Advancing Justice: Best Practices for Litigating Gender Based Asylum Cases in Immigration Court

April 25, 2024

The Honorable Lisa Dornell, Retired Immigration Judge

A GUIDE TO THE EFFECTIVE REPRESENTATION OF GENDER-BASED ASYLUM CASES IN U.S. IMMIGRATION COURTS



Preparation: Know Before You Go

WHAT TO KNOW

- Know Statutes
 - Immigration and Nationality Act
- Caselaw
 - Know precedent decisions of the Board of Immigration Appeals (BIA)
 - Know Circuit Court Law
 - Know Supreme Court Precedent

Know the Regulations

- FRCP and FRE Not Binding
- 8 Code of Federal Regulations (8 C.F.R.) Contain Rules, e.g.:
 - How Hearings Are Conducted
 - Admissibility of Evidence
 - Size of Documents
 - 8 CFR 1003.32(d) Unless otherwise authorized all documents filed must be submitted on 8 1/2 x 11 size papers)

Know the Rules in the EOIR Practice Manual

- The Practice Manual provides additional guidance and describes specific procedures and requirements in greater detail
- The Practice Manual rules get more specific about documents filed:
 - Binding All forms, motions, briefs, and other submissions should always be pre-punched with holes along the top (centered and 2³/₄" apart).
 - Submissions may be stapled in the top left corner. . . .Submissions should neither be bound on the side nor commercially bound. . . .
 - Practice Manual 3.3

Know the Rules: Avoid Rejection

• Common Errors that lead to rejection by the Clerk's Office:

- No A-number
- No attached order for motions
- Incorrect filing location (wrong court)
- Documents submitted without translation
- No proof of service or improper proof of service



Know Your Judge

Preferences

- How are pleadings handled?
- Web-Ex (Virtual) or In Court
- Preference for opening statements/theory of the case
- Does the Judge want a closing argument?
 - Sources of information about Judges: other practitioners, Judges' Legal Assistants
 - Observe hearings



Know How to Avoid Credibility Pitfalls

Know Your Record

- Have knowledge of everything that is submitted
 - Ensure that information on country conditions is corroborative and does not contradict the claim
 - Carelessness can lead to impeachment!



Know Where to Look for Inconsistencies

Form I-213 Record of Deportable Non-Citizen (Initial Encounter Form) Filed by the DHS

"non-citizen stated that she came to the United States to work and does not fear returning to her country of origin"

- What were the circumstances encounter after traumatic departure and arrival?
- Was the statement taken in the client's language?

Prior applications

 Pro Se applications filled out by client alone or with jailhouse lawyer and/or without an interpreter

Know Where to Look for Inconsistencies

- Witness Statements that are not carefully examined by counsel
- Might have different dates of events
- Might have different account of events
- Might include translation errors

Examination of Witnesses



Don't Rely on Scripted Examination and Testimony Have a conversation with the witness

3

Let the witness tell the story

Prehearing Briefs: To File or Not to File?

The Practice Manual encourages the filing of Prehearing Briefs. PM 4.19 Always consider an opening brief where there are complicated or novel legal issues

Get the strongest version of the facts before the IJ Make clear and persuasive legal arguments

Seek Stipulations

- Seek stipulations prior to the hearing
 - Spare client from being retraumatized
 - Narrow the issues for trial
- Request a prehearing conference *if necessary*

Stipulations

- Permission to lead the witness
- Stipulation to resting on affidavit
 - Limit questioning to DHS crossexamination with right to redirect if necessary
- Don't rule out partial stipulations!
 - Stipulations as to general country conditions – e.g., there is limited or no protection for women in country x against domestic violence
 - Stipulation that there was harm suffered that constituted persecution
 - E.g, Issues to litigate are nexus; governments willingness or ability to control; internal relocation, etc.
 - If no pre-trial stipulations reached, seek stipulations on the day of trial before the judge takes the bench OR
 - Ask the judge for a brief recess to discuss stipulations with DHS counsel

THE COURTROOM ENVIRONMENT: Know What You Can Control

- Things Outside of Counsels' Control
 - May be Crowded and Noisy
 - Fast-paced Proceedings
 - Delays, Long waits, Continuances

