



PROGRAM MATERIALS

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Expert Testimony in Immigration Court: Using Psychosocial Evaluations as Evidence

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**Expert Testimony in Immigration
Court:
Using Psychosocial Evaluations as
Evidence**

Books

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.

PSYCHOSOCIAL EVALUATIONS AND CONSULTATION IN CIVIL LITIGATION:

*Strategies to Understand
and Humanize the Client*

MARK S. SILVER

M.A., L.C.S.W., Ph.D., J.D.

Handbook of Mitigation in Criminal and Immigration Forensics

Humanizing the Client
Towards a Better Legal
Outcome

SEVENTH EDITION

MARK S. SILVER
M.A., LCSW, PhD, JD.

Outline

- Kinds of Cases
- Reasons for Live Testimony: lawyer, client, IJ
- Preparation for the Expert
- Advantages of Conferencing with Client Before a Hearing
- Advantages of Live Testimony for the Expert
- The Uncertainty Factor
- Poor Phone Reception: Telephonic Disadvantage
- Body Language
- Expense
- Stipulations
- Factors to Consider Before Calling An Expert to Testify

Kinds of Cases

(separate CLEs on these issues)

- Removal / Deportation (EEUH -exceptional and extremely unusual hardship)
- Asylum (1Year Bar – why miss the deadline)
- Spousal Abuse (domestic violence issues)
- Criminal Immigration (mitigation)
- Competency Evaluations (Matter of M-A-M)

Why Have an Expert in Court?

- Clinical Issues that are not obvious or documented. Case example psych issues
- Empathy – Case example: Client cannot self-advocate, children who don't testify, and loco parentis
- Honesty – Case example: Syrian Asylum.
- Cumulative analysis – Wide psycho-social considerations summarized. Case example: weak hardship case
- Supportive / Supplemental evidence

Reasons for Live Testimony #1

The lawyer makes the request:

- As a matter of practice
- “I have an expert and they don’t”
- medical experts unreliable
- therapists won’t testify
- direct persuasive evidence (PTSD)
- expert testimony can be useful to supplement primary testimony
- there are nuanced mental health (BPD)
- family dependence issues
- very high bar (EEUH)
- get it on the record for appeal
- If the expert is not allowed to testify -> issue for appeal

Reasons for Live Testimony #2

The client makes the request:

- client has difficulty expressing himself (uneducated / inarticulate)
- client believes that the expert's presence will help him or his family to remain better focused b/c anxiety
- Some clients wish the expert to attend simply given the gravity of the legal proceeding (insurance policy)

Reasons for Live Testimony #3

The government and/or judge make the request:

- although unusual there have been instances where the government and/or judge have specifically requested my presence in court
- not necessarily a bad thing
- respond to questions and not ape content
- help IJ to convince himself. Case example.
"something to hang my hat on."

Prepare the Expert

- Litigation is litigation is litigation
- No surprise questions
- No surprises

Advantages of Conferencing with Client Before a Hearing

- Opportunity to converse
- Calm the client
- Update information, especially for clients who failed to bring in documentation earlier
- Refresh MY memory

Case Example - client suffers from mental health disorders, but experiences a precipitous decline or improvement in functioning. The client can benefit from speaking with the forensic expert before the hearing. This is particularly true with PTSD, as the slow process of recovery can be quite uneven.

Case Example – Indian power outage case.

Advantages of Live Expert Testimony

- Expert can direct his focus toward any person(s) in the courtroom (“I’m talking to you”)
- Opportunity for a face-to-face conversation with IJ permits a more intimate and congenial atmosphere
- May permit the forensic expert to make a point in a way that may be compromised in the absence of the face-to-face contact
- Know the mood or frame of mind of the IJ

The Uncertainty Factor

- Courtroom proceedings are inherently unpredictable. The predilections of the IJ and a host of other factors create an environment that does not provide much room for certainty of outcome. The immediate availability of the expert in the courtroom can provide the lawyer with an added element of reassurance, particularly if there is serious mental health and family issues involved, which may require clarification whether this is immediately before the hearing, during the hearing, or when a short recess is available

Case Example – “there is no hardship”

