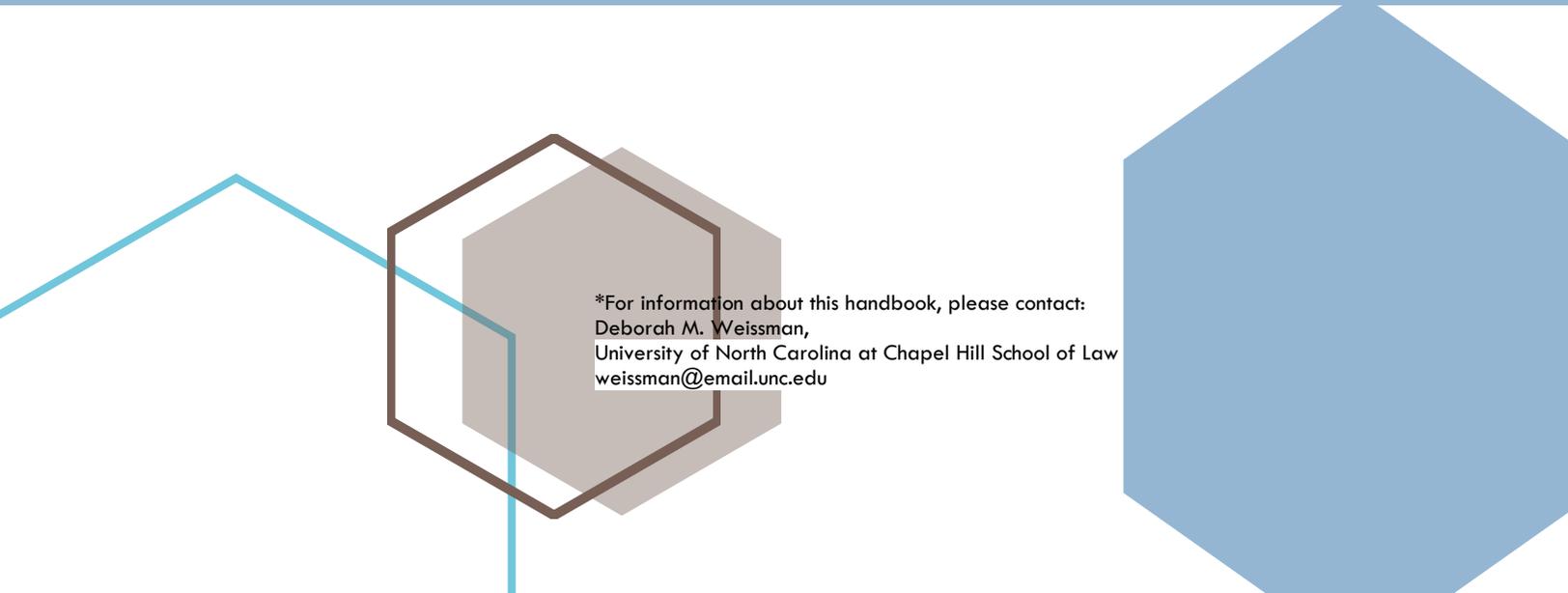


Expert Witnesses in U.S. Asylum Cases: A HANDBOOK

Kelcey Baker, Katherine Freeman, Gigi Warner,
and Professor Deborah M. Weissman
2018

<http://www.law.unc.edu/documents/academics/humanrights/expertwitnesshandbook.pdf>

This handbook provides guidance for anyone considering serving as an expert witness in an asylum case, as well as best practices for immigration attorneys working with expert witnesses in asylum cases.



*For information about this handbook, please contact:
Deborah M. Weissman,
University of North Carolina at Chapel Hill School of Law
weissman@email.unc.edu

Acknowledgements

This handbook was created by students of Professor Deborah Weissman's Spring 2018 Forced Migration class at the University of North Carolina School of Law.

The project would not have been possible without the invaluable input of several individuals who took time out of their schedules to discuss their work and experiences, including: Dr. Deborah Bender of UNC's Gillings School of Global Public Health; Teresa Chapa, Latin American, Iberian and Latina/o Studies Librarian at UNC; Dr. Mimi Chapman, Professor at UNC's School of Social Work; Dr. Evelyne Huber, Morehead Alumni Professor of Political Science at UNC; Dr. Robin Kirk, Co-Chair of Duke Human Rights Center; Dr. Julia Mack, Associate Professor in the UNC Department of Romance Studies; Ms. Patricia Martuscelli, visiting scholar at the Carolina Population Center; Dr. Lindsay Fernandez Rhodes, Post-doctoral Research Associate at the UNC Department of Epidemiology; Heather Scavone, Director of Elon University's Humanitarian Immigration Law Clinic and Assistant Professor of Law; Dr. Daphne Sharpe, Assistant Professor of Nursing at Winston-Salem State University; and Dr. Ariana Vigil, Associate Professor at UNC's Department of Women's and Gender Studies. We are also grateful to Blaine Bookey, Neela Chakravartula, Eunice Lee, and Lisa Weissman-Ward for their helpful review and suggestions which significantly contributed to this effort.

The student authors also want to thank Professor Weissman for designing this project and for her unyielding commitment to human rights, immigrant rights, gender equity, and public interest law that serves as an inspiration to the entire UNC Law community.



TABLE OF CONTENTS

INTRODUCTION	5
PART ONE: OVERVIEW OF ASYLUM LAW	7
I. THE LAW OF FORCED MIGRATION.....	7
A. <i>The Law of Asylum</i>	7
B. <i>Withholding of Removal</i>	8
II. THE ELEMENTS OF AN ASYLUM CLAIM.....	8
A. <i>Well-Founded Fear</i>	9
B. <i>Persecution</i>	10
C. <i>On Account Of: The Nexus Standard</i>	15
D. <i>Five Enumerated Grounds – Race, Religion, National Origin, Membership in Particular Social Group, Political Opinion</i>	15
III. UNDERSTANDING THE APPLICATION PROCESSES.....	18
A. <i>First Bite at the Apple: Affirmative Asylum</i>	18
B. <i>Defensive Asylum</i>	20
IV. UPHILL BATTLE: MAJOR OBSTACLES IN ASYLUM LAW	22
A. <i>The One-Year Filing Deadline</i>	23
B. <i>Bars to Asylum</i>	23
C. <i>Discretion</i>	24
D. <i>Prolonged Detention of Asylum Seekers</i>	24
V. CONVENTION AGAINST TORTURE CLAIMS: POSSIBLE ALTERNATIVE RELIEF	25
PART TWO: CREATING THE FOUNDATION FOR A WINNABLE ASYLUM CASE AT TRIAL AND FOR APPEAL..	28
I. JURISDICTIONAL ROULETTE: VARIATION IN APPROVALS, HIGH DENIALS.....	28
II. APPEALING ASYLUM DENIALS.....	29
A. <i>First Chance to Appeal: The Board of Immigration Appeals</i>	29
.....	30
B. <i>Second Chance to Appeal: Federal Courts</i>	31
III. THE ADVANTAGE OF LEGAL REPRESENTATION	32
IV. THE IMPORTANCE OF EXPERTS	33
PART THREE: THE ROLE(S) OF AN EXPERT WITNESS	35
I. EXPERT WITNESSES: COUNTRY-SPECIFIC INFORMATION.....	35
A. <i>Writing a Report on Relevant Country Conditions</i>	36
B. <i>Addressing the Specific Allegations of the Claimant</i>	36
C. <i>Document Analysis</i>	37
II. EXPERT WITNESSES: MEDICAL AND PSYCHOLOGICAL EXPERTISE	38
A. <i>Corroborating Physical and/or Psychological Harm</i>	38
B. <i>Explaining Difficulty in Recalling Dates/Providing Coherent Narrative</i>	39
C. <i>Helping the Client Through the Process</i>	40
PART FOUR: HOW ONE QUALIFIES AS AN EXPERT	42
I. QUALIFYING AS AN EXPERT	42

Expert Witnesses in U.S. Asylum Cases: A Handbook

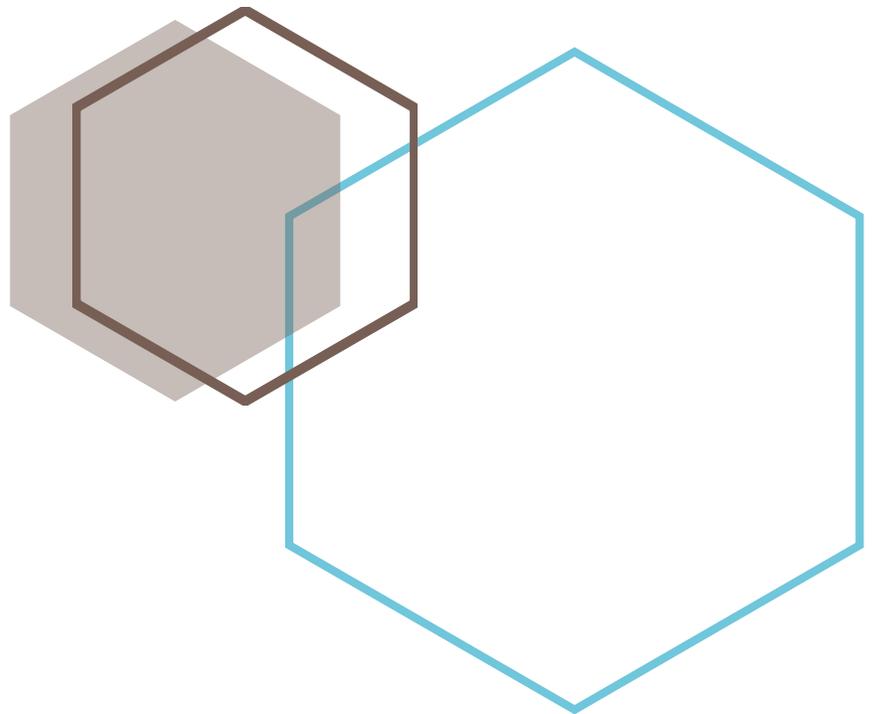


A. Generally.....	42
B. In Asylum Matters.....	42
II: THE LAW GOVERNING THE USE OF EXPERT TESTIMONY IN ASYLUM CASES.....	43
A. The Daubert Standard.....	44
B. A Relaxed Daubert: The Rules of Evidence Exist “In Spirit”.....	44
C. Admissibility v. Probativity.....	45
PART FIVE: FORMS OF EXPERT ASSISTANCE	47
I. ASSISTING ADVOCATES WITH RESEARCH QUESTIONS AND FRAMING THE ASYLUM CLAIM.....	47
II. AFFIDAVITS	48
III. IN-PERSON TESTIMONY.....	50
IV. TELEPHONIC APPEARANCES	51
V. GENERAL APPROACH TO QUESTIONING EXPERTS: TYPE, SUBSTANCE, AND FLOW	51
PART SIX: BEST PRACTICES FOR ATTORNEY-EXPERT COLLABORATION	54
I. FOR EXPERTS: DEADLINES, COMMUNICATION, CLARIFICATION.....	54
II. FOR EXPERTS: TO MEET OR NOT TO MEET? INTERACTION WITH CLIENTS.....	54
III. FOR ATTORNEYS: COLLABORATING WITH EXPERTS.....	56
A. Best Practices: Before Finding and Contacting an Expert	56
B. Best Practices: How to Find an Expert.....	57
C. Best Practices: When to Contact the Expert	59
D. Best Practices: Establishing Contact with a Potential Expert	60
E. Best Practices: What to Discuss During the Initial Phone Call or Meeting.....	62
F. Best Practices: What to Send the Expert to Review	65
G. Best Practices: How Often to Be in Touch with the Expert	66
H. Best Practices: How to Help an Expert Write an Affidavit	66
I. Best Practices: How to Prepare an Expert for Giving Telephonic or In-Person Testimony.....	68
J. Best Practices: How to Manage Expert Expectations throughout the Process	70
K. Best Practices: How to Work with the Expert on the Day of the Hearing.....	70
L. Best Practices: Whether to Follow Up with the Expert after the Hearing	71
IV. THE IMPORTANCE OF SELF-CARE.....	72
PART SEVEN: IDENTIFYING SOURCES OF EVIDENCE	73
I. COMPILING A COUNTRY CONDITION INDEX	73
II. OTHER SOURCES OF EVIDENCE	74
A. Newspapers.....	74
B. Non-Governmental Organizations	74
C. Statistical Data	75
D. Human Rights Tribunals.....	76
III. WHAT JUDGES PREFER.....	76
CONCLUSION.....	78
APPENDIX A – EXPERT CONFIDENTIALITY	79
APPENDIX B – MODEL AFFIDAVITS.....	80
APPENDIX C – AFFIDAVIT OUTLINE TEMPLATE	81
APPENDIX D – CHECKLIST FOR INITIAL CALL/MEETING WITH EXPERT.....	82
APPENDIX E – RESOURCES.....	83

Expert Witnesses in U.S. Asylum Cases: A Handbook



<i>PLACES TO SEARCH FOR AN EXPERT WITNESS (OR BE ADDED TO A LIST OF EXPERT WITNESSES)</i>	83
<i>HUMAN RIGHTS – ONLINE RESEARCH RESOURCES</i>	83
<i>PERTINENT INTERNATIONAL ORGANIZATIONS</i>	83
<i>INTERNATIONAL COURTS AND CASES</i>	84
<i>TREATIES</i>	84
<i>RESEARCH GUIDES</i>	85
<i>FOREIGN LAW</i>	86
<i>JOURNAL DATABASES</i>	86



INTRODUCTION

The role of an expert witness is often crucial in asylum cases. An expert witness often makes the decisive difference between obtaining a grant of asylum on behalf of an asylum seeker or deportation to a place of danger and peril. The primary purpose of this handbook is to expand the roster of expert witnesses willing to serve as experts in asylum cases by providing guidance and information about the asylum process and explaining the role of experts in that process.

While every asylum case is different, the information in the handbook provides a foundation for those who have never served as an expert in an asylum case but may be contemplating such a role, and those who have already served as experts and seek additional information about the process. With the intensifying political focus on immigration and asylum, increasing numbers of individuals have expressed interest in helping asylum seekers, yet they may have questions about the requisite qualifications necessary to serve as an expert or are otherwise hesitant because they are not familiar with the ways in which experts can provide assistance in these matters.

In order to encourage and develop expert asylum resources, this handbook provides experts with a basic overview of asylum law. It also explains the importance of expert testimony in creating a strong record that will support all stages of asylum representation, from the earliest stages through the appellate processes. The handbook then reviews the various roles and contributions of an expert, how one qualifies as an expert, and how experts can best assist attorneys.

This handbook also provides suggestions and recommendations to asylum attorneys who may seek to engage the services of expert witnesses. As referenced in the appendices to this handbook, there are a number of excellent substantive legal manuals for attorneys who have never represented an asylum

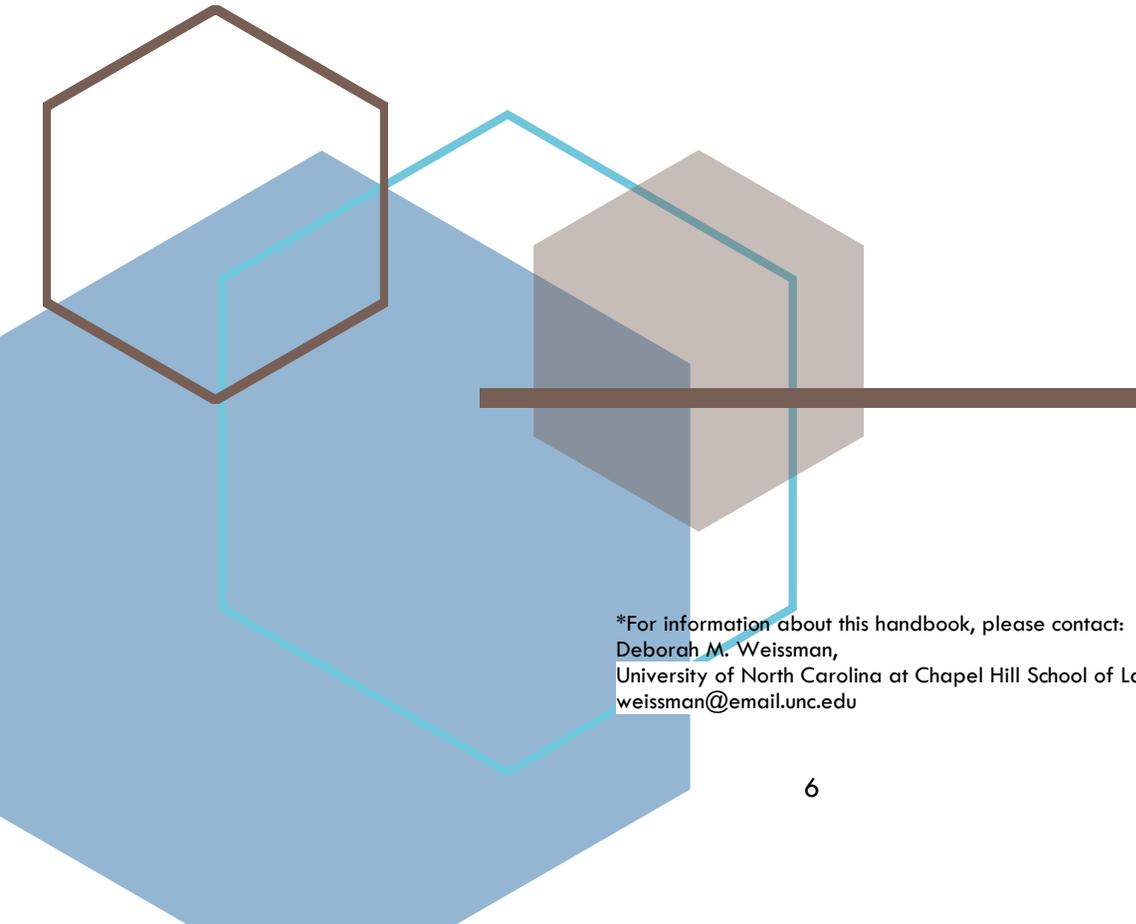
Expert Witnesses in U.S. Asylum Cases: A Handbook



seeker, as well as advanced training materials for experienced asylum attorneys, and this handbook is not intended to substitute for those materials. To that end, the handbook identifies best practices for attorneys collaborating with experts, drawn from interviews with experienced asylum attorneys, experienced expert witnesses, and individuals currently contemplating whether to offer their services as experts in asylum matters.

