you let him go, are you required to report him to the RSD decisionmaker, or to other NGOs that use his services? Are you allowed to report him? Do you have a duty of confidentiality to the interpreter?
      1. You are not required to report the interpreter to anyone.
      2. Whether you have a duty of confidentiality depends on how you learned that the interpreter is selling testimonies, and whether the interpreter is also a client, but most likely you are not required to keep the testimony-selling confidential – so your supervisor may want to consider warning other NGOs that also use this interpreter.
    - ii. What other considerations might apply?
      1. Your duty of diligence toward your clients may apply: If you think that reporting the interpreter to the RSD decisionmaker would cause the decisionmaker to consider your clients’ claims suspect, you should not report the interpreter.
      2. If you report this interpreter to the RSD decisionmaker, the refugee community may not trust your assurances of confidentiality for clients.
  - c. **What do you do if you have clients whose claims were harmed by the interpreter’s actions?**
    - i. You have a duty to try to repair the damage to your clients. Deciding how best to repair the damage, however, will depend on the local context, the attitude of the RSD decisionmaker, and how your clients were harmed.
    - ii. If your clients submitted false testimonies on the advice of this interpreter, you must convince your clients to correct the misstatements. If you



cannot convince them to correct the misstatements, under the Nairobi Code you must withdraw from representation. In correcting the misstatements, your clients should explain why they initially made the misstatements.

- iii. You should always consult with a supervisor before making a decision about how to handle this type of situation. The guiding principle here is your duty of diligence to your clients: Act in the way that best furthers your clients' interests.
  - d. **What do you do if you have clients whose claims cannot proceed without this interpreter's assistance?**
    - i. Seek an extension of time from the RSD decisionmaker to prepare their claims. Talk with your supervisor about how to find another interpreter.
  - e. **What steps can you take to prevent this type of situation from happening in the future?**
  - f. Hand the participant who read the hypothetical the answer and ask him to read it to the group.
    - i. Answer: Let your supervisor decide. If you are the supervisor, you probably should let this interpreter go, even if it may harm other cases. You have no obligation to report this interpreter, however, if he has harmed the asylum claims of any clients in the office, it is your duty to try and repair any damage this might have caused for those clients who were deceived. In the future, always try and cultivate relationships with more than one interpreter.
  - g. How do your answers compare to the "correct" answer? What are the strengths of this answer? Do you see any potential weaknesses in the answer?
- V. Hypothetical 5: You are taking testimony from an asylum seeker who you believe is giving you false information. As in many of these claims, there is no means of independent verification. You know that this client comes from a region that is volatile and an ethnic group that is in serious danger, but the details of her personal story don't add up.
- a. **What are the relevant sections in the Nairobi Code that address this situation?**
    - i. Focus on the Duty of Integrity (particularly 7.4 and its subsections).
  - b. **What are some good techniques for addressing with your client possible misrepresentations he has made?** (Note: Make sure the following are discussed)
    - i. Explain to the client the importance of being credible. Tell the client what you know about the Country of Origin Information and mention that the decision-maker may also know the same.
    - ii. You may want to use this technique to give the client a way to save face: "I think your claim is less likely to succeed if you include this information, but it's up to you to decide whether we include it."



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- iii. Emphasize confidentiality and your ability to assist: If you have all of the information, you can discuss all of the options available, while keeping the client's information confidential.
  - iv. In a non-judgmental way, explain that in your experience sometimes people tell things hoping to make their claim stronger, when quite often the real story is enough. Further explain to them that, as the legal advisor, you have been trained and that it is your job to get the facts and decide, together with them, how to best present the claim. Tell them that they don't need to decide on their own, never having been through the process, and that's why they have a legal advisor to help them. (Note: You may also want to try and find out what rumors they might have heard in the community that are causing them to misrepresent themselves.)
- c. Should you continue to represent this client?**
- i. Note to Leader: Make sure the group discusses that we, as legal advisors, are making a credibility assessment, and that we are vulnerable to making the same mistakes as anyone else. We may misinterpret body language due to cultural differences or believe something about the country of origin that turns out to be false. Where massacres or other mass human rights violations are occurring, sometimes the only people who survive are the ones who have an extraordinary, nearly incredible story. Remind participants that if they suspect a client is lying, they must remember to carefully examine the underlying reasons for their skepticism before coming to a conclusion.
  - ii. This is also a good time to emphasize the importance of the training manual sections on credibility assessments.
- d. Hypothetical 5a: Your client gives you what you believe is true information, then testifies to a misrepresentation in an RSD proceeding.
- i. **What are the relevant sections in the Nairobi Code that address this situation?**
    1. Section 7.6 and its subsections
  - ii. **How do you handle this situation during the proceeding?**
    1. Make sure participants distinguish between misrepresentations that are central to the asylum claim, and misrepresentations that are incidental or do not bear on the client's right to asylum.
  - iii. **How do you handle this situation after the proceeding?**
- e. Hypothetical 5b: Your client gives you true information you know might harm their claim.
- i. **What are the relevant sections in the Nairobi Code that address this situation?**
    1. Consider Duty of Integrity provisions in conjunction with the second part of Diligence provision 4.1.
  - ii. **How do you handle this situation?**



- f. Hand the participant who read the hypothetical the answers and ask her to read them all to the group.
- i. Answer to Question 5: You can not present something you know to be a lie or a misrepresentation. However, when you suspect something may be a lie or misrepresentation but are not sure, you are not required to withdraw from representation. Be sensitive to the implications of representing someone who presents a false story: you could be representing a human rights violator. In addition, the legal aid organization's credibility could be impaired by representing clients who present false information, and your time is taken away from other clients. This is one reason why it is important to be familiar with the Country of Origin Information (COI) and the human rights situation in each country your clients come from.
  - ii. Answer to Question 5A: As soon as you hear a misrepresentation, ask for a break from the proceedings and speak with your client privately, if you can do so discreetly. If it is not possible to speak privately with your client at the RSD proceeding, you should consider asking to continue the proceeding after lunch or on another day, so you can go somewhere where you can speak privately. You are not required to inform the tribunal of your client's misrepresentation, but if the misrepresentation is central to the asylum claim and you cannot convince your client to correct the misrepresentation promptly, you will have to withdraw from representation. You may not, under any circumstances, make a misrepresentation to the tribunal.
  - iii. Answer to Question 5B: You cannot lie, but you are under no ethical obligation to disclose everything your client tells you. It is your job as the legal advisor to decide how to present the claim effectively. This is true, of course, unless the information causes you to believe they are not eligible for refugee status. In that case, you cannot ethically continue to represent the client.
- g. How do your answers compare to the "correct" answers? What are the strengths of these answers? Do you see any potential weaknesses in these answers?

**Recap:** (10 minutes)

- I. Is there anything in the Nairobi Code that surprises or bothers you?
- II. Do you see any provision in the Nairobi Code that seem to conflict with each other?
  - a. Can you think of a hypothetical situation that would implicate any of these conflicting clauses?
  - b. How would you handle that situation?
- III. Reiterate to all of the participants that Asylum Access has adopted the Nairobi Code and that as an advocate you are bound to follow them. Also, emphasize that you do not need to make difficult ethical decisions on your own. If you have a conflict, you should seek advice from your supervisor!