



PROGRAM MATERIALS

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Crimmigration Defense Strategies: Using Mitigation to Explain Criminal Conduct, Fraud, Misrepresentation, and CIMTs

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**CRIMMIGRATION DEFENSE STRATEGIES: USING
MITIGATION TO EXPLAIN CRIMINAL CONDUCT,
FRAUD, MISREPRESENTATION, AND CIMTs**

BOOK RECOMMENDATIONS

Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Towards a Better Legal Outcome. SEVENTH EDITION 2021

Psychosocial Evaluations and Consultation in Civil Litigation: Strategies to Understand and Humanize the Client. 2021.

Handbook of Mitigation in Criminal and Immigration Forensics

Humanizing the Client
Towards a Better Legal
Outcome

SEVENTH EDITION

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**PSYCHOSOCIAL
EVALUATIONS AND
CONSULTATION IN
CIVIL LITIGATION:**

*Strategies to Understand
and Humanize the Client*

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Sample Report

- For a case sample email me at marksilver1@cs.com with your personal information
- Put the word “crimmigrationsample” in the subject line with your information to weed out spam

Crucial, but not usually covered

- Criminal mitigation is not something that immigration lawyers normally think about as part of ordinary practice even though it is crucial to immigration defense in many cases
- AILA national does not offer a CLE in criminal mitigation for immigration lawyers
- Similarly, criminal defense lawyers have not historically considered immigration consequences to plea deals until more recently

Why is the Waiver Required

- Separate CLE on Waiver / Hardship criteria
- What is the nature of the problem, how serious is it?
- Will the waiver be evaluated based on the hardship? Perhaps the real problem is the fraud or misrepresentation
- Is there a connection between the waiver requirement and the hardship?

Definition of Criminal Mitigation

Mitigation is a bio-psychosocial evaluation of the client's social and psychological history informed by the facts of the criminal case with appropriate recommendations as a means to minimize the negative legal outcome either in court, or with an adjudicator or prosecutor.

Mitigating circumstances reduces the degree of moral culpability or blame which in fairness, sympathy, or mercy may lead to a more favorable outcome for the defendant.

When to use Mitigation

- Adam Walsh Act – totally separate CLE
- Bond Hearings
- 601-A Provisional Waivers
- Cancellation of Removal
- Fraud / Misrepresentation (601 Waivers)
- VAWA waiver
- U visa / Asylum cases when crime occurs
- Criminal Arrests / Convictions
- CIMTs (crime involving moral turpitude)

When to use Mitigation (Con't)

Bond Hearings

- Similar to a criminal hearing, ie, risk to community and flight risk
- This may have little or nothing to do with a hardship analysis, but hardships can be part of the analysis
- Family, personal and property ties in the U.S.
- Employment and community ties
- good moral character and how client has changed for the better since any past criminal behavior
- proof of participation and/or completion of rehabilitation programs (anger management, substance abuse counseling).
- the same analysis is needed for the waiver

When to use Mitigation (Con't)

601-A Provisional Waivers

Helps with weak hardships cases

May help prove why the American cannot live with his spouse in her country of origin

EG: Female persecution. Women as second-class citizens: legal, social, education, employment, religious, community opportunities

When to use Mitigation (Con't)

Cancellation of Removal

EG: DUI / DWI -> available supports and treatment in US providing stability vs. no supports or social services in country of origin (and maybe even alcoholism in family of origin)

When to use Mitigation (Con't)

601 Waivers

- Fraud
- Misrepresentation

VAWA Waivers

- History of abuses
- Psych consequences
- History of other abuses
- Psych consequences
- Hardships in this context

When to use Mitigation (Con't)

U Visa / Asylum cases when crime occurs

EG: derivative daughter of U visa mother has multiple arrests

When to use Mitigation (Con't)

Criminal Arrests / Convictions

- almost anything except aggravated felonies
- CIMTs

Purpose of Mitigation

- Humanize client through a sympathetic narrative
- Induce empathy for the reader
- Disposition is the only information in immigration court
- Document client's life history, especially if there is trauma
- Contextualize client's conduct
- Family's physical, psychological, and financial hardships
- Illustrate client's community, educational, employment ties
- Express client's remorse & regret