This handbook was developed with the hope that the information provided will encourage more individuals to serve as experts for asylum cases, will assist both attorneys and experts to more effectively and efficiently navigate the asylum process, and will enhance the legal protections to the countless individuals seeking refuge from persecution and harm.

<http://www.law.unc.edu/documents/academics/humanrights/expertwitnesshandbook.pdf>



*For information about this handbook, please contact:
Deborah M. Weissman,
University of North Carolina at Chapel Hill School of Law
weissman@email.unc.edu

PART ONE: Overview of Asylum Law

I. The Law of Forced Migration

People who have fled their country because they fear persecution may seek legal relief in various forms so that they are not returned to the country where their lives may be in danger.¹ These legal protections are found in international law as well as federal law.² This Part sets forth a basic overview of the domestic law of asylum, which provides successful claimants with a pathway to permanent residency in the United States. It also describes a “lesser” remedy known as withholding of removal, which provides, at a minimum, assurances that a person with a well-founded fear of persecution will not be returned to their home country. It then explains the basic processes for individuals who are applying for asylum and withholding relief as well as some of the barriers they face. This Part then describes yet another alternative remedy with fewer protections, found in the Convention Against Torture, an international human rights treaty that the United States has signed, ratified, and made a part of federal law.³

A. The Law of Asylum

Asylum can be briefly defined as an immigration status given to individuals who are legally considered refugees. In order to be eligible for asylum in the United States, an applicant must qualify as a refugee under the Immigration and Nationality Act (INA). The INA defines a refugee as someone who has left their homeland due to past persecution or fear of persecution on the basis of race, religion, nationality, membership in a particular social, or political group.⁴ If granted asylum, a person may be eligible to become a lawful permanent resident (LPR), which means they have the right to remain permanently with work authorization in the United States and can petition to become a U.S. citizen after four more years of becoming an LPR.

Expert Witnesses in U.S. Asylum Cases: A Handbook



Asylum is an immigration status that can only be applied for by those who physically arrive at the borders or who are present in the United States. Individuals who are outside the United States must apply for refugee status. The INA provides both the eligibility requirements and the procedural framework for asylum claims and for refugee status. Applicants for asylum and for refugee status must both meet the definition of refugee as defined in the INA.⁵

The asylum seeker may include their spouse and children who are in the United States on their application at the time they file or at any time until a final decision is made on their case.⁶ There is also a mechanism for applicants to petition for overseas spouses and children as well. The asylum claim, however, is granted based upon the merits of the asylum seeker's case – not on whether the applicant's spouse or children also suffered the same persecution.

B. Withholding of Removal

Withholding of removal (withholding), while based on the same grounds as asylum, is an alternative to asylum for individuals who deserve refugee protection but, for reasons explained below, may not qualify for asylum relief.⁷ Compared with asylum, the benefits of withholding of removal are limited. While an individual cannot be removed to the country from which they were fleeing persecution, the applicant will not be able to obtain lawful permanent residency, will not be eligible to join family members in their application, and will not be able to leave the United States without losing their withholding status. Persons granted withholding of removal may still be deported to a country other than the one from which they were granted withholding of removal.

II. The Elements of an Asylum Claim

Understanding and applying the refugee definition is key to asylum law. A refugee is defined as a person who "... is unable or unwilling to avail himself or herself of the protection of that country

Expert Witnesses in U.S. Asylum Cases: A Handbook



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.”⁸ All elements must be shown in order to have a successful asylum claim. To meet this standard, the asylum applicant must show that they have:

1. a well-founded fear
2. of persecution (future or having experienced in the past)
3. on account of
4. one of five grounds: race, religion, national origin, membership in a particular social group, or political opinion.
5. where the persecutor is a government actor and/or a non-governmental actor that the government is unwilling or unable to control.⁹

The elements for obtaining withholding of removal are the same as asylum elements. In an asylum claim, the burden of proof is on the applicant for asylum.¹⁰ If the applicant meets this burden of proof, the burden shifts to the government to establish by a preponderance of the evidence (the greater weight of credible evidence in the case) a “fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹ The government may also attempt to rebut the presumption in favor of asylum by showing the applicant could avoid future persecution by relocating elsewhere in their country.

A. Well-Founded Fear

The term “well-founded fear” comes from the UN Convention on Refugee Status of 1951 and INA’s definition of “refugee” and is a crucial element to establish. Unless the applicant can very clearly demonstrate *past* persecution, the applicant should be prepared to demonstrate an unwillingness to return to their country due to a well-founded fear of *future* persecution.¹²

There is both a subjective and objective component to the definition of “well-founded fear.” “Well-founded fear” traditionally requires that the asylum seeker demonstrate an actual, subjective fear

Expert Witnesses in U.S. Asylum Cases: A Handbook



of being returned *and* that there is a “well-founded,” objective basis for that subjective fear.¹³ The asylum seeker must prove that their subjective fear of return is genuine. The asylum seeker must then prove that their fear is reasonable through credible and particularized evidence – the objective piece.¹⁴ Expert witness testimony often helps to establish the objective component of the well-founded fear as part of the credible and particularized evidence.

The U.S. Supreme Court has set forth the current legal basis for demonstrating a well-founded fear: “one can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”¹⁵ According to the Court, a one-in-ten, or ten percent, possibility of future persecution would theoretically be sufficient to establish a well-founded fear.¹⁶ This standard, however, has not been used as a bright-line test for well-founded fear and different courts have been known to apply different standards.

There are also different legal standards of proof for asylum and for withholding of removal in order to meet the element of a well-founded fear. Asylum requires that there is a *reasonable probability* of well-founded fear. Withholding of removal has the same well-founded fear element, but the applicant must show that there is a *clear probability* of a well-founded fear (a higher standard than the preponderance of evidence). Even though withholding of removal offers lesser benefits, it has a higher legal standard of proof.

B. Persecution

The definition of “refugee” also hinges upon whether the harm the asylum seeker fears rises to meet the definition of persecution. This is a particularly nebulous area because the INA does not define “persecution.” Currently, some of the best guidance comes from the Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter “UNHCR Handbook”). The UNHCR Handbook states that:

Expert Witnesses in U.S. Asylum Cases: A Handbook



[T]here is no universally accepted definition of ‘persecution,’ and various attempts to formulate such a definition have been met with little success. From Article 33 of the 1951 Convention [Relating to the Status of Refugees], it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution.

Case law also can give some general insight into what might constitute persecution for the purposes of asylum eligibility. Generally, case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive.¹⁷ The asylum seeker is not required to prove the subjective intent of the persecutor. This can mean that whether national policies are meant to “cure” a victim (e.g., programs for behavioral modification of LGBTQ+ individuals) or benefit large portions of the population (e.g., one-child policies to limit population growth on a national level), or whether they are imposed for punishment for the persecutor’s own sadistic reasons, they may be considered forms of persecution.¹⁸

As a historical concept, asylum law sought to protect against persecution when perpetrated by governments or government officials. However, over time, asylum decision-makers have recognized that persecutive acts may be committed by non-state actors, such as gangs, anti-foreigner groups, or individuals.¹⁹ Many asylum seekers have been able to win their cases upon a showing of past or feared future persecution from non-governmental actors where the applicant could prove that the government of their home country was unwilling or unable to control that entity. Examples of non-state actors include gangs, guerilla groups, paramilitaries, and private citizens including family members whom the government in the country of origin is unwilling or unable to control.²⁰ Whether the government is *unwilling* or *unable* to protect an applicant is a question of fact and must be evaluated on the basis of the evidence presented in each case. Courts should distinguish between circumstances where a government might be willing to prevent persecution and when it is unable to do so. For example, it may be possible to demonstrate a government’s inability to prevent persecution where an applicant has already suffered persecution and the government was unable to prevent the harm. In these matters, courts must consider

Expert Witnesses in U.S. Asylum Cases: A Handbook



the social norms and context that serve to condone the subordination or discrimination against persons and groups.²¹

It is important to differentiate *persecution* from *prosecution* for acts deemed illegal in the country from which the asylum seeker is fleeing. If the action claimed to be persecution is lawful punishment for unlawful behavior on the part of the applicant, and the punishment is pursuant to a law of general applicability, these circumstances will not ordinarily constitute persecution. However, if an asylum seeker is prosecuted for openly espousing opinions contrary to the government, the prosecution may arise to the level of persecution on account of political opinion.²² Like most asylum claims, these types of claims are decided on a case-by-case basis.

Immigration courts have set demanding standards as to the type of harm that rises to the level of persecution. The following are examples of cases where the court found that the harm inflicted upon the individual did not rise to the level of persecution:

- The applicant was briefly detained twice, his home was bombed, his father was kidnapped for three days, and his brother was kidnapped and tortured for several days.²³
- The applicant was interrogated, beaten, and kicked while detained for six hours.²⁴
- The applicant was detained for three days and beaten on the soles of his feet.²⁵

Often, physical persecution will be a much easier case than non-physical forms of persecution, such as economic persecution. Physical harm, however, is not necessary for harm to arise to the level of persecution and threats and severe emotional harm may be sufficient.²⁶ Economic persecution will not qualify for the purposes of asylum law, unless the economic harm rises to the level of “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life.”²⁷

Expert Witnesses in U.S. Asylum Cases: A Handbook



1. Past Persecution

Asylum regulations provide that “an applicant who has been found to have established . . . past persecution shall also be presumed to have a well-founded fear of persecution” if based upon the same type of persecution.²⁸ In other words, a person who can establish past persecution has a rebuttable evidentiary presumption of a well-founded future fear—meaning that it is presumed they do have a well-founded fear. Certain types of past persecution can also constitute a permanent and continuing act of persecution (e.g. forced sterilization).²⁹ These determinations are based on findings of facts made by the immigration judge.

2. Humanitarian Asylum and Other Serious Harm Related to Past Persecution

Persons who have suffered past persecution but cannot establish a well-founded fear of future persecution may still qualify for asylum, either because of reasons arising out of having suffered particularly atrocious past persecution, or because there is a reasonable possibility that they may suffer other serious harm in their home country.³⁰ Some examples of severe past persecution resulting in humanitarian grants of asylum include:

- The applicant had been imprisoned for political reasons for 13 months under “deplorable” conditions, including physical torture and psychological abuse, beatings, electrical shocks, inadequate diet and medical care, and integration with criminal and mentally ill prisoners.³¹
- The applicant had undergone female genital mutilation in aggravating circumstances and had been found to have suffered an “atrocious form of persecution that results in continuing physical pain and discomfort.”³²

In addition to showing a severe form of persecution, applicants who suffered past persecution may also be eligible for humanitarian asylum when they can demonstrate that there is a “reasonable possibility” of “other serious harm.”³³

3. Future Persecution

If it is not found that an asylum seeker has suffered past persecution, the applicant may still be able to prevail in their case if they are able to show a well-founded fear of future persecution. Past persecution creates a presumption of a well-founded fear of future persecution.³⁴ However, actions and threats made by the persecutor, in the context of the country conditions, can be sufficient to establish a well-founded fear of future persecution if the asylum seeker were to be returned to their home country – even if past persecution is not established.³⁵

As noted in the well-founded fear section above, an asylum seeker must show that there is a well-founded fear of future persecution by demonstrating a current fear of persecution in their home country (based upon the enumerated grounds discussed below), that there is a reasonable possibility of suffering that persecution if they were to return to their home country, that the feared persecutor is either a state actor or a non-state actor that the government is unable or unwilling to control, and that they are unwilling or unable to return to their home country because of that fear.³⁶

To show there is a reasonable possibility of suffering such persecution if returned - that is, a well-founded fear of future persecution - the applicant must meet what has been described as the *Acosta/Mogharrabi/Kasinga* test, based upon a group of case decisions. This test requires the applicant to meet four elements of proof:

1. the applicant possesses a belief (imputed or actually held – see Political Opinion section below) or characteristic which a persecutor seeks to overcome by means of punishment or action of some sort;³⁷
2. the government, or a third party that the government is unable or unwilling to control, is aware of or could become aware of that belief or characteristic;
3. the persecutor is capable of persecuting the applicant; and
4. the persecutor is inclined to persecute the applicant.³⁸

Expert Witnesses in U.S. Asylum Cases: A Handbook



This test, as applied now by immigration courts, requires that applicant show a close connection between persecution and one of the enumerated grounds – this is the nexus requirement (discussed in the section “On Account Of” below).

C. On Account Of: The Nexus Standard

All asylum cases must meet the burden of what is referred to as the nexus requirement. Nexus, written in the law as “on account of,” is the connection between the persecution and asylum ground, and is potentially the most difficult part of asylum cases to demonstrate. The applicant must show that (1) they were persecuted or have a well-founded fear of persecution, (2) **on account of**, and (3) one or more of the five enumerated grounds. Put another way, an asylum applicant must not only show that they suffered or fear persecution if returned, they must also demonstrate *why they were persecuted* and show that it was because of one of the five grounds upon which asylum may be granted. Asylum applicants often are not in a position to know with specificity about the persecutor’s motives, but strong circumstantial evidence should be enough to satisfy their burden of proof. Thus, expert testimony can be particularly useful or even crucial when demonstrating a nexus between the persecution and the ground of asylum. Country conditions experts can be critical in establishing the evidence of nexus when written documentation is lacking.

D. Five Enumerated Grounds – Race, Religion, National Origin, Membership in Particular Social Group, Political Opinion

In order to establish eligibility for asylum, the applicant must show that the past or well-founded fear of persecution is “on account of” one of five protected grounds: race, religion, nationality, membership in a particular social group, and political opinion. The applicant must demonstrate they have the characteristics necessary to fall in one of the five protected categories, in addition to showing persecution or well-founded fear of persecution, and nexus.

Expert Witnesses in U.S. Asylum Cases: A Handbook



The REAL ID Act of 2005 amended the INA to state that an applicant for asylum has the burden of establishing that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.³⁹ There may be mixed motives for the persecution, but it must be proven that the central reason for persecution is on account of one of the five grounds.

1. Race, Religion, and National Origin

The concepts of race, religion, and nationality are fairly familiar, and are somewhat self-explanatory for the purposes of asylum law. While there is no definition of race in the 1951 Convention on Refugees, advocates and adjudicators may look to the Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which defines race to include “race, color, descent, or national or ethnic origin.”⁴⁰ In order to win an asylum claim based upon these enumerated grounds, the applicant must show that individually, they face a reasonable possibility of persecution or that there is a “pattern” or “practice” of persecution of that race, religion, or ethnicity in that country.⁴¹

2. Particular Social Group

In recent years, a growing number of asylum applicants rely on the enumerated ground particular social group (PSG) as their primary ground for seeking asylum. PSG are often the most challenging types of asylum cases to win.⁴² While all asylum cases are decided on a case-by-case basis, there are particular hurdles to defining a PSG for purposes of an individual asylum case. There is no set definition for what constitutes a PSG, nor is there a requirement of formal membership in an official or identifiable group organization. There are, however, guidelines for determining if the PSG requirement has been met.