Things Counsels May Be Able to Control

- Orient Client as to the Courtroom Environment
 - Tell them what to expect
 - Show them what to expect
 - If the hearing will be in person, reach out to the Court Administrator to arrange a tour
 - If there is a Pro Bono Liaison Judge, reach out to make arrangements for a tour



Decorum

• 4.12 of the EOIR Practice Manual Addresses Decorum:

- Addressing the Immigration Judge
- Attire
- Conduct
 - This information should be shared with clients and witnesses before the hearing

Courtroom Environment

- Things That Counsels May Be Able to Control
 - Is the Hearing Open or Closed to the Public?
- Immigration court hearings are open to the public, with limited exceptions, as specified in law.
 - HOWEVER:
- Evidentiary hearings on applications for asylum or withholding of deportation will be closed to the public unless the applicant expressly requests that it be open

8 CFR 1240.33(c)(1)

Courtroom Environment

- Location from where client testifies
 - Counsels' table? Witness Stand?
- Support Persons in Courtroom
 - e.g., therapist, family, friend
- Request for client to take breaks as needed



Interpreter Issues

A request for an interpreter, whether made by oral motion, by written motion, or in a written pleading, should contain the following information:

- the specific dialect of the language, if applicable
- the geographical locations where such dialect is spoken, if applicable
- the identification of any other languages in which the respondent or witness is fluent
- any other appropriate information necessary for the selection of an interpreter

Practice Manual Chapter 4.15(o)

 Oral motion for an interpreter is made at a master calendar hearing or is made in writing through a written pleading.

Interpreters

• IMPORTANT!: Follow the Practice Manual for requesting interpreters post-master calendar hearing

 A separate motion with a cover page labeled *"MOTION TO REQUEST AN INTERPRETER"* is required.
 PM 4.15 (O)(1) • SPANISH OR KANJOBAL?

Amharic Turkish

• WHAT TYPE OF ENGLISH?

• CREOLE OR FRENCH?

 AMERICAN SIGN LANGUAGE (ASL?)



ENGLISH

BE AWARE OF SPECIFIC LANGUAGE NEEDS

- Not everyone from Latin America speaks Spanish – they may speak a "dialect"
- Consider asking for a "stand-by" interpreter

Interpreters

• Can you request a specific gender?

• "any other appropriate information necessary for the selection of an interpreter"

Practice Manual Chapter 4.15(o)

Know All of Your Client's Special Needs

Inform the Court of Special Needs *Before* the Hearing

Vision loss

Hearing loss

Physical disability

Address Mental Competency Issues Prior to the Merits Hearing

• "If there are indicia of incompetency, the Immigration Judge must make further inquiry to determine whether the noncitizen is competent for purposes of immigration proceedings.

 If the [applicant] lacks sufficient competency to proceed, the Immigration Judge will evaluate and apply appropriate safeguards." Matter of M-A-M-, 25 I&N Dec. 474, 479 (BIA 2011) Mental Competency Hearings

- Mental Competency Hearings Are Separate Hearings, On The Record
 - If mental competency is not addressed in advance, appropriate safeguards might not be available on the day of the scheduled asylum hearing
 - e.g., additional time for therapy to address trauma; waiving client's appearance, etc.
 - Where might these indicia be found in the court record?
 - Buried in the evidentiary record in the form of a psychological evaluation

Know the Impact of Cultural and Educational Factors

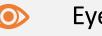
- Literacy
- Familial Relationships
- Demeanor
- The Marking of Time
 What Calendar is
 - Used?



Lay a foundation for literacy before asking witnesses to identify documents



Are we all brothers?



Eye contact



Gregorian v. Julian Calendar

KNOW HOW TO UTILIZE EXPERT WITNESSES

- Witness lists must be filed in accordance with the rules at section 3.3 of the EOIR Practice Manual
- There are additional requirements for expert witnesses:
 - A CV or resume must be filed for expert witnesses PM 3.3(g)
- Be aware of specific requirements for experts who will not be testifying in person

Motion for Video or Telephonic **Appearance** of Expert Witness

EOIR Practice Manual Ch. 4.15(o)(iii)

Video testimony

- Witnesses may testify by video at the individual calendar hearing
- It is at the immigration judge's discretion.
 Video testimony may be requested *only by written* motion.