Purpose of Mitigation Con't

- Professional expression can replace self-expression
- Not just a mental health report
- Single document theory
- Counter the the government's documentation
- Something for the adjudicator / IJ to hang her hat on

Dispel Nonexistent Patterns

- Disabuse other party of bias and prejudice about patterns of bad behavior
- Don't leave the person guessing – do not allow the other person to fill in the blanks with assumptions

Key Ideas to Consider in Mitigation

- Aberrant decision
- Misguided behavior
- Error in judgment
- Foolish conduct (dumb mistake, no animus)
- Unthinking moment
- Diminished capacity
- Life stressors
- Poor judgment
- Not evil, ie, not bad, but misunderstood or ill...
- Conscious avoidance / should have known
- REDEMPTION (hardships analysis and rehabilitation)
- BALANCE / JUSTICE / DETERRENCE
- Cumulative assessment

Judge's Perspective

**“There is no guarantee of justice except the personality of the judge.”
Eugene Ehrlich. Quoted by Benjamin N. Cardoza in The Nature of the
Judicial Process 1921.**

- I'm not judging the person who committed the crime I'm judging a person who has changed who's in the court room today
- Modesty, minimize self-importance even in community work
- The judge does not like a loser. The judge wants to be on a winning team.
- The judge wants to be part of a team that fixes things
- An incremental process of continuing improvement, which would otherwise be interrupted by incarceration
- A reason to hang his hat on

The Ten “R’s” of Mitigation

- Reality - facing a full narrative
- Rhea- mens rhea / intent / volition
- Recency- when did the crime occur
- Repetition - examine client's overall record
- Rung - what level of seriousness is involved
- Restorative - has the client righted the wrong
- Rehabilitation - client has, can, or will change
- Remorse / Regret - does the client understand and accept his actions
- Roles – community role and behavior in crime
- Recommendations - what can be fixed who can be helped

Lawyer & Mitigation Expert

- Roles should complement one another so that lawyer can advocate for the client in a more complete way
- Mental health issues and psychosocial history with all mitigating factors must be interweaved and integrated into a coherent whole

Who Should Evaluate a Mitigation Case: Therapist or Forensic Evaluator

- A systemic analysis is required not just mental health issues
- The forensic evaluator knows what to look for
- Therapist may only contribute progress notes rather than a detailed summary including diagnosis
- Many therapists are frightened to write forensic reports or maybe just don't know how or won't because they're not being paid and therefore write a less than satisfactory report
- Submitting therapist notes alone misleads the USCIS evaluators into believing that this should be the standard
- There is no evidence that this is a better method than the forensic evaluator and research by USCIS suggests that there is no difference in the ultimate decision-making

Detention Cases or Client is in Another Country

- NOTHING REPLACES MEETING A CLIENT FACE TO FACE FOR AN EVALUATION
- Multiple Meetings
- Cost
- must be included bc the client is the focus of the mitigation evaluation
- audio-video conferences tend to be poor (although improving)

Psychiatric Issues

- IN MOST CASES THE CLIENT SUFFERED TRAUMA
- Complex trauma
- broad mental health issues
- sub-clinical / atypical issues
- undocumented issues
- is psychiatric care anathema to client's culture or stigmatized?
- mental health support in church / temple
- label without the diagnosis

Denials – what to do?

- IN DENIALS, MITIGATION IS ALMOST ALWAYS MISSING IN THE ORIGINAL APPLICATION
- there are two kinds of lawyers those who get denials and lawyers who get denials but won't admit that they get denials
- de novo, ie, a fresh start, ie, take advantage of the opportunity
- second bite at the apple b/c mitigation is new even if hardships are not new
- try to read between the lines and consider what is not in the denial or only mentioned in passing

Clients Who Most Benefit

- Mitigation issues
- Mental health problems
- Extreme hardships
- Childhood traumas / abuses
- Inter-family dependence
- Poor language, communication, social, self-care, adaptive, or executive skills
- Fear of authority
- Confluence of mental health & social deficits

USCIS vs. IJ's

- Always better to have the opportunity to explain things in person to adjudicator, especially for mitigation
- Adjudicator may not read or understand the report even though stipulated to
- Body language and much more
- Travel may be necessary and costly

Thank You !