To meet the requirements of a particular social group, the group must be “a group of persons all of whom share a common, immutable characteristic.” The shared characteristic might be an innate one,

Expert Witnesses in U.S. Asylum Cases: A Handbook



such as sex, color, or kinship ties. In some circumstances it might be a shared past experience such as former military leadership or landownership. Essentially, the persecution must seek to punish people of a certain relation, or having a certain degree of similarity, to one another. The similarities can be status in the same class, or having kindred interests such as shared ethnic, cultural, or linguistic origins, education, family background, habits, or social status.⁴³ An immutable characteristic is one that is either unable to be changed by the individual, or is “so fundamental to the individual’s identity or conscience that it ought not to be changed.”⁴⁴

Two additional elements must be met to establish a PSG: particularity and social distinction.⁴⁵ The group must also be defined with sufficient particularity, meaning that the group must be distinct and discrete from other groups in that society, that is that the group be clearly defined with concise boundaries. It will be important to ensure that an immigration judge is considering the particular society in question and not rejecting a social group in one country because it is not a recognized group in another country.⁴⁶ The applicant must demonstrate the shared characteristics of the group must be recognizable by others in the community – that is, that the members of the group are perceived as a group by society, or socially distinct.

Evidence such as country condition reports and expert testimony are often needed to support the existence of any characteristic that defines a proposed social group, such as gang membership, familial ties, or gender-related matters, as well as the particularity and social distinctiveness of the social group. Experts can help establish the context-specific aspects of the elements of a particular social group. The ground of PSG often intersects with other asylum grounds. For example, in many asylum cases, especially gender cases, the persecution may not be solely on the basis of particular social group but may also be argued on the basis of political opinion/imputed political opinion (described below) or one of the other enumerated grounds.

3. Political Opinion and Imputed Political Opinion

Asylum claims are often based on fear of persecution due to political opinion. The classical political opinion claim generally depicts the asylum seeker as an open, vocal, recognizable political dissident who participated in political demonstrations and took other actions that made them a target by and/or of the government. Many asylum cases citing this enumerated ground, however, are much more nuanced than such a formulation. Neutrality, for example during a civil war, can be interpreted as a political opinion, because it is a political view that expressly rejects the political aims of the two factions.⁴⁷ Per case law, the reasons underlying an asylum seeker's political choice can have no bearing on the merits of an asylum case, and the government may not inquire into them in order to determine why the asylum seeker made a particular political choice.⁴⁸

Political opinion can also be imputed, that is, it does not need to be the case that the asylum seeker actually held that political opinion. If the persecutor believed that the asylum seeker held that political opinion and persecuted them because of the perceived political opinion, asylum may be granted on the basis of imputed political opinion.

III. Understanding the Application Processes

A. First Bite at the Apple: Affirmative Asylum

To apply affirmatively for asylum, an applicant must file a form I-589 (the Application for Asylum and Withholding of Removal) with the United States Citizenship and Immigration Service (USCIS). Subject to some compelling exceptions, the application must be filed within one year of the applicant's arrival to the United States. The I-589 form constitutes the basic filing requirement for an asylum application, but, without more than the form itself, it is difficult for an asylum seeker to successfully establish their claim. The asylum seeker should submit, in addition to the I-589, all possible evidence that supports and

Expert Witnesses in U.S. Asylum Cases: A Handbook



corroborates their claim, including expert affidavits, witness testimony, country condition reports, news articles, and any other helpful documentation.

Affirmative asylum applications are filed with particular USCIS service centers designated according to where the applicant lives. There is no filing fee to apply for asylum.⁴⁹ Once the case has been received and processed, a trained USCIS asylum officer will hear and conduct an interview with the applicant who may be accompanied by an attorney, in the jurisdictional office. A key feature of the affirmative process is that it is non-adversarial in nature. Asylum seekers may apply for asylum status regardless of how they arrived in the United States or their current immigration status, but they must be physically present in the United States.⁵⁰

Affirmative asylum is often considered the “first bite at the apple,” because it is the first of several chances to have an asylum case approved. If an asylum officer approves the affirmative asylum case, the asylum seeker will be granted asylum without having to argue their case in immigration court. If the USCIS asylum officer determines that the applicant is ineligible on the merits and denies the claim, or if the claim was untimely filed, the case is “referred” to an immigration judge, and the asylum seeker will have to argue asylum as a defense to being removed, or deported, from the United States. The stronger the applicant’s case for their initial affirmative asylum claim, the better their chances are for being granted asylum. For this reason, affidavits from experts can make a critical difference when included in the affirmative asylum application.



Vignette 1: Affirmative Asylum

Jean-Pierre is a gay man from Jamaica, where there is intense hatred and violence against actual or suspected homosexual persons. He has suffered daily public ridicule and beatings by various individuals. He struggled through his childhood and adolescence to hide his homosexuality, fearing rejection, violence and abuse from his family and others merely because he was different. He was assaulted and harassed in school. After being diagnosed as HIV positive, he was attacked at his community health center. He was attacked and sexually assaulted at gunpoint multiple times in 2017. The man who attacked Jean-Pierre threatened that if he ever reported the attack, he would be killed.

In January 2018, Jean-Pierre left Jamaica to flee to stay with a friend in the United States and applied for asylum by filing his I-589 with USCIS. He had an affirmative asylum interview with an asylum officer. During the interview, Jean-Pierre expressed fear that he would be beaten, harmed, and likely killed if he continued to live in Jamaica, stating that he had received multiple death threats already because he is a gay, HIV positive, effeminate man in Jamaica. Jean-Pierre was able to provide evidence of how gay and HIV positive men are treated in Jamaica, including an affidavit from a country condition expert familiar with LGBTQ+ issues in Jamaica. The expert witness affidavit provided proof that LGBTQ+ individuals are at severe risk of persecution in Jamaica, that Jean-Pierre would likely not be protected by the government, and that he could even be expected to endure acts of persecution on behalf of the government, as well as from non-state actors that the Jamaican government would be unwilling or unable to control. Jean-Pierre was found to meet the definition of refugee because the asylum officer found he had experienced past persecution and had a well-founded fear of future persecution on account of his membership in a particular social group as a gay, HIV positive, effeminate Jamaican man. The asylum officer granted Jean-Pierre asylum.

B. Defensive Asylum

Asylum claims may be raised as a defense to deportation when asylum seekers are put into removal proceedings and must ask for asylum and/or withholding of removal in order to avoid being removed from the United States.⁵¹ This occurs for one of three reasons: (1) they applied for affirmative asylum to USCIS, but the Asylum Officer did not grant them asylum and “referred” their case to an immigration judge; (2) the asylum seekers were placed into removal proceedings because they were caught in the United States without immigration status or in violation of their immigration status; or (3) they were caught by U.S. Customs and Border Protection (CBP) trying to enter the United States without

Expert Witnesses in U.S. Asylum Cases: A Handbook



immigration status but were found to have a credible fear of persecution or torture by an Asylum Officer (this latter circumstance may, in some instances, also allow an applicant to first bypass the removal proceedings and seek asylum as an affirmative claim). Defensive asylum claims are heard in ‘removal proceedings’ in immigration court, housed within the Executive Office for Immigration Review (EOIR). When put into removal proceedings, the asylum seeker will receive a document from U.S. Immigration and Customs Enforcement (ICE), called a Notice to Appear (NTA), which functions much like a court summons and lists the time and date the asylum seeker must appear in court, as well as immigration “charges” from the government.

Once in removal proceedings, the asylum seeker will usually have two types of court appearances before an immigration judge. The first is called the ‘master calendar hearing’, an adversarial (courtroom-like) proceeding where the asylum seeker must answer the charges listed in the NTA with in-court oral or written pleadings. This usually includes the applicant’s name, country of origin, date the asylum seeker entered the United States, and the asylum seeker’s current immigration status (or lack thereof). The immigration judge will also set the date for the submission of documents and the next court appearance for the asylum seeker, known as the merits hearing. There may be more than one hearing scheduled for the master calendar, and an applicant may also have to appear more than on one occasion for the merits hearing.

If the asylum seeker is in removal proceedings, they will appear later at an ‘individual merits hearing,’ where they will argue their case in front of the immigration judge. There are no juries in immigration court; it is the judge assigned to the case who hears the evidence and arguments and is the sole decision-maker in this step of the process. In an individual merits hearing, the immigration judge will hear arguments from the asylum seeker (and their attorney, if they are fortunate enough to be represented), and the U.S. Government, which is represented by an attorney from the Department of Homeland Security (DHS). Thus, the asylum seeker’s attorney and the government’s attorney are opposing

Expert Witnesses in U.S. Asylum Cases: A Handbook



counsel. The individual merits hearing is where the applicant will testify and tell their story to the judge, as well as present any other supporting evidence. As with affirmative asylum claims, expert witness affidavits may be submitted, as well as other forms of evidence including country condition reports, news articles, and testimony from other witnesses. Experts are often asked to testify either in person or telephonically in defensive asylum claims. It is particularly crucial to submit expert evidence in immigration court because most of the record for an appeal to the BIA, and then the federal courts of appeal, is created at this stage of the proceedings.

The immigration judge then decides, based upon all of the evidence submitted during the individual merits hearing, as well as legal arguments, whether the individual is eligible for asylum. If the immigration judge finds the asylum seeker eligible, they will then determine whether relief should be granted as an act of discretion. If the immigration judge finds that the applicant is not eligible, or that relief is not warranted as an act of discretion, the immigration judge will determine whether the individual is eligible for any other forms of relief from removal. These forms of relief can include withholding of removal, described above, or relief under the Convention Against Torture (CAT), described below. Both of these alternative forms of relief have higher evidentiary standards than asylum in order for such claims to succeed, and thus, it may be difficult for the applicant to meet those standards if found ineligible for asylum. If found ineligible for other forms of relief, the immigration judge will order the individual to be removed, or deported, from the United States. The immigration judge's decision can be appealed by either party, a process explained in Part Two, Creating the Foundation for a Winnable Asylum Case at Trial and for Appeal.

IV. Uphill Battle: Major Obstacles in Asylum Law

In addition to the burden on applicants to prove all the elements required to meet the definition of refugee and eligibility for asylum, asylum law is fraught with many other obstacles that can prevent

Expert Witnesses in U.S. Asylum Cases: A Handbook



applicants from succeeding with their claims. Asylum statutes provide that if the government can show a change in circumstances related to the applicant's country of origin so that the dangers of persecution no longer exist, or if the immigration judge is able to determine that the applicant could be deported to a "safe third country," (in the case of withholding of removal) an immigration judge may deny the claim.⁵² Other barriers, however, may prevent an applicant from obtaining asylum.

A. The One-Year Filing Deadline

Asylum applicants must file their I-589 application for themselves and their spouses and children who are in the United States, within one year of the applicant entering the United States. If an asylum seeker is unable to file their application before the one-year deadline, the burden is then on them to demonstrate that the application was delayed due to extraordinary circumstances or that the delay is justifiable because of changed circumstances in the country of removal.⁵³ For example, a claimant who can show that they suffered from such extreme trauma as a result of persecution and was thus medically unable to file within the one-year deadline, or that upon arriving in the United States, the claimant had no reason to fear return but that conditions in the claimant's home country changed, justifying a well-founded fear of returning might avoid the one-year filing deadline. These individuals will have to file within a reasonable period of time in light of these circumstances. Asylum seekers who cannot demonstrate these exceptions and who do not file within the year, even if they are refugees with well-founded fears of persecution, are barred from asylum protection. While they may be eligible for lesser forms of relief, including withholding, they may be unable to obtain permanent status in the United States.⁵⁴

B. Bars to Asylum

Asylum laws, aside from setting forth eligibility requirements, also include prohibitions to claiming asylum known as "bars to asylum." These provisions operate to exclude applicants from asylum eligibility,

Expert Witnesses in U.S. Asylum Cases: A Handbook



even if they are found to have a well-founded fear of persecution on account of one or more of the enumerated grounds. Bars include, but are not limited to, participating in the persecution of others; conviction of a serious crime; committing serious nonpolitical crimes outside the United States; being considered a security risk or danger to the United States; terrorism-related activities; or having been firmly resettled in another country prior to coming to the United States.⁵⁵ Expert testimony can be helpful to buttress an asylum seeker's arguments around non-applicability of the bar. For example, a country expert can contextualize the political nature of an act to exclude it from the serious nonpolitical crime bar; and a mental health expert can establish an applicant's susceptibility to duress, which may exempt the applicant from the persecutor of others bar.

C. Discretion

Asylum is a discretionary remedy, that is, asylum is granted at the immigration judge's discretion. The applicant may be able to demonstrate that they meet the refugee definition and that none of the bars to asylum apply, but the applicant must then demonstrate that the immigration judge should grant asylum in the exercise of discretion. Appellate courts give deference to immigration judges in their exercise of discretion; thus, expert evidence will often have significant weight not only at the trial level, but upon appellate review. Unlike asylum, if an applicant meets the standards for withholding of removal, a judge must grant the relief; however, as noted above, the standards for withholding are more onerous.

D. Prolonged Detention of Asylum Seekers

Asylum seekers who enter the United States without authorization or documentation and who are detained may be denied bond or parole, despite demonstrating to an asylum officer at the border that

Expert Witnesses in U.S. Asylum Cases: A Handbook



they have a credible fear of persecution.⁵⁶ These claimants will have a particularly hard time finding an attorney or preparing their asylum case on their own. Detention centers are operated like prisons; they are located in remote and rural areas and severely restrict an asylum seeker's contact with the outside world. This environment is distressing for asylum seekers, many of whom suffer from post-traumatic stress disorder, do not speak English fluently, do not have access to whatever possessions they may have brought from their country of origin, and are in acute need of the support of family and community. These factors can make finding representation or gathering evidence for their merits hearing an extremely challenging and often impossible task. A mental health expert can help document the deleterious effects of detention on an asylum seeker for purposes of, e.g., explaining inconsistent or confused testimony, or the non-reliability of remarks made to immigration officials in coercive circumstances. Although outside the scope of this advisory, such an evaluator can also buttress a detained individual's request for release submitted to a DHS official or an immigration judge.

V. Convention Against Torture Claims: Possible Alternative Relief

The Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT) was entered into force in 1987 and expressly forbids governments from using torture. Torture is different than persecution. The definition of torture under Article 1 of CAT is:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁵⁷

Expert Witnesses in U.S. Asylum Cases: A Handbook



The Convention Against Torture (CAT) not only forbids torture, but also forbids governments from returning individuals to countries where they will face torture. Article 3 of CAT states this as part of the following obligation known as *nonrefoulement*:

[N]o State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁵⁸

A CAT claimant does not have to show that the torture occurred on account of one of the five enumerated grounds required for asylum or withholding relief; the torture could have occurred for any reason. However, the standard to prove torture in CAT claims is higher than the standard to prove persecution in asylum and withholding; CAT claimants must show that it is “more likely than not” that the individual will face torture if returned to their home country. Additionally, the feared torture must be carried out by the government or someone acting with the acquiescence of the government. Generally, the acquiescence element can be demonstrated by showing that the government was aware of the torture and failed to intervene, thereby breaching a legal responsibility,⁵⁹ although some courts have held that “willful blindness” satisfied the acquiescence standard.⁶⁰ Moreover, the remedy under CAT is not as beneficial as an asylum claim – there is no path to citizenship under CAT; rather the claimant is limited to the guarantee that they will not be sent back to the applicant’s home country and may be sent to a third country or possibly held in detention in the United States.

An asylum claim and a CAT claim are not mutually exclusive. Evidence for the CAT claim is attached to the asylum petition and is part of the I-589 Form.