Telephonic testimony

- may be requested by oral motion at the master calendar hearing or by written motion.
- If telephonic testimony is permitted, the court specifies the time and manner under which the testimony is taken.

The rule covers format and required contents – including an explanation as to why the witness cannot appear in person

Know How to Use Expertise Wisely

Expert on Trauma, e.g., therapist, psychologist

- Use to address potential credibility issues:
 - The manner in which memory is encoded during traumatic events
 - Inability to testify in a linear fashion
 - Inability to recall certain specific details

Expert on Country Conditions

- What value can they add?
- How do country conditions affect YOUR client's case?

Expert Witnesses: Preparation

- Ensure that credentials match proffered expertise (call the right witness)
- Seek a stipulation as to expertise to forgo a voir dire
- If no stipulation on expertise, seek stipulation as to credentials
- Let witnesses know that voir dire is not personal
- Prepare witnesses that if a stipulation is reached, they may not have to testify
- Instruct witnesses that testimony in a court of law is not the same as a lecture- the focus is on answering specific questions in a direct manner

Voir Dire Of Expert Witnesses in Immigration Court

- 1. Where do you work?
- 2. What is your educational background?
- 3. What degrees do you possess?
- 4. Did you specialize in any particular field?
- 5. Are you an author of any publications relevant to the issues in this case?
- 6. What specific training do you have in the area of your specialty?
- <u>http://www.law.unc.edu/documents/academics</u> /humanrights/expertwitnesshandbook.pdf

Voir Dire Of Expert Witnesses in Immigration Court

- 7. Have you received any honors, awards, or recognition in your field of work?
- 8. Have you traveled to the country from which the asylum seeker is fleeing, and if so, could you describe any extended periods of time spent there?
- 9. Do you have prior experience testifying as an expert or serving as an expert witness?
- 10. Do you have prior experience testifying as an expert in asylum matters?
- 11. Did you prepare a report in this case?
- 12. Can you please explain the materials that you reviewed in creating your report?
- 14. Please describe the specific facts and data that you relied on in coming to your conclusion.
- <u>http://www.law.unc.edu/documents/academics/humanrights/expertwitnesshandb</u> <u>ook.pdf</u>

Cross-Examination on Voir Dire

- Prepare the Expert for a Voir Dire Cross Examination
 - Have they ever found a client not to be credible?
 - If so, what steps did they take?
- What tests/measures do they use to evaluate the credibility or truth of information?
 - E.g., do they employ any tests for malingering?
- Have tests/evaluations been normed for the relevant populations?
 - E.g., non-English speakers from different cultures?
- Are they being compensated in any way?
 - Paid for their testimony?
 - Compensated for gas or parking?

Court Rejects Tendered Expert: Lay Witnesses

- Lay witnesses generally cannot provide opinions but, instead, testify based on personal experience and perception. Matter of Y-S-L-C-, 26 I&N Dec. 688, 690 (BIA 2015) (citing Fed. R. Evid. 602)
- Consistent with FRE RULE 701 OPINION TESTIMONY BY LAY WITNESSES
- Ultimately, the Immigration Judge will evaluate the weight that can be given to the testimony

Make the Most of Closing Arguments

- DO NOT simply restate the facts
- DO focus on issues that are of particular concern to the Court
- DO take the opportunity to address weaknesses, inconsistencies etc.
- DO NOT engage in theatrics: avoid weeping and hyperbole
- DO NOT misconstrue or exaggerate facts
- DO NOT refer to any facts or evidence not in the record
- DO remember that closing argument is always at the option of the Court

DO NOT

Approach the Bench and Use Money As a Visual Aid During Closing Argument



TRAC Immigration, May 12, 2023 (Syracuse University):

- "As of the end of April 2023, over three out of four persons ordered removed this fiscal year by Immigration Judges had no representation, and just 0.8% -- that is only 8 out of 1,000 -had been able to find a volunteer attorney to represent them."
- Without the help of a skilled immigration attorney, fewer immigrants are able to prepare asylum applications or other materials required to get their claims even heard."

Thank You and Best of Luck!



JUSTICE FOR ALL!