Poor Phone Reception: Telephonic Disadvantage

- Telephonic testimony may be accompanied by various annoying interferences, such as call-waiting beeps, poor reception, static, or shuffling of papers in the courtroom—all of which make it difficult for the expert to concentrate and hear what is said in court
- the phone may be far from the lawyer's chair and this may make careful listening difficult. At times, the lawyer might be asked to speak louder, more clearly, or to repeat questions to be properly understood. This adds to everyone's annoyance and might leave the judge with the impression that the expert is not really familiar with the case
- These distractions can be a major problem for everyone and may compromise the integrity of the expert's testimony and the ability of the IJ to focus his attention on what the expert is trying to relate

Body Language of IJ / TA

- The expert who provides telephonic testimony can only respond to direct questions and will miss out on nonverbal cues from the judge, lawyers, and respondent in the courtroom. It is impossible for the forensic expert on the phone-line to know if a break in questioning is due to the judge's skepticism about the testimony, an attorney who is taking a few minutes to search his file, or some other extraneous matter

Body Language of IJ / TA (con't)

Meta-communicative meanings:

- hand gestures, facial expressions, and general demeanor
- subtle gestures such as raised eyebrows (which may indicate skepticism) or grimaces or frowns (which may indicate annoyance), can assist the forensic expert to deduce when a point may need to be repeated in a different form or emphasized in a different context.

Case Example – “Didn’t you see the judge?”

Body Language of Expert

- Body Language to induce empathy
- Both subtle and overt

Case Example – “security, safety, stability....”

Expense

The lawyer might believe that telephonic testimony will reduce the client's costs, as the expert will not be required to devote half a day to a live appearance thereby decreasing the expense. However, the difference between live and telephonic testimony may not be that great and the rewards to the client are potentially significant when considering the impact of live testimony and the gravity of the issues at hand.

Pitfalls of Stipulations

- A stipulation is an agreement between opposing counsel to submit documentary evidence without the need to examine the probative value, bias, or relevance of the evidence either in pre-trial motions or during formal litigation.
- Everyone is happy b/c no expert testimony saves time and energy

Pitfalls of Stipulations Con't

1. In immigration court when opposing counsel stipulate to an expert's written report the report is not read into the trial transcript. As such, it is difficult for the lawyer to determine the degree to which the judge understands, internalizes, or accepts the content of the report. By its nature, forensic reports are both factually and clinically oriented and supported by a host of details. If the lawyer cannot determine what components of the report the judge found compelling and what parts of the report the judge found unpersuasive it is difficult for the lawyer to know what to review or stress at the immigration hearing, or if the expert is needed for testimony.

Pitfalls of Stipulations Con't

2. The IJ may determine that a stipulated report negates the need for testimony from the expert. While reports should be complete and accurate *experts can always clarify or augment a forensic report and expand on those issues that are nuanced or technical.* This is particularly true of non-factual issues, such as emotional and psychological hardship matters.

Pitfalls of Stipulations Con't

3. Stipulations alone omit the opportunity for the expert to humanize the client's case and the expert can sympathetically reinforce this both through his tone of voice and body language. The personal testimony of facts infused with emotional content acutely affects the listener.

Factors to Consider Before Calling An Expert to Testify

The lawyer should judge if a stipulation is sufficient making the expert's presence in court necessary based on three central considerations:

Factor #1

1. The lawyer must consider the factual strength of the client's case. A case that involves two female USC children who have medical issues and whose parents emigrated from a country where female genital mutilation occurs is clearly extremely strong. In contrast, cases without children will be much more difficult to support and the expert's presence should be considered.

Factor #2

2. Judges are human and have predilections and biases. While some judges appear to openly consider all relevant material other judges seem to have their minds made up from the outset. Such judges must have their assumptions and biases (or prejudices) challenged through open discourse with the forensic expert.

Case Example – “Homosexual Asylum Cases”

Factor #3

3. The applicable legal standard in the case, such as “exceptional and extremely unusual hardship,” will have an important influence. This standard is probably the highest legal standard in jurisprudence and can be quite difficult to overcome, such that the testimony of the forensic expert may be necessary.

Case Example – “Loser Case”

THANK YOU