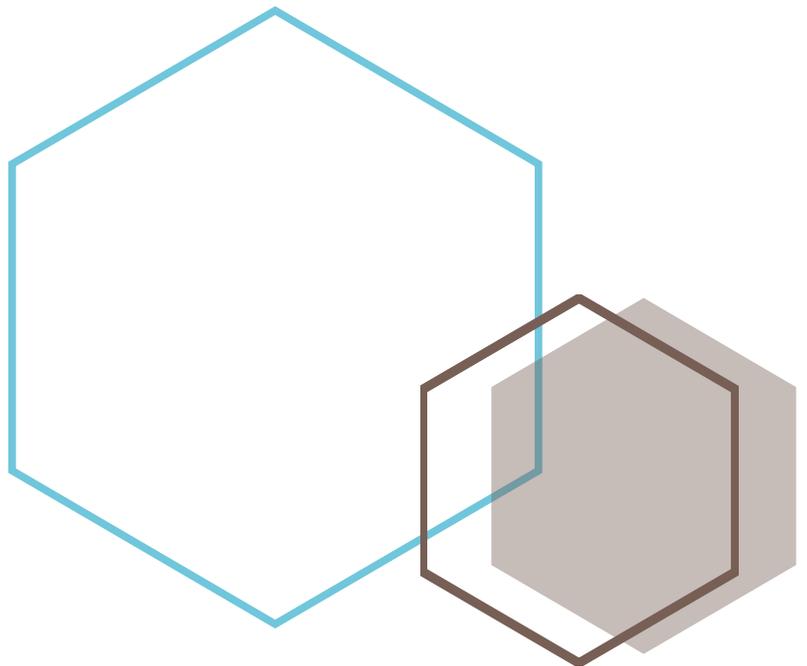
The people who may benefit the most from CAT are those who do not qualify for asylum because they are barred due to past criminal conduct. In fact, CAT may be the only form of relief for those who have a criminal record for immigration purposes. As noted above, a criminal record is often a statutory bar to an asylum grant. Under CAT, there is no bar based upon a criminal record – the requirement of

Expert Witnesses in U.S. Asylum Cases: A Handbook



CAT is based on the concept of *nonrefoulement*. CAT's protection against *nonrefoulement* is usually considered absolute for those who face a substantial risk of torture if expelled. CAT is also an important protection for those who have a real fear of return but cannot establish a sufficient nexus to a protected ground for asylum or withholding purposes.

Experts may be particularly helpful in establishing claims under CAT. Medical experts may be able to diagnose torture, either from a physiological or mental health perspective, and country experts may be able to support arguments about acquiescence on the part of the government.



PART TWO: Creating the Foundation for a Winnable Asylum Case at Trial and for Appeal

The variation in asylum case approval rates across the United States demonstrates the sometimes-arbitrary nature of asylum decisions and describes the importance of building a strong case at the inception of the claim in anticipation of a possible appeal. As explained in the prior section, applicants filing an *affirmative* asylum application present their case before an asylum officer. If that officer approves the claim, the asylum case is complete, but if the officer denies the claim, the applicant has an opportunity to present their claim to a judge in immigration court. Applicants who are not eligible to file affirmative claims will seek *defensive* asylum, as a defense to efforts to remove them from the United States. Those claims are only presented to a judge in immigration court, without ever seeing an asylum officer. In both types of filings, and in the eventuality of an appeal, having an attorney and assistance from an expert significantly improves the likelihood of success.

I. Jurisdictional Roulette: Variation in Approvals, High Denials

Because asylum law is discretionary, each immigration judge tends to establish their own personal standard for what constitutes a successful asylum case. While a grant of asylum is discretionary, the problem is that immigration judges are not applying the law in a uniform or predictable way. As a result of this variation and the fact-intensive nature of asylum claims, each judge develops a different approval rate for asylum filings. Grant rates are declining overall. The national approval rate for asylum cases in fiscal year (FY) 2017 was 38.2 percent, down from 55.5 percent five years ago.⁶¹ An explanation of the causes of this drop exceeds the scope of this handbook, but the unfortunate trend reflects that approval rates have continued to decline. However, rates vary drastically from judge to judge and from city to

Expert Witnesses in U.S. Asylum Cases: A Handbook



city. For example, Atlanta has the lowest approval rates of asylum cases. There, the average approval rate for FY 2012 through 2017 was 10.24 percent, with one judge granting only 2.2 percent of asylum claims and another judge granting 20.9 percent.⁶² By comparison, the average approval rate in New York City's immigration court is the highest in the nation. An average of 81.39 percent of asylum cases were granted in FY 2012 through 2017, ranging from 97.0 percent for one judge to 41.5 percent for another judge.⁶³ Immigration courts across the United States fall within those two cities' averages, but the average leans low toward thirty-eight percent. One judge in Oakdale, Louisiana has granted zero asylum claims (out of hundreds) over the past three years.⁶⁴ As researchers have observed, these differences may not always be attributed to the strength of the facts of the cases before any particular judge, but rather may reflect individual judges' predilections and biases.⁶⁵ The discrepancies in asylum grants require attorneys to spare no effort in creating a strong record of the asylum claim, which often depends on the evidence and submissions of an expert witness.

II. Appealing Asylum Denials

In light of these low approval rates and wide variation among individual judges, many immigration attorneys have sought to enhance their legal skills in order to successfully overturn denied asylum applications on appeal. As noted throughout this handbook, this often requires that they obtain the services of an expert with whom they can collaborate at all stages of the case.

A. First Chance to Appeal: The Board of Immigration Appeals

When an asylum-seeker appeals a case from the trial level, the case goes to the Board of Immigration Appeals (BIA). The BIA is an administrative body that hears all appeals from local immigration courts. A BIA panel member hears cases (or sometimes as a full seven-member panel). Because the BIA has no fact-finding authority, it is very difficult to provide new evidence at this stage of

Expert Witnesses in U.S. Asylum Cases: A Handbook



the proceedings. The BIA could address a denied asylum claim in a few ways. The BIA could reverse the immigration judge's ruling and direct the local immigration judge to grant asylum to the applicant. The BIA could send the case back to the immigration judge with instructions for the judge to reevaluate a certain fact or question of law and to make a new determination of approval or denial of the asylum claim. The BIA could also uphold the immigration judge's denial of the asylum claim. In that situation, the asylum applicant's attorney can appeal the case to the federal circuit court of that region.

Vignette 2: Board of Immigration Appeals

Fernando is from El Salvador, where he worked as a doctor. As a community doctor, Fernando would travel to assigned neighborhoods and meet with community members to provide basic healthcare, administer vaccines, and gather confidential health information about community members. Fernando was approached by the MS-13 gang, who tried to recruit him to join. The gang members told him that he would be valuable for his knowledge of confidential health information and trust from neighborhood residents, and they threatened him multiples times at gunpoint to join. One time, when he refused again to work for the gangs, he was beaten, kidnapped, and taken to an unknown location where he was held and told he would be killed the next day if he did not join and give the gangs information he had obtained as a community doctor. Fernando was able to escape the house and fled immediately to the United States. Fernando presented himself at the border and was put into removal proceedings. He filed a claim for asylum (defensive asylum), as well as withholding of removal.

As part of his proof, Fernando submitted an affidavit from an expert on gangs in El Salvador and the nature of the gang recruitment process, including that individuals targeted for recruitment by the gangs must join the gang or be killed. Despite submitting substantial evidence on the country conditions of El Salvador, including the dangerous, widespread nature of the MS-13 and their recruitment practices, the Immigration Judge denied his claim for asylum, finding that Fernando did not establish a well-founded fear of future persecution by MS-13 and that the actions taken by the gang were not on account of Fernando being a trusted and well-known community doctor in El Salvador. Fernando appealed his case to the Board of Immigration Appeals (BIA), who reversed the Immigration Judge's denial, because the expert's affidavit helped Fernando show his objective fear of being killed by the gangs if he was returned.

Expert Witnesses in U.S. Asylum Cases: A Handbook



B. Second Chance to Appeal: Federal Courts

In the United States, the federal judicial court system is comprised of local federal district courts (trial courts), twelve appellate-level circuit courts, and the U.S. Supreme Court. When a case is appealed from the BIA, it moves from the administrative immigration court system to the federal judicial court system. An appeal from the BIA goes to the federal circuit court (Federal Court of Appeals) in which the original asylum hearing occurred. For example, a trial in the Charlotte Immigration Court would be appealed to the BIA and then to the Fourth Circuit Court of Appeals, because the Fourth Circuit Court encompasses North Carolina.

The Court of Appeals has a number of ways in which it can decide the case and it is important to understand that its review is fairly limited. Assuming that the Court of Appeals agrees that the agency (either Immigration Judge or BIA) committed error in denying the application for asylum, withholding of removal, or relief under the Convention Against Torture, the court typically “remands” and sends the case back to the BIA. The remand order/instructions may come in different forms. The following are a few common manners in which the court may send the case back to the agency where it finds the agency has committed error: The Court may order the BIA to issue a new decision consistent with its findings. Here the order may include language that finds that the evidence in the record compels a contrary conclusion. The Court may also order the BIA to remand the case to the Immigration Court to address issues not previously decided (discretion, evidence, or legal issues not previously examined). It is crucial to include expert evidence at the immigration court stage since the Court of Appeals generally cannot examine any documents or arguments that were not before the immigration judge.

Beyond the Circuit Court of Appeals, an asylum applicant could try to appeal their case to the U.S. Supreme Court. However, that Court has limited jurisdiction and only accepts cases in certain

Expert Witnesses in U.S. Asylum Cases: A Handbook



circumstances. Thus, the vast majority of cases appealed to the U.S. Supreme Court never reach that courtroom and a federal circuit court is often the applicant's last realistic chance to appeal their case.

III. The Advantage of Legal Representation

Having legal representation in an immigration proceeding immensely improves the probability of a positive case outcome. Although immigrant applicants have a right to an attorney, they have no legal right to an appointed attorney at the government's expense. In 1963, the U.S. Supreme Court announced the constitutional right to a court-appointed attorney for state criminal defendants in the case *Gideon v. Wainwright*, but the Court has rejected efforts to extend that right to civil litigants.⁶⁶ The Sixth Amendment guarantees the right to a court-appointed attorney for indigent criminal defendants in federal court, but, because immigration cases are categorized as civil matters, the Sixth Amendment right does not apply in immigration court.⁶⁷ The Supreme Court has repeatedly recognized that the grave consequences resulting from a negative ruling in immigration court (such as deportation) can far outweigh the consequences resulting from a criminal conviction.⁶⁸ Regardless, immigrants without an attorney must participate in the adversarial system and advocate for themselves against the full-time government attorneys representing the Department of Homeland Security (DHS).

In FY 2017, 20.6 percent of asylum-seekers did not have an attorney.⁶⁹ Asylum applicants with an attorney are five times more likely to receive a grant of asylum than applicants without an attorney.⁷⁰ In FY 2017, ninety percent of asylum applicants without an attorney were denied asylum, whereas fifty-four percent of asylum-seekers with an attorney were denied asylum.⁷¹ These figures are not simply the result of attorneys choosing winning cases; they illustrate the severe disadvantage that immigrants without an attorney suffer. Despite the compelling constitutional arguments in support of court-appointed immigration attorneys, every day immigrants must navigate the complex world of civil procedure,

Expert Witnesses in U.S. Asylum Cases: A Handbook



administrative filings, and byzantine, ever-changing immigration law. Those unlucky enough to face it without counsel almost always get deported.

IV. The Importance of Experts

Having an expert in an asylum case also significantly improves the applicant's chances of success. As research has demonstrated, "[m]ost commonly, experts in country conditions are a routine part of most adequate applications for persecution-based relief. Medical experts are also frequently necessary to demonstrate past persecution."⁷² Other scholars have noted that "[i]n many jurisdictions, the submission of extensive evidence, and in particular of psychological, medical, and country condition expert testimony, has become a functional requirement for a successful asylum application."⁷³ Social workers and mental health specialists can provide crucial testimony regarding an asylum applicant's past persecution or fear of future persecution, as well as explanations for behavior caused by trauma that a judge or asylum officer may misunderstand (such as inconsistencies or gaps in the applicant's timeline).⁷⁴ Depending on the facts of the individual case, an attorney may solicit experts from several different disciplines to create a complete picture for the judge to understand the asylum applicant's claim, and experts can work holistically alongside the attorney to develop the strongest possible case for the asylum seeker.

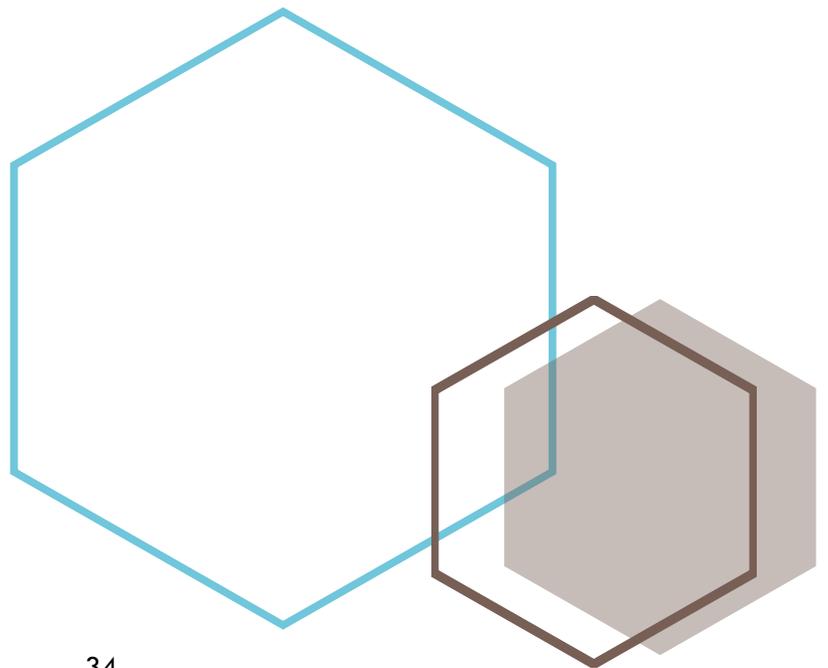
Due to the high rates of asylum case denials in immigration trial courts, best practices require attorneys to approach a case under the assumption that it will be denied and that the case may be appealed to the Federal Court of Appeals. This means that the attorney must give attention to creating a winnable trial record and assuring that all evidence that might assist the immigration judge is submitted at the trial level.

Experts play two crucial roles in asylum cases. First, experts improve the chances of an asylum officer or an immigration judge granting the asylum application at the initial trial level. An immigration judge who has the benefit of facts and research from an expert who has an understanding of the country

Expert Witnesses in U.S. Asylum Cases: A Handbook



conditions and circumstances that are favorably related to the applicant's case should consider such evidence when issuing an order. Second, expert testimony constitutes a key part of "the record" that a federal appellate court reviews to determine if the trial judge made an incorrect decision. The chances that an appellate court will reverse an asylum claim denial are much improved when an expert provided compelling testimony at the trial level.



PART THREE: The Role(s) of an Expert Witness

Expert witnesses may undertake various roles that require differing levels of commitment when working with asylum attorneys and their clients, and there are various ways in which an expert can provide assistance in asylum cases. The role of experts in asylum cases generally depends on the procedural posture of the case, the particular needs of the attorney for their case, the nature of the expert's knowledge, and the expert's comfort with the level of involvement needed in the case.

Experts typically fall into one of two broad categories: those whose knowledge is related to an understanding of the political or cultural climate and conditions of a particular country or region, and those whose expertise allows them to evaluate the medical consequences of persecution, whether physical and/or psychological harm, that an asylum seeker may have suffered.⁷⁵ These groups of experts can help in various ways including providing written affidavits, testifying at an asylum hearing either in person or telephonically, and assisting attorneys with research questions or with the framing the overall case.⁷⁶

I. Expert Witnesses: Country-Specific Information

Evidence regarding the conditions of an asylum claimant's home country is vital, both in claims based on past persecution as well as future persecution. While a client may establish some of the necessary elements through their own testimony, the additional corroboration of expert testimony helps to document necessary elements, provide objective evidence about country conditions, and enhance the credibility and sufficiency of the claim of persecution.⁷⁷

Expert Witnesses in U.S. Asylum Cases: A Handbook



Country condition experts may include individuals with generalized knowledge about a particular country or region as well as those with more specific knowledge, such as expertise on domestic violence in Guatemala or gang violence in Mexico. They may work in various fields and can include anyone with the requisite knowledge about a particular country or region.⁷⁸ Experts may be academics who have focused some or all of their research on the country.⁷⁹ They may be also be individuals such as peace corps volunteers or human rights experts who have worked in the applicant's home country and thus have practical experience in, and first-hand knowledge about, the country.⁸⁰

A. Writing a Report on Relevant Country Conditions

Country condition experts typically provide a written affidavit on the relevant information about the applicant's home country. A claimant's attorney is the one who is there to serve as an advocate, while an expert is expected to use their knowledge to provide "objective independent evidence."⁸¹ Within the report, the expert may be asked to address two different general questions: "are the factual claims made by an appellant or witness consistent with the context from which they arise?" and/or "given the appellant's particular circumstances, is he or she at real risk of being persecuted?"⁸² As with other evidence introduced in an asylum case, the judge will decide what weight to give the expert's affidavit. Further information on how affidavits are structured and the rules of evidence that govern expert assistance in asylum cases can be found in Appendix B and Part Four, respectively, of this handbook.

B. Addressing the Specific Allegations of the Claimant

A country condition expert, whether through testimony and/or through an affidavit or through initial case-planning discussions with the attorney, is a great resource for evaluating how a claimant's allegations of persecution align with the conditions of the claimant's home country overall.⁸³ The expert can provide important corroboration of the details of a claimant's case by comparing the narrative to

Expert Witnesses in U.S. Asylum Cases: A Handbook



what they know about the country through their research and experience.⁸⁴ Addressing the specifics of a particular case is often one of the most vital roles that a country condition expert can fulfill. While general reports can be a great resource, the courts favor expert analyses that discuss a claimant's specific allegations. The more a country condition expert's testimony and/or report address specific details about a claimant's case, the more helpful it will be.⁸⁵ It is not, however, the expert's job to assess the credibility of the claimant, which is a legal issue left for the judge to address. Rather, the expert should evaluate whether the asylum seeker's allegations are "consistent with the background evidence (or otherwise plausible when viewed against it)."⁸⁶

C. Document Analysis

As part of an asylum application, the attorney will have many documents compiled regarding country conditions and other aspects of the asylum seeker's claim.⁸⁷ The documents are submitted as exhibits of the case. In order to ensure that these documents are accurate and, therefore, helpful to the claimant's case, attorneys can seek help from country condition experts by having them analyze the various documents. Since experts have experience and knowledge about the claimant's home country, country condition experts can be well-equipped to assess documents that come from or focus on that region. They can address important document analysis questions, such who is the intended audience, where was it created, and under what circumstances was it created.⁸⁸ Whether by analyzing potential exhibit documents, helping a lawyer assess a claimant's specific allegations, or writing an affidavit addressing conditions relevant to the case, country condition experts are an important resource for successful asylum cases.

II. Expert Witnesses: Medical and Psychological Expertise

The very nature of the harms suffered by those who seek asylum means that the applicant will often have physical and/or mental health complications because of their past experiences. A medical expert's evaluation of a client's health or injuries is often one of the best ways to individualize and strengthen a client's case.⁸⁹ Immigration judges frequently hear similar claims, given that many asylum seekers from any one country may suffer the same type of persecution. The repetition of facts and similar sounding narratives may contribute to the predisposition of some judges to deny asylum because they believe a client's case sounds too similar to other cases that they have heard. By evaluating a client and providing a descriptive connection between the claimant's injuries or mental symptoms and their explanation of persecution, medical and psychological experts provide an important way to distinguish one case from others.⁹⁰

A. Corroborating Physical and/or Psychological Harm

An asylum claimant's testimony about the harm to which they have been subjected is often negatively affected by the stress of the court process and of recollecting such painful memories.⁹¹ An expert's evaluation of the individual's physical and/or mental health can help substantiate the applicant's own testimony about the harm they suffered and buttress their claims.⁹² When an individual is attempting to claim asylum based on torture to which they were subjected in their home country, a medical expert can present evidence documenting the scarring and other effects such torture suffered by the claimant.⁹³ A medical expert can corroborate the client's testimony as to the harm they suffered based upon clinical observations and examinations, and thus explain to the court how the medical findings may support the claimant's explanation of what happened.⁹⁴ A medical expert can also attest to the consequences of returning a claimant to their home country, such as suffering unbearable trauma or needing to continue ongoing treatment that will not be available if they were to return.⁹⁵

Expert Witnesses in U.S. Asylum Cases: A Handbook



Psychologists, mental health experts and other individuals who have experience diagnosing and treating the mental effects of trauma are important to the presentation of the case, when the effect of an asylum seekers' past experiences include psychological suffering. Behavioral and mental complications caused by traumatic experiences are common in those seeking asylum. In fact, numerous studies have researched the occurrence of Post-Traumatic Stress Disorder (PTSD) in asylum seekers.⁹⁶ The percentages of those who suffered from PTSD ranged anywhere from 20% to 80% depending on the study.⁹⁷ Having an expert provide evidence demonstrating that a particular asylum seeker suffers from psychological disorders can assist the claimant in proving their case.

B. Explaining Difficulty in Recalling Dates/Providing Coherent Narrative

Mental health experts are also needed to explain the context for the asylum applicant's difficulty in recalling dates and providing a coherent narrative of events. Many judges expect asylum seekers to recount specific details about their experiences of persecution in their home countries, but this is a difficult task for trauma-affected individuals.⁹⁸ The trauma that some asylum applicants may have experienced can have a substantial impact on their ability to navigate the asylum system effectively.⁹⁹ The psychological effect of the harm they have suffered can prevent them from being able to provide detailed accounts of their experiences. PTSD often diminishes the ability of an applicant to recount the events with what the adjudicator may perceive to be appropriate affect; thus, they may testify to horrific facts with little to no emotion in their voice.¹⁰⁰ If an asylum seeker omits details in their statements or appears to be detached emotionally during their testimony, they may appear to be less than credible

before the judge.¹⁰¹ Mental health experts can explain and rationalize an asylum seeker's behaviors to the court, and thus enhance client credibility.

Vignette 3: Client Credibility

Laura is a young woman from Honduras who has suffered extensive domestic violence at the hands of her partner. One year after their daughter was born, Laura's partner began to beat her and threaten to kill her during fights. Over the course of two years, Laura's partner beat her on multiple occasions with closed fists on her head and in her stomach, kicked her in the spine, choked her until she fell to the floor, held a knife to her throat, and threatened to hurt and kill her, her mother, and her grandmother. Laura was able to finally escape the house and obtain a domestic violence protection order, but her partner ignored the restraining order and began to harass her and threaten her and her family. She fled Honduras with her daughter to be with her sister, who lived in the United States. Laura filed an affirmative claim for both her and her young daughter who also feared from the perpetrator. The asylum officer did not grant affirmative asylum because he did not find Laura credible because she could not remember dates well, and felt that she did not show subjective fear of returning to Honduras. The asylum officer referred the case to an immigration judge for a possible defensive asylum claim.

Laura worked with an attorney and submitted evidence to the judge on conditions for domestic violence victims in Honduras. Laura and her attorney were able to obtain an affidavit from a therapist she had been working with since coming to the United States. The therapist's affidavit spoke to the effects of trauma, including an inability to remember dates and use of a flat speaking tone, in order to address the asylum officer's concerns that Laura did not have a subjective fear. The affidavit from the therapist explained that Laura experienced PTSD as a result of the violence she experienced. Laura's attorney was able to work with a country condition expert who submitted an affidavit and testified in court to the legitimacy of Laura's well-founded fear of future persecution if she and her young daughter were to return to Honduras, due to the danger to women and to domestic violence victims. The Immigration Judge granted Laura and her young daughter asylum.

C. Helping the Client Through the Process

The very process of applying for asylum can compound PTSD and mental health difficulties. A study of Australian asylum seekers found that "[t]hose with PTSD [] reported more serious stress in relation

Expert Witnesses in U.S. Asylum Cases: A Handbook



to post-migratory factors relevant to the asylum seeking process, particularly relating to pursuing refugee status (delays in processing refugee applications, interviews by, and conflict with, immigration officers), feelings of alienation and isolation (racial discrimination, loneliness and boredom), and work issues (unemployment and not having a work permit).¹⁰² An asylum seeker's psychological harm can affect their case outside the courtroom by interfering with their ability to communicate openly with their attorney or health providers.¹⁰³

In order to present the best case possible, an attorney needs to have specific information about the harm their client has suffered, which can be a difficult task for an asylum seeker who is coping with the very trauma they are required to prove. Connecting a client with a mental health professional is often an important step in the initial construction of an asylum case. An asylum applicant who receives psychological counseling and support is likely to have fewer communication barriers and be more comfortable sharing their experiences with their attorney. Addressing an asylum applicant's mental health through consultation with a psychological expert, therefore, is an important step in developing an asylum case and may enable an asylum seeker to sustain their application and follow through with the process of telling their story and recalling painful events.

PART FOUR: How One Qualifies as an Expert

I. Qualifying as an Expert

A. Generally

While some individuals may be hesitant about agreeing to be an expert in an asylum case, the bar for an individual to qualify as an expert should not be difficult for most persons with specialized knowledge and experience to meet.¹⁰⁴ Rule 702 of the Federal Rules of Evidence provides guidance: an expert is a person with “scientific, technical, or other specialized knowledge” who can “assist the trier of fact.”¹⁰⁵ In these cases, the trier of fact is the judge, not a jury. Judges must consider three factors when considering whether to admit expert evidence: relevancy, qualifications, and reliability.¹⁰⁶

The standard is often expressed in terms that indicate that, in order to be an expert, an individual must only have more knowledge about the specific subject matter than that of a layperson.¹⁰⁷ The individual can gain expertise either through education or experience or a combination of the two. Someone who may hesitate to serve as an expert because they do not have advanced degrees in the particular field about which they are being asked to consult may still qualify if they have actual experience in the field. If an individual has questions about whether their knowledge and experience qualifies them to act as an expert, they should raise those concerns with the attorney seeking to use their services who can review what information is being sought and explain how their knowledge and experiences are sufficient to allow them to qualify as an expert.

B. In Asylum Matters

In asylum cases, the Federal Rules of Evidence do not strictly apply, but rather they serve as a guideline for determining whether someone can qualify as an expert.¹⁰⁸ Case law related to immigration

Expert Witnesses in U.S. Asylum Cases: A Handbook



proceedings set out a more relaxed test for the admission of evidence: “whether the evidence is probative and its admission is fundamentally fair.”¹⁰⁹ Just as both academics and those with practical experience can be experts in general, they can, of course, be experts in asylum cases. For instance, a Peace Corps or other NGO volunteer or employee who has lived in a particular country for a number of years need not have a doctorate in the study of that region to be considered an expert.¹¹⁰ However, the amount of time that has passed since the potential expert was last in the country and the amount of time that they were there will be particularly important if the expert does not qualify as a scholar with academic or research credentials.¹¹¹

In addition to determining whether someone qualifies as an expert, judges may take into consideration their concerns about a potential expert’s credibility or credentials in factoring how to weigh the evidence they proffer.¹¹² For instance, “[f]actors such as publication experience, education and work experience in the relevant field, and potential bias may inform the judge’s view of the weight to give the expert’s testimony,” instead of preventing the expert from being qualified.¹¹³ These factors governing expert qualification allow various individuals to serve as experts, including those who are not professional researchers or scholars, who may be able to provide significant assistance as an expert in an asylum case based on their knowledge and experience in another country. As long as an individual essentially has more knowledge than a layperson about the particular subject, the judge is likely to recognize them as qualified experts.

II: The Law Governing the Use of Expert Testimony in Asylum Cases

“Relevance and fundamental fairness are the only bars to admissibility of evidence in deportation cases.” - *Matter of Ponce-Hernandez* (1999).¹¹⁴

The above quote aptly sums up how to approach the evidentiary standard for using expert witness testimony in an asylum case. Immigration courts use a relaxed version of the Rules of Evidence that

Expert Witnesses in U.S. Asylum Cases: A Handbook



govern most other non-administrative courts. When considering using an expert witness, attorneys should review the evidentiary standards below in order to determine if an expert is qualified as such, but also to be sure that the form and substance of the expert’s testimony will have the greatest possible weight on behalf of the asylum seeker’s case.

A. *The Daubert Standard*

The Federal Rules of Evidence are the rules that govern the introduction of evidence at civil and criminal trials in United States federal trial courts. The Rules are based on some basic concepts: the relevance of evidence, efficiency of introducing evidence, the reliability of evidence, and the overall fairness of the adversarial trial process.

Under the Federal Rules of Evidence, the legal standard for considering whether expert testimony can be admitted is called the *Daubert* Standard, (from the Supreme Court case that promulgated this rule, *Daubert v. Merrell Dow Pharmaceuticals*).¹¹⁵ The *Daubert* Standard, following the Federal Rules of Evidence, states that evidence based on innovative or unusual scientific knowledge may be admitted only after it has been established that the evidence is reliable and scientifically valid in order to prevent “junk science” from consideration in legal matters.¹¹⁶ The *Daubert* standard also applies to expert opinion testimony, as well as scientific testimony.¹¹⁷ A judge at the trial court level uses the criteria identified in *Daubert* to determine the reliability of either the underlying scientific technique or the expert’s conclusions.

B. *A Relaxed Daubert: The Rules of Evidence Exist “In Spirit”*

Daubert applies to trials in federal trial courts, which – as noted in Section I – are different from administrative agencies and administrative hearings. Immigration courts, where asylum seekers argue their cases, are administrative agencies, not federal trial courts. Therefore, the Rules of Federal Evidence are not used in immigration courts in the same way they are used in other trial courts. With regard to

Expert Witnesses in U.S. Asylum Cases: A Handbook



expert testimony in immigration cases, the evidentiary standard is a more flexible standard than that used in federal trial courts. Courts are less likely to apply a strict *Daubert* analysis and are instead concerned that the “spirit of *Daubert*” applies.¹¹⁸ The standards are more relaxed as to the rigor of the expert’s qualifications, methods, and personal experience. That being said, an immigration judge may properly exclude expert evidence because of a lack of sufficient expertise or because the expert’s opinion is unreliable.¹¹⁹

C. Admissibility v. Probativity

The general rule with respect to evidence in immigration proceedings favors admitting evidence, such as expert testimony, so long as it is shown to be (1) probative of relevant matters and (2) fundamentally fair so as not to deprive the asylum seeker of due process of law.¹²⁰ Probativity is defined as having the effect of proof, tending to prove, or actually proving.¹²¹ In layperson’s terms, this means how persuasive the judge finds the evidence.

The central issue with regard to expert evidence focuses less on whether it will be admitted and rather how much weight the immigration judge decides to accord to such testimony or affidavit when they are deciding the case. Stated differently, the immigration judge must determine whether the expert testimony adds to the proof of the asylum applicant’s case. Once expert evidence is admitted, the immigration judge should consider its relevance and probativity. The judge’s determination with regard to the expert evidence should be part of the record, setting forth whether and to what extent the evidence is found to be reliable and persuasive in deciding the asylum case.¹²²

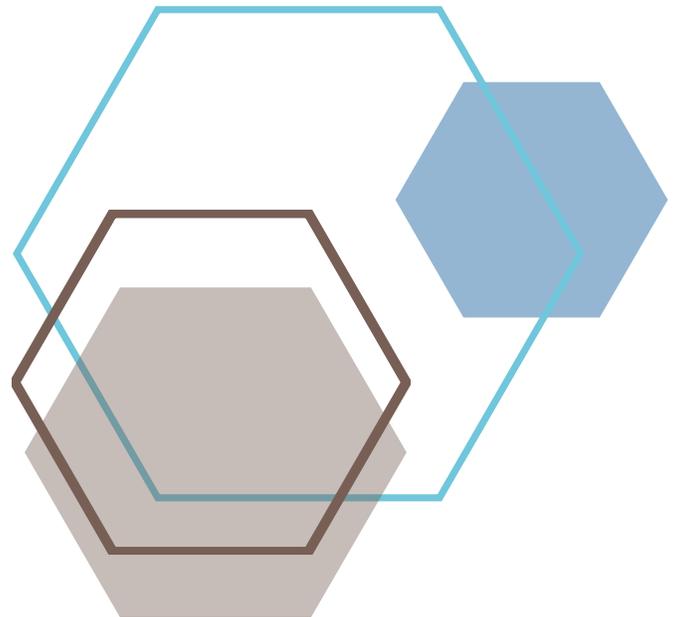
Immigration judges will also have to consider whether other types of evidence are sufficiently reliable and trustworthy for consideration and will often have to consider whether to admit hearsay evidence. “Hearsay” means a statement that a person made outside of the trial but seeks to introduce that statement as a means to prove the truth of the statement.¹²³ As a general rule, under the Federal

Expert Witnesses in U.S. Asylum Cases: A Handbook



Rules of Evidence, the judge may not admit a statement made out of court if the person who made the statement is not available to testify in court or be subject to cross-examination. This rule, however, is more relaxed in immigration cases, though the rule does exist “in spirit,” as noted above.

An immigration judge will often prefer, if not require, that witnesses be available for questioning during the hearing. This has particular significance for experts who may wish to provide a written affidavit but may not be able or willing to provide in-person or telephonic testimony. Although an affidavit of an expert is generally admissible without the expert being available to testify, the immigration judge might give the statement less weight because the expert is not present in court to be cross-examined by the government’s attorney.¹²⁴ However, the attorney can and should argue against according the statement lesser weight, especially if the government attorney has not previously indicated through pre-hearing conferences between the parties of their intention to cross-examine the witness. Therefore, attorneys and experts should both discuss this possibility, evaluate the likelihood that it may occur, and decide if the expert should be prepared to testify before the immigration judge and be cross-examined by the opposing counsel.



PART FIVE: Forms of Expert Assistance

I. Assisting Advocates with Research Questions and Framing the Asylum Claim

The cultural, political, and social differences of a claimant's home country can create challenges for the asylum seeker's attorney when they are initially trying to structure a case theory.¹²⁵ The attorney must understand and grasp the particularities of their client's home country in order to develop a case theory that successfully demonstrates that the client has either faced past persecution or has a well-founded fear of future persecution on account of one of the five protected grounds described in Part One, Section II. Experts can help explain to the attorney whether and how a client fits into one of the protected groups and/or explain why a particular statement, action, or attribute would subject them to persecution in their home country.¹²⁶ Moreover, the expert can guide the attorney as to what evidence might support the claim.

When additional information or interpretation of facts are needed to establish the basic elements of an asylum case beyond explanations that the client can provide, experts are an excellent resource for attorneys. The expert's knowledge and experience of country conditions can assist an attorney to better grasp and frame the case theory. An expert's understanding of the country and the language(s) provide additional research capacity more efficiently and effectively than an attorney may be able to do without such assistance.¹²⁷ Thus, if an expert seeks to limit their involvement in the case and is unable or hesitant provide an affidavit or testimony as described below, they can still provide significant assistance in crafting a successful asylum claim.

Expert Witnesses in U.S. Asylum Cases: A Handbook



II. Affidavits

Attorneys frequently seek assistance from experts in the form of written statements known as affidavits that may be used as evidence in asylum cases. Affidavits are a piece of writing that includes the information that an expert would state in a hearing if they were to testify in person or telephonically. The framework of an affidavit typically follows a format that includes: (1) an overview of the expert's qualifications, (2) relevant information about the asylum seeker's home country, and (3) how the expert's information and knowledge about the home country corroborates elements of the asylum claim. The expert is required to swear or attest under penalty of perjury that the facts are true to the best of their knowledge, information, and belief.

Most attorneys prefer that experts write their own affidavits, while others may request that the expert provide the requisite information to the attorney, who then makes use of the information by drafting an affidavit for review and revision by the expert. In affirmative asylum cases, where deportation proceedings have not yet occurred, experts generally do not testify in person; therefore, an applicant must rely solely upon an expert's affidavit if they wish to have expert evidence presented in their case.¹²⁸

The information contained in an affidavit can differ with regard to the amount of detail included, depending on the particular question(s) that an expert is asked to address.¹²⁹ The affidavit will need to include the expert's background information: educational and professional credentials, relevant research and other experience, and highlight any time spent in the country from which the asylum seeker has fled.¹³⁰ In addition to an overview of their credentials and experience in the actual text of the affidavit, the expert's CV must be submitted as an attachment to the document.¹³¹

The substantive part of the affidavit will include information pertaining to the facts and circumstances of the asylum case. When possible, the affidavit should address the particular questions

Expert Witnesses in U.S. Asylum Cases: A Handbook



that have been posed to the expert by the attorney that directly bear on the specific case at hand.¹³² The expert should describe the circumstances and conditions in the country from which the asylum seeker fled, explain how these conditions pertain to the elements of the asylum seeker's claim, and analyze and corroborate the asylum seeker's own statement or declaration based on the expert's knowledge and experience.¹³³ Finally, an expert affidavit should include their own opinion about what would happen if the asylum seeker were made to return to their home country.¹³⁴ It is important that an expert include facts and explanations for their opinions to avoid being overly conclusory.¹³⁵ Affidavits that are too conclusory in nature and that do not properly explain the basis of the expert's opinion can be excluded or otherwise be afforded less weight by the judge.¹³⁶

Although there is no requirement that an expert testify in person or telephonically, in removal cases where live testimony is possible, it is worth noting that an expert's affidavit may have less value to the court if the expert does not testify and be available for cross-examination.¹³⁷ Nonetheless, this should not deter someone from agreeing to assist an attorney, if they cannot or do not wish to provide in-person or telephonic testimony, by providing an affidavit which will be an important means of proving the asylum claim.

Some affidavits may be of a general nature and may not include information about the specific case; rather, they may provide background facts and other contextual information to assist the judge in understanding the asylum seeker's claims.¹³⁸ If an expert's affidavit is general enough or if identifying details can be easily omitted, it is proper to use the affidavit for multiple cases, assuming the relevancy and permission of the expert. Thus, one expert affidavit may be used as a resource for other asylum attorneys and their clients. Appendix B provides links to other organizations who have sample affidavits.

Expert Witnesses in U.S. Asylum Cases: A Handbook



III. In-Person Testimony

As noted above, a written affidavit is one way to provide documentation to support an asylum applicant. An expert can also provide actual testimony in court if the asylum claim is raised when deportation proceedings have been commenced against the claimant, rather than an affirmative asylum case where an asylum interview takes place before a specialized asylum officer.¹³⁹

The information that an expert provides through in-court testimony is similar to what they would provide in an affidavit. As with a written affidavit, an expert must demonstrate that they have the requisite expert credentials and provide a CV for submission to the court.¹⁴⁰ The government's attorney may choose to concede the expert's qualification without further questioning, or may test the sufficiency of such qualifications in a preliminary examination before the judge in a process known as voir dire. The expert should expect or request that the attorney with whom they are working prepare for the possibility of voir dire and review the type of questions that might be posed with regard to qualifications, in advance of the hearing (the section below provides an example of voir dire questions).

When an expert qualifies and proceeds to testify about the facts and issues in a case, they are subject to cross-examination by the government's attorney.¹⁴¹ If the government's attorney perceives weaknesses in the testimony or points that need clarification, they may seek to question the expert during cross-examination to either clarify the matter or otherwise attempt to undermine the testimony.¹⁴² With or without cross-examination, it is the judge's responsibility to determine whether the expert is credible and to decide how much weight to give to an expert's testimony.¹⁴³ Many experts will be unfamiliar with the process of testifying. Just as an attorney has the obligation to prepare an expert for voir dire, they have an obligation to fully prepare the expert through mock hearing sessions designed to review the types of direct- and cross-examination that the expert is likely to face in the actual hearing, and to answer any questions or concerns the experts may have.

Expert Witnesses in U.S. Asylum Cases: A Handbook



IV. Telephonic Appearances

Whether because of time constraints or because of budgetary concerns, there are many instances in which an expert cannot physically be present at a court to testify. Unlike other types of cases, when an expert cannot appear in court to provide live testimony at an asylum hearing, telephonic testimony is often allowed.¹⁴⁴ In order to have telephonic testimony rather than in-person testimony, an attorney must first seek the court's permission in advance and must provide a sufficiently compelling explanation as to why the expert cannot be present. It is ultimately in the discretion of the judge whether to allow telephonic testimony.¹⁴⁵ However, it could be considered an abuse of discretion to deny telephonic testimony and thus deprive an applicant of the opportunity to fully and meaningfully present evidence in their case. Because the attorney must seek permission for telephonic testimony and explain in advance why an expert cannot testify in person, it would be best practice for the expert to inform the attorney as soon as possible as to whether they will be unable to appear at the hearing.¹⁴⁶

V. General Approach to Questioning Experts: Type, Substance, and Flow

For both in-person and telephonic testimony, the attorney representing the asylum claimant will posit questions to the expert in order to elicit the necessary information; such questioning will often follow a general pattern.¹⁴⁷ It is possible that the government would stipulate to the expert's qualifications, or to portions of, or the entire affidavit. After demonstrating that the expert has the requisite qualifications to offer an expert opinion during voir dire, the attorney will ask about the basis upon which the expert used to compile their analysis including facts, research, experience, and other methods by which they accumulated knowledge.¹⁴⁸ Next they will question the expert about the methodology the expert utilized when evaluating the information.¹⁴⁹ Once an attorney offering the expert as a witness completes their questioning of the expert, the government's attorney representing the Department of Homeland Security is then allowed to cross-examine the expert. Cross-examination may involve questions about the expert's

Expert Witnesses in U.S. Asylum Cases: A Handbook



qualifications, but more typically delves into the basis for the expert's opinion and ask for further clarification on aspects of the expert's testimony.¹⁵⁰

As explained above, the questioning process designed to elicit the qualifications and the cross-examination aimed at exposing weaknesses in the expert's qualifications is called voir dire.¹⁵¹ Below is a sample of questions that a voir dire might include.

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?
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?
13. After you completed your report did you arrive at a conclusion?
14. Please describe the specific facts and data that you relied on in coming to your conclusion.
15. Please describe the scientific or technical principles or methods that you used in coming to your conclusion.
16. Are the specific scientific or technical principles or methods that you used in coming to your conclusion widely used in your field?
17. Do you believe your testimony will be helpful in assisting the judge to understand the facts of this case?

Keep in mind that cross examination questions of the expert are often aimed at demonstrating bias; thus, an attorney may want to ask additional questions on direct such as whether the expert agrees to provide assistance in every case, and if not, their criteria for deciding to appear as an expert, and whether they are being paid. Following these questions, the attorney will ask the court to accept the witness as an expert in the case.¹⁵²

Expert Witnesses in U.S. Asylum Cases: A Handbook



The questions asked during voir dire will vary depending on the type of expert who is testifying. A non-academic would likely be asked questions about their time spent in a country or otherwise how they obtained their knowledge as a matter of practice, rather than questions focused on scholarly publications.¹⁵³ While testifying in-person or over the telephone can seem like a daunting experience, such testimony is truly an integral part of a successful asylum case, and any concerns can be addressed with proper communication and preparation with the attorney.¹⁵⁴

PART SIX: Best Practices for Attorney-Expert Collaboration

I. For Experts: Deadlines, Communication, Clarification¹⁵⁵

Perhaps the two best practices for an expert in an asylum case are rather basic and include 1) meeting deadlines and 2) being responsive to communications from the attorney. Just as attorneys need to take care to establish firm expectations with experts, experts also must communicate clearly with attorneys about their time demands and set forth their deadlines for completing their work products. If the expert has a change in circumstances that affects their ability to accomplish a task related to the case, they should inform the attorney about that situation as expeditiously as possible. Otherwise, experts should diligently follow deadlines established by the attorney in the case. If an expert believes that the attorney has not sufficiently clarified the process or otherwise answered questions about the expert's role and tasks, they should be proactive in following up. The diligence on the part of the expert is ultimately to the benefit of the asylum seeker.

II. For Experts: To Meet or Not to Meet? Interaction with Clients

Whether the expert will meet with the client depends on the type of expert, the type of assistance the expert provides, and the individual case needs. Country condition experts may not need to or want to meet with the client. Those experts will be able to review case documents, render an expert opinion, and write an affidavit based solely on that information and their own research. On the other hand, some country condition experts may assist with framing the theory of the case, instead of writing an affidavit, and might wish to interview the client.

Expert Witnesses in U.S. Asylum Cases: A Handbook



Similarly, some medical experts will need to meet with the client, while others will not evaluate the client personally. Some professionals, such as social workers, psychologists, or psychiatrists, will meet with the client in a therapeutic capacity and may also provide a mental health evaluation of the asylum applicant. These mental health workers will write a statement describing the applicant's mental health profile, any diagnoses, and any other relevant observations about the applicant. A mental health professional could write an affidavit and/or testify about various behaviors caused by PTSD, such as difficulty recalling events chronologically, which would be used by the attorney in relation to specific facts in the case. In some cases, a medical professional would need to provide a physical evaluation of the applicant to document scars or injuries, and they would then write a detailed summary of their findings. These types of affidavits serve as supporting evidence in a case, and the health worker who performs an evaluation of the applicant often would not testify at the court hearing.

Conversely, some health professionals could serve as experts without meeting the client. Such an expert would review any statements by the applicant's healthcare providers and any other related documentation in order to render an objective expert opinion regarding the applicant's psychological or physical health. Of course, not all cases will need or benefit from expert testimony about the applicant's mental health or physical condition.

Some jurisdictions disapprove of experts who interview or meet with applicants before testifying, out of concern that such an encounter reduces the expert's objectivity.¹⁵⁶ Other jurisdictions, on the other hand, prefer for expert witnesses to have met the applicant (such as in Texas).¹⁵⁷ The attorney and expert will need to decide together what is best for the case and the comfort of the applicant and the expert. Regardless, experts should maintain their neutrality and independence at all times. Neutrality and independence do not require that the expert have an unemotional response to the case details, but they do require that the expert form a professional opinion on the basis of reliable research instead of

Expert Witnesses in U.S. Asylum Cases: A Handbook



based on a desired outcome for the applicant. The attorney should discuss this issue with the expert during the initial conversation where roles, responsibilities, and tasks are determined.

Lastly, attorneys and experts should exercise care when communicating, especially by email, to avoid compromising client confidentiality. While most experts can assume that their emails will remain private, in at least one known situation a DHS attorney tried to subpoena emails between the attorney and expert. Although the effort was unsuccessful, it is a good reminder that confidential case details, including documents and their edits, must be discussed or otherwise shared in ways that do not jeopardize client confidentiality, such as over the phone, in person, or by mail.

III. For Attorneys: Collaborating with Experts

Attorneys should approach working with experts within a holistic framework in which the attorney constitutes one part of the asylum applicant's care and counseling.¹⁵⁸ Mental healthcare providers can provide therapy and connections to local resources; physicians perform needed medical evaluations and treatment; country condition experts explain the home country circumstances that the applicant faced and/or will face if returned there; investigators acquire key documents and witnesses; interpreters enable the applicant to understand the process; and attorneys provide crucial legal representation.¹⁵⁹ This holistic approach ensures that the asylum-seeker receives the best possible legal representation and support services. The following sections provide a step-by-step process to guide an attorney in finding, soliciting, and working with an expert to hopefully facilitate and create efficient working relationships.

A. Best Practices: Before Finding and Contacting an Expert

Ideally, the attorney should first have gathered as many facts from the applicant as possible and have established the legal framework for the claims, before researching the type of expert needed and endeavoring to locate such an expert. The attorney should have a complete statement (translated into

Expert Witnesses in U.S. Asylum Cases: A Handbook



English as needed) from the applicant, as well as basic information about where the applicant was living and the circumstances in the home country from where the asylum applicant fled. The attorney should do their own research into the country conditions, which can include state department reports, travel warnings, and news stories for that locality. A list of resources on country conditions can be found in Appendix E. Before identifying which expert could be useful to the case, the attorney needs to know whether the filing is an affirmative or defensive case, what grounds for asylum will be claimed, and the general timeline that the case will follow.

In addition to becoming familiar with the details of the case, the attorney must determine what kind of expertise will benefit the case and what role an expert could play. The expert can either provide assistance with research and developing the theory of the case, or the expert could provide documentation and testimony. Testimony can be in the form of a written affidavit, or the expert could provide telephonic or in-person testimony during the court hearing. (Part Three above describes the various roles of experts in greater detail.) Experts who provide telephonic or in-person testimony also will produce a written affidavit for the attorney to submit into evidence before the formal court hearing; thus, most experts will be asked to write an affidavit (also referred to as a 'declaration'), while only some will be asked to give live, oral testimony. The attorney should have a sense of which type of help is needed, and what the scope of the help will likely be and communicate that to the expert in the earliest stage of the relationship as possible.

B. Best Practices: How to Find an Expert

Once the attorney has performed the preliminary tasks, they can begin reaching out to potential experts. Several options exist to assist with this step. First, the Center for Gender and Refugee Studies has launched a nation-wide expert data base.¹⁶⁰ Second, attorneys can ask colleagues which experts have been helpful in the past, as many experts are discovered through word of mouth. Third, attorneys

Expert Witnesses in U.S. Asylum Cases: A Handbook



can find potential experts from a wide range of institutions, including colleges and universities, journalism, NGOs (e.g., Human Rights Watch or Amnesty International), non-profits, professional licensing boards (for mental health or forensic experts), Probono.net, the Rights in Exile Programme and other such entities.

Websites and further information about these options are listed in the Resources section below.

Attorneys should determine whether a potential expert's CV or resume may be found online in order to learn whether they have done recent field work in the country or town at issue, and to determine whether the potential expert has published any work or engaged in other specific research pertinent to the matter involved in the case. Below are some examples of the types of case facts that could be reinforced by different experts. (An example of the various academic departments can be found at UNC A-Z <https://www.unc.edu/a-z/>.)

- Socio-economic or Political Country Conditions: Professors, graduate students, or any other academic researcher in Geography, Political Science, History, Public Health, Public Policy, Human Rights, Anthropology, the area studies or other particular university centers; journalists; researchers or employees at non-profits, international non-governmental organizations, or human rights organizations; Peace Corps veterans.
- Medical Country Conditions: Professors, graduate students, doctors, nurses, practitioners, or other researchers in Medicine, Nursing, Public Policy, Geography, Public Health, Social Medicine.
- Presence or Effects of Trauma: Professors, graduate students, doctors, nurses, practitioners, or other researchers in Social Work, Psychology, Psychiatry, Nursing, and Licensed Clinical Social Workers.
- Physical Harm or Torture: Professors, graduate students, doctors, nurses, or other researchers in Medicine, Anatomy and Physiology, Biology.
- Language Interpretation to can provide explanation of word definition and usage: Professors, graduate students, practitioners, or other researchers in Language Departments, Linguistics, Anthropology.
- Local Investigators: The organization Justice in Motion (link to website in Appendix E) offers networks of local investigators to help find documents, family members, and other evidence in the applicant's home country.
- Attorneys should generally avoid using members of the home country government as experts.

Expert Witnesses in U.S. Asylum Cases: A Handbook



C. Best Practices: When to Contact the Expert

Attorneys may have little control over when they begin their representation, as clients may contact them when their asylum interviews are already scheduled in the near future or when court hearings or other filing deadlines are near. In other cases, there may be no looming deadline; thus, timelines will vary according to each case. However, these general suggestions drawn from interviews with attorneys and experts provide some guidance to attorneys as to how much advance notice an expert will need in order to provide quality assistance. In many instances, the attorney should anticipate that the potential expert may be unavailable to talk until two to four weeks after the initial contact.

If the attorney is contacting the expert for help with developing the theory of the case or with research, they should contact the expert within six to nine months of a court hearing or filing deadline.

If the attorney plans for the expert to give in-person or telephonic testimony, the attorney should contact the expert within four to six months of the court hearing.

If the attorney wants the expert to provide a written affidavit to be submitted to the court, the attorney should contact the expert within three to four months of the court hearing or filing deadline.

The attorney needs to be cognizant of the fact that the expert may be engaged in other projects and may have undertaken other obligations, in addition to considering a request to serve as an expert. Attorneys should also consider the fluctuations in time demands of an expert's career, such as the semester schedule for academics. Practitioners should build in extra time to give the expert room to work around their schedule. Beyond the general guidelines provided above, an attorney should try to contact a potential expert as far in advance as possible. An attorney should contact an expert within two months of a filing deadline, at an absolute minimum, in order to ensure that the expert has adequate time to prepare a quality work product for the case. However, given current long backlogs, it may be beneficial

Expert Witnesses in U.S. Asylum Cases: A Handbook



to develop the facts while they are still fresh. Moreover, if there is not adequate time to develop a specific declaration, a general declaration can nonetheless be helpful.

D. Best Practices: Establishing Contact with a Potential Expert

Based on interviews with seasoned attorneys and experts, attorneys may have the best chances of establishing a meaningful line of communication by emailing potential experts instead of calling. The email should include several key points as the foundation for establishing an efficient and effective relationship.

First, it is preferable for attorneys to email from their professional work email address that has an email signature listing their contact information and, ideally, a link to their website. Experts may otherwise view solicitation emails as spam, so attorneys will need to thoughtfully craft their initial email so that they readily appear professional and genuine.

Second, attorneys should clearly identify who they are and provide a basic summary of the case, without identifying information that might breach client confidentiality. The details should include the applicant's age, gender, the country and town where they come from, the type of harm they suffered, the type of application the attorney plans to file, the form of relief the applicant is seeking, and any known court dates or filing deadlines. The attorney should identify if they have taken the case *pro bono*, and thus, whether the expert would also agree to help *pro bono*, or whether the expert could expect to receive payment for their assistance. If the attorney is receiving payment for their representation on the case, it seems appropriate that any expert who aids the case should also receive compensation. Section D below includes a more thorough discussion of payment of experts.

Third, the attorney should ask to set up a time to speak by phone with the expert (or in person, if logistically feasible and efficient) for about thirty minutes to discuss the case and the potential role for the expert. The attorney should provide a narrow description of the subject area of expertise needed so

Expert Witnesses in U.S. Asylum Cases: A Handbook



that the expert can evaluate whether they constitute a good fit. The attorney should provide times they are available for this phone call or meeting during the next two weeks.

Fourth, the attorney must take care to be mindful of the expert's time. Anyone who might serve as an expert in an asylum case is most likely a busy person. The attorney should be as prepared as possible when communicating with the expert to make efficient use of the expert's time and to take care to commence and maintain the relationship on terms that respect the expert's needs and interests.

Fifth, and possibly most importantly, the attorney should *never* tell an expert that if they do not help with the case that the client will face harm, danger, or death. Attorneys should never put a potential expert in the position of thinking that they are obligated to accept the request out of fear that the client will be harmed. Experts should always be provided the opportunity to decline a request for help, and attorneys should never state or imply otherwise. The attorney may want to ask, if the expert is unavailable at this time, whether the expert could recommend someone else with relevant expertise.

Sixth, the attorney should ask the expert to email them their CV if the attorney has not been able to find it online. Immigration court rules mandate that an applicant must provide to the court a copy of an expert's CV or resume if the case includes an affidavit or testimony by an expert.¹⁶¹ Additionally, the attorney will need to review the CV to determine what subject areas constitute the expert's strengths and to anticipate potential challenges to credibility by opposing counsel in a trial setting.

Seventh, the attorney should expect that finding an expert may not be easy and should anticipate having to contact more than one expert in order to find a suitable expert whose schedule fits within the timeframe of the case. If an attorney receives multiple offers of assistance, and each presents a unique and important contribution to the case, the attorney should welcome assistance from all available experts and should seek to coordinate their roles as appropriate.

E. Best Practices: What to Discuss During the Initial Phone Call or Meeting

The attorney will need to concisely explain several important concepts to the potential expert during the first phone conversation or meeting. After introductions, the attorney should give a simple description of the U.S. immigration asylum process. Only once the expert has a basic understanding of the process should the attorney review the basic details of the case and explain the procedural posture of the case. The attorney should expect that those without specialization in asylum-related matters may have some misperceptions about asylum law and how it is different from certain immigration processes that may have recently received attention in the news. Non-immigration practitioners may conflate refugees, asylum-seekers, DACA applicants, Dreamers, unaccompanied minors, those with Temporary Protected Status, and many other types of immigrants, as those distinctions are not always made clear in general public discourse. For example, most non-practitioners do not know that the immigration court system is administrative and not judicial. The attorney will need to explain the basic structures of asylum law for the expert to understand the fundamental framework of the case process.

Next, the attorney should outline how and why experts bring strength to an asylum case. This explanation should include a description of “building the record” and ensuring a strong case in the eventuality of an appeal. The attorney needs to explain that experts can help in a number of ways: assisting with preliminary guidance and research, assessing the client’s circumstances against the backdrop of country conditions, medical or psychological consequences of persecution, writing an affidavit, and/or providing telephonic or in-person testimony. The attorney should clarify that the expert will review the facts of the case, provide necessary corroboration of the facts as applicable, and provide a professional opinion about what could happen to an asylum seeker if they return to their home country. The expert should understand that they can testify to objective facts that they have learned through their research and experience to demonstrate how those facts may specifically pertain to the applicant’s case.

Expert Witnesses in U.S. Asylum Cases: A Handbook



The attorney should tell the expert that they will provide model affidavits so that the expert can better understand the role of an expert and the manner by which the expert information is presented to an asylum officer or immigration judge.

If the attorney has not yet fully established that this researcher has the requisite expertise, the attorney should ask the expert about their particular work or field research to confirm that the expert will serve as a good fit for the case. Then the attorney should identify the type of help they hope this expert might provide. The attorney should specify whether they need preliminary guidance, an affidavit, or testimony and explain what that entails for the expert, including the time commitment and anticipated deadlines. The attorney should outline the materials that they will send the expert to review, *before* the expert commits to assisting with the case. The expert needs to have the opportunity to review the materials and consider their existing commitments and time demands, before formally agreeing to serve as an expert for an asylum case.

The attorney will need to cover certain logistical matters with the potential expert, including confidentiality and compensation. The attorney should explain confidentiality principles and obligations and provide the expert with a written agreement that outlines the confidentiality responsibilities and privileges of the expert. Appendix A demonstrates an example of a confidentiality contract to provide to an expert. It will be important at the outset for the attorney to explain to the expert that their work with the attorney becomes encompassed within the attorney-client privilege and to further explain that the expert cannot be ordered to divulge confidential information. The attorney should obtain from the expert an acknowledgement that they are forbidden from sharing confidential information without an express waiver by the client. If the expert agrees to help with the case, the attorney should have the expert sign a written confidentiality agreement to ensure that the expert understands the requirements and protections.

Expert Witnesses in U.S. Asylum Cases: A Handbook



The attorney also should address whether the expert requires payment for their services or whether they can assist *pro bono*. As stated above, if the attorney is working on the case *pro bono*, the attorney should explain that to the expert, with the hope that the expert also will be able to provide help without compensation. Certain experts will be able to assist within the realm of their profession and may not need payment, but other experts may require a fee, even if the attorney is working *pro bono*. Alternatively, if the attorney is receiving payment for the representation, then the attorney should expect to pay the expert for their assistance. Some experts may not seek fees, others will have set fees, and still others may need guidance determining what an acceptable fee might be. Amounts will generally vary from case to case, but attorneys can seek guidance from other local immigration attorneys or from the local chapter of the American Immigration Lawyers Association (AILA).¹⁶²

The attorney should assure the expert that the attorney will be available to them to respond to questions and concerns about their role throughout the entire process. The attorney might consider reminding the expert, especially if they have never worked on an asylum case previously, that the cases can be emotionally draining. The attorney should consider informing the expert that they will need to establish a regular communication schedule throughout the case, which could range from an email check-in every few weeks to a phone call every month or two, depending on the needs of the case. The expert should be aware that the attorney will maintain communication during the pendency of the case.

Lastly, the attorney should give the expert an opportunity to ask questions so that they have all of the information needed to decide whether to accept the role of expert. The attorney should inform the proposed expert that if the expert is willing to consider the request to assist, the attorney will be sending a packet of information to review that will allow the expert to more fully understand the parameters of the case and to make a well-informed decision about any role they will play. The attorney should then establish a deadline for the expert to email the attorney with a final decision about whether the expert wants to assist. The attorney should again clarify that the expert is not obligated to help but that they

Expert Witnesses in U.S. Asylum Cases: A Handbook



could be a critical asset to the case. The attorney should keep a record of notes from the call to document the conversation and to confirm that the attorney advised the expert about confidentiality with the client's case materials.

F. Best Practices: What to Send the Expert to Review

After the initial phone conversation or meeting, the attorney should email the expert a packet of materials related to the case so that the expert can fully evaluate whether they want to or can assist, beginning with the confidentiality agreement for the expert to sign. The attorney should then send the following: the complete, translated statement of the client; any country condition reports or other research about the locality where the client originated; and any other primary sources of evidence relevant to the expert's field, such as medical records, affidavits from relatives, or photographs of injuries. The attorney should also provide a description of the claimed grounds for filing for asylum, as well as the type of filing (whether it is an affirmative or defensive case). The materials should also include any important dates, such as when the attorney needs to get a commitment from the expert, when any work products would be due, and/or the dates of any court hearing or filing deadlines. Lastly, the attorney should send the expert a redacted model affidavit or a transcript of testimony so that the expert can see what the task entails. The attorney can either provide instructions for writing an affidavit at this stage, or the attorney could wait until the expert has reviewed the materials and agreed to help. Section H below includes further guidance about assisting an expert with writing an affidavit.

As suggested above, attorneys need to take caution when discussing the case over email with an expert and to ensure that all confidentiality concerns are appropriately handled when providing privileged information to an expert. All attorney communications with the expert should maintain and encourage the expert's impartiality and independence. An expert may have an opinion based on their expertise and professional judgment as to what a reasonable outcome should be, but the relationship

Expert Witnesses in U.S. Asylum Cases: A Handbook



between the attorney and the expert should be one that calls into question neither the expert's impartiality or independence. Attorneys and experts both must be careful about the contents of their email correspondences, to consider whether third parties might access those communications, and to speak by phone or in person when discussing any potentially sensitive matters as a means to safeguard the client's confidentiality.

G. Best Practices: How Often to Be in Touch with the Expert

Once the expert has committed to assisting with the case, the attorney needs to establish a schedule of periodic communication with the expert. Regular check-ins may be helpful to the expert to remind them of work they are submitting. Both the attorney and expert should determine the form and frequency of the communication. Depending on the type of help the expert provides, the attorney may need to play a stronger or lesser guiding role. Descriptions of how attorneys should help with each type of expert assistance are listed in the following two sections.

Establishing a schedule of periodic communication with experts is important for two reasons. First, attorneys will need to ensure that experts abide by deadlines, that the expert has all the information they need, and that the expert is updated about any new circumstances or dates. Second, the attorney should be readily available to assist the experts as needed if they have any questions or concerns. Attorneys should take care to be responsive to emails or calls by experts to maintain a fully collaborative relationship.

H. Best Practices: How to Help an Expert Write an Affidavit

Some experts will require very little guidance on writing an affidavit, but others will need more intensive guidance. Unless the attorney is working with a seasoned expert in asylum cases, the attorney should share redacted model affidavits so that the expert can become familiar with the type of document

Expert Witnesses in U.S. Asylum Cases: A Handbook



they are expected to produce. At the same time, however, it will be important to advise the expert to avoid using boilerplate language and to tailor the document to the individualized circumstances of the case. The attorney should send the expert a clear list of guiding questions to organize an affidavit and consider offering a bullet list of headings for the expert to use in an affidavit to address each question. A model email with a list of guiding questions and headings for an affidavit can be found in Appendix C. The attorney will likely have specific subjects they want the expert to address, which can be included as a written checklist of items.

The affidavit must describe the expert's biographical information to establish their expertise, as well as a description of how that expertise relates to the facts of the specific case. The expert should outline all of the sources upon which they relied when forming their opinion about the case. The affidavit should conclude with a section in which the expert attests that the information in the document is true, under penalty of perjury. The expert must provide their CV, and the attorney may advise the expert to include a list of any prior testimony they have provided in asylum cases.

The attorney should establish clear expectations about how the affidavit will be edited, if at all. The attorney can provide general feedback with suggestions or requests for changes, possibly identifying areas that need clarification or an extraneous point that should be removed, always mindful of issues pertaining to impartiality, independence, and client confidentiality.

The attorney should never request an expert to draw a conclusion that does not comport with the expert's professional opinion nor should the attorney request that the expert declare an opinion beyond the scope of their expertise.

Expert Witnesses in U.S. Asylum Cases: A Handbook



I. Best Practices: How to Prepare an Expert for Giving Telephonic or In-Person Testimony

In affirmative asylum cases heard before an asylum officer, an expert who has provided a written affidavit to accompany the I-589 generally will not be expected to appear, either in person or telephonically to provide testimony. However, if the asylum officer denies the application and the case goes before a judge in immigration court at a later date, the attorney may want the expert to be available at that court hearing. The attorney will need to discuss such an arrangement with the expert, depending on the circumstances of the case. Similarly, an attorney may decide that an expert does not need to provide live testimony, even in a defensive asylum case, but the attorney may want the expert to be available on standby on the day of the hearing, in the event an issue arises that requires the expert's testimony. In other cases, the attorney will decide that the expert definitely should provide live testimony. In all of these scenarios, but especially the last one, the expert needs to be prepared for testifying.

Very few people have ever given testimony in court before, and most individuals who will serve as experts in asylum cases will have never been in that setting. Therefore, the attorney has a responsibility to prepare the expert for that experience. Ideally, the attorney should organize a live mock direct- and cross-examination for the expert. However, if time or other constraints preclude the opportunity for a live mock session, the attorney should have a thorough phone or in-person conversation with the expert to describe in detail what to expect and how to prepare. At this point, before the attorney arranges the conversation to prepare the expert for giving live testimony, the expert should have reviewed all of the relevant case materials and completed their written affidavit for the case.

The attorney needs to begin by painting a visual picture for the expert of what the courthouse and the courtroom will look like. Many people do not know that immigration courts are often in old buildings with small, crowded courtrooms. The attorney should describe to the expert where everyone will be seated on the day of the hearing, including the judge, the clerk, the interpreter, the parties, the

Expert Witnesses in U.S. Asylum Cases: A Handbook



audience, and the expert. The attorney should clarify where the expert will need to sit before the attorney calls them to the stand and where they should sit when they complete their testimony.

The attorney should carefully prepare the expert for direct, cross, redirect, and re-cross examinations, by completing the following checklist:

- Provide the expert with a list of direct examination questions so that the expert can anticipate their answers ahead of time or flag any issues with the questions. The expert should review their CV and written affidavit before testifying.
- Advise the expert to speak with a tone and demeanor that establishes credibility and objectivity.
- Describe to the expert how the initial expert qualification process will unfold. The expert should anticipate the process to appear adversarial towards the expert. Advise the expert to be succinct in their responses to questions, and explain that the attorney will ask follow-up questions if the expert did not respond as fully as the attorney needs.
- Explain to the expert that this process is different from giving an academic or professional presentation. The expert should avoid identifying weaknesses or gaps in their research, and the expert should anticipate challenges to their background, claims of potential bias, or implications of a lack of credibility.
- Explain that the expert needs to understand the question before answering, so the expert should not hesitate to ask for clarification if they do not understand the question.
- Remind the expert that they can take a minute to think before they respond to a question, and the expert should feel comfortable saying when they do not know the answer to a question. It is better for the expert to say they do not know than to guess.
- Explain that the expert should keep their answers focused on the purpose of the asylum claim and should avoid discussing topics outside the scope of the question or the case. Experts need to testify in a way that is tailored to the facts of the case, and the testimony should be as specialized and particular as possible, as opposed to generalized.
- Advise the expert to avoid overstating their findings or using superlatives, such as terms like always or never.
- Remind the expert that they cannot draw legal conclusions, but instead will only testify about their expert opinions or relevant facts they know that are specifically related to the case.

Expert Witnesses in U.S. Asylum Cases: A Handbook



- ❑ Explain that the expert needs to exhibit their impressive, professional, and intellectual demeanor and characteristics, but the expert will also need to speak in terms that laypeople can understand. Immigration judges are trained in the nuances of immigration law, but they may not have specialty training in other academic disciplines. The expert needs to be able to establish themselves as an expert (through the attorney's questions about their background and work), and then use clear language or otherwise define professional language in lay terms for the remainder of the testimony.
- ❑ Prepare the expert for cross-examination by providing the expert with a list of potential questions that the DHS attorney will ask. The attorney should tell experts about the possibility of facing a hostile opposing counsel. The attorney should assure the expert that the attorney will object whenever the situation calls for it and that the attorney will ensure that the expert has the opportunity to answer the DHS attorney's questions without being interrupted.
- ❑ Advise the expert that the immigration judge could also ask them questions, which at times might feel as if the judge is advocating for one side or the other. The attorney should explain that the expert should answer in the same way they have been advised to answer all other questions, and that the attorney will object if necessary.

J. Best Practices: How to Manage Expert Expectations throughout the Process

In addition to preparing the expert in advance about the possibility (or likelihood, depending on your location) of a denial at the trial level, the attorney should provide the expert with a clear picture of how the overall process works. If dates or circumstances change, the attorney must inform the expert of those changes. The attorney must maintain the established schedule of communication. The attorney should always be responsive to calls and emails from the expert and address their concerns.

K. Best Practices: How to Work with the Expert on the Day of the Hearing

The attorney should provide clear instructions to the expert for how to find the correct courtroom, and the attorney should greet the expert when they arrive and ensure the expert is comfortable. The attorney should explain to the expert how the day will proceed, and the attorney should identify the various people in the room (judge, clerk, DHS attorney, client, etc.) to properly orient the expert. After

Expert Witnesses in U.S. Asylum Cases: A Handbook



the expert has testified and at a point in time where there is a break in the proceedings, the attorney should debrief with the expert to answer any questions and to discuss any concerns the expert may have about their experience. The attorney should also inform the expert whether they will follow up with the expert once they know the final outcome of the case.

L. Best Practices: Whether to Follow Up with the Expert after the Hearing

Attorneys will need to decide how they want to approach the issue of sharing the final outcome with the expert. This will often be a case-by-case situation, depending on the expert's wishes, the attorney practice, and the client's needs. Some attorneys are of the opinion that the expert should not learn of the case disposition and, if this is a firm practice, should consider advising the expert in advance that they do not disclose the outcome after the case ends. There may be various reasons why attorneys do not disclose: ongoing confidentiality concerns, client instructions, or an interpretation of how expert impartiality should be maintained. Other attorneys consider it best practice to share the final outcome with the expert. This approach recognizes the expert's investment in the case and their desire to know if their assistance helped contribute to a positive disposition, or may be otherwise interested in the court's perception of the weaknesses in the case. Communicating this information to the expert can foster an ongoing relationship in which the expert might be willing to work with that attorney or office on future cases. If the attorney adopts this view, the attorney should inform the expert that the attorney will notify them of the outcome.

In the event of a denial of asylum and an appeal of the case, the attorney should advise the expert that appeals can take several years to be completed but that they will contact the expert once a decision is rendered. As the section above explains the need to be careful about communications that may jeopardize a client's confidentiality or an expert's neutrality or independence, the attorney may

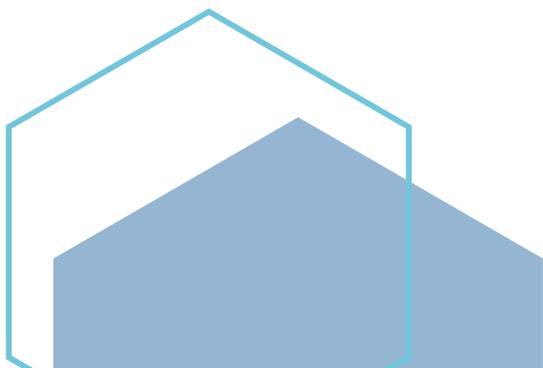


want to share information about the case disposition over the phone or in person, to preclude the possibility of a third party learning the outcome.

IV. The Importance of Self-Care

Both attorneys and experts who work on asylum cases need to be mindful about the risk of compassion fatigue and vicarious trauma, making time for self-care imperative. Compassion fatigue is a particular form of burnout that involves deteriorated physical and/or emotional wellbeing resulting from continued exposure to traumatic stories.¹⁶³ Vicarious trauma, on the other hand, is a permanent disruption of an individual's cognitive "schema," resulting from empathetic engagement with traumatic material.¹⁶⁴ Asylum cases often involve harrowing and disturbing facts about a person's past suffering and fear of future harm. Some stories are more difficult to digest than others.

As appropriate, attorneys may remind the expert to make time to engage in healthy self-care activities and assure the expert that the attorney will be there to guide the expert along the way. Self-care can look differently for each person, but it often includes time for oneself away from work or other responsibilities, exercise, time in nature or with animals, creating a healthy work environment with appropriate hours and leave time, adjusting one's expectations of other people, adopting a robust sense of humor, time spent on hobbies, and counseling, if needed. People who work with trauma survivors often return to the concept that "one must put on their own oxygen mask before helping others," as a reminder that self-care is not selfish or indulgent; rather it is critical to providing quality help. As long as both attorneys and experts are mindful about self-care, then working on an asylum case can be a rewarding and meaningful experience.



PART SEVEN: Identifying Sources of Evidence

I. Compiling a Country Condition Index

As part of a successful asylum application, evidence including country condition reports and other articles are often compiled into a Country Condition Index that is submitted to the judge as part of the asylum case.¹⁶⁵ The index is designed to be a compilation of evidence that the judge can review efficiently to digest the conditions of the asylum claimant's home country.¹⁶⁶ The index varies from case to case, depending the particular asylum claims raised in any one case. The index generally includes articles and data reports detailing information about an asylum seeker's home country and the persecution they faced.¹⁶⁷ For instance, an asylum seeker claiming to have faced persecution in Guatemala because of their sexuality would include newspaper articles, data, and other reports or media sources discussing incidents of violence and discrimination against LGBTQ+ individuals in Guatemala.¹⁶⁸ Some organizations have compiled country condition reports that they provide, such as Human Rights Watch¹⁶⁹ and the UN Refugee Agency.¹⁷⁰ The State Department also compiles country condition reports (referred to as human rights reports by the department) that are issued every year. These reports can be found at the State Department's [website](#). These reports from the State Department are given a lot of weight by the court and, as such, can be extremely helpful to a case if the report includes information supporting the asylum seeker's claim.¹⁷¹ If the information contained in the report is not helpful, however, it can be contested by reports from different sources and other evidence.¹⁷² Countries other than the United States also compile similar reports that can be helpful to an asylum case, such as Canada, which refers to such reports as [National Documentation Packages](#).¹⁷³ Other resources for country condition reports or compilations of information related to country conditions include: the [International Committee of the Red Cross](#),¹⁷⁴ [Amnesty International](#),¹⁷⁵ and the [Inter American Commission on Human Rights](#).¹⁷⁶

Expert Witnesses in U.S. Asylum Cases: A Handbook



II. Other Sources of Evidence

There are many resources that can be utilized as evidence in asylum cases. The difficulty is often parsing through the many results that appear when searching online and finding those that are actually useful to the particular case. Often for experts with connections to academic institutions, academic librarians can be particularly helpful in assisting people in researching particular topics and finding sources that are both useful and credible. In fact, much of the information found in this section was obtained from a page created by Teresa Chapa, the Latin American, Iberian and Latina/o Studies Librarian at UNC's Davis Library.¹⁷⁷ There are also several websites that provide links to various resources of evidence (see Appendix E). Aside from country condition reports, which will be discussed later in this section, the following sections provide examples of several good sources to examine when searching for evidence, including newspapers, non-governmental organizations' websites, and compilations of statistical data.

A. Newspapers

- [Latin American Network Information Center](#): Due to a loss in funding, the links and information on the LANIC website once maintained by the University of Texas at Austin has not been updated since 2015, yet there are many links that are still useful. This website sorts the various media resource links under headings for each country. It also has a section including links to Spanish language newspapers in the United States.¹⁷⁸
- [The Guardian World News Guide: Latin America](#): The Guardian's directory includes country-by-country lists of media/newspaper resources, as well as links to government websites for each country. They also often include a short description of whether the newspaper is more left-leaning or conservative next to the links.¹⁷⁹
- [Zona Latina: Latin American Media and Marketing](#): This site includes links to various Latin American media resources, including newspapers, radio and internet news sites.¹⁸⁰

B. Non-Governmental Organizations

Non-governmental organizations (NGOs) are non-profit associations of groups and individuals directed towards a common purpose. Many NGOs address humanitarian issues and, "advocate and

Expert Witnesses in U.S. Asylum Cases: A Handbook



monitor policies. . . . Some are organized around specific issues, such as human rights, environment or health. They provide analysis and expertise, serve as early warning mechanisms and help monitor and implement international agreements.”¹⁸¹ Many of these organizations have information and data on their websites that can be useful as supporting evidence in asylum matters.

- [Latin American Network Information Center](#): LANIC has a list of both regional NGO sites and country-by-country NGOs.¹⁸²
- The World Association of Non-Governmental Organizations (WANGO) WANGO has a searchable database of NGOs worldwide. Researchers and advocates can search for NGOs by specific country and can use the search function to find NGOs with specific missions and areas of focus.¹⁸³

C. Statistical Data

Using statistical data about certain factors in an asylum applicant’s home country can often help to show that their claims are truthful and not fabricated or that returning to the country would likely place them at risk of persecution. It is worth noting that statistics can be a double-edged sword. Some judges may take the view that a higher prevalence of certain forms of harm may diminish an asylum seeker’s claim of particularity and weaken their individualized narrative. For instance, evidence that demonstrates widespread violence as a general country condition may undermine the applicant’s claim of an individualized threat and reduce the chances of obtaining a favorable decision.¹⁸⁴ Statistics would likely be more helpful if they are more narrowly tailored to a particular issue or group, such as statistics regarding the attacks on political supporters of a certain party or some other recognized social group. Statistics can also be helpful to show the detrimental effects of returning an asylum applicant to their home country. Experts who can assist in contextualizing this data can be especially helpful, especially in cases premised on particular social group.

- [UN Statistics Division: The World’s Women: Trends and Statistics](#): Provides statistics about various topics relating to women around the world, including violence against women and poverty.¹⁸⁵

Expert Witnesses in U.S. Asylum Cases: A Handbook



- [Economic Commission for Latin America and the Caribbean](#): The Commission provides links to various compilations of data on different topics. The statistics are sorted into categories such as economic, environmental, social, and gender. Under each category, you can select a specific country's profile showing statistics about the category.¹⁸⁶
- [Statistical Yearbook for Latin America and the Caribbean 2016](#): This is a document in Spanish and English detailing statistics from 2016 on various Latin American and Caribbean countries. The statistics deal with population, labor, education, health, and the environment.¹⁸⁷

D. Human Rights Tribunals

Across the world there are various different human rights monitoring systems that track violations of human rights treaties. Often these systems include courts and tribunals that hear cases alleging human rights violations by particular countries. The various cases and information that these systems facilitate can be useful when researching the conditions of a claimant's home country.

- [World Legal Information Institute](#): The institute has an online International Courts & Tribunals Collection that allows people to search for cases from specific tribunals or from specific databases of cases that have been compiled (such as Caribbean cases from 2005).
- [Inter-American Court of Human Rights](#): This organization is responsible for addressing violations of the American Convention on Human Rights for the twenty-three-member states of the Organization of American States that have accepted the jurisdiction of the Court.
- [European Court of Human Rights](#): The European Court addresses alleged violations with the European Convention on Human Rights. All of the courts judgments, many of their advisory opinions, other decisions and other released information is collected in a database that can be found on their website.
- [African Court on Human and People's Rights](#): This Court, along with the African Commission on Human and People's Rights, monitors compliance with the African Charter on Human and People's Rights. Information about pending and finalized cases can be found on their website, as well as statistical data on the filings made with the Court.

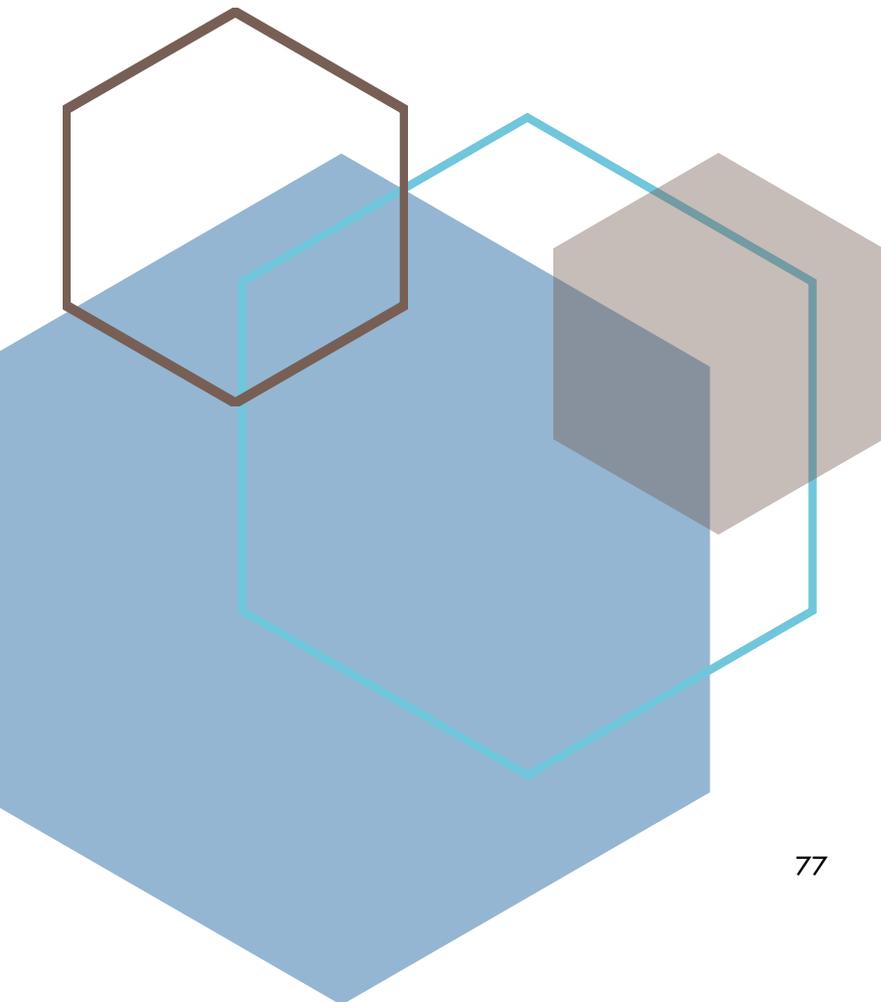
III. What Judges Prefer

It must be emphasized that the asylum regulations provide that an applicant's testimony alone, if credible, may be sufficient to sustain the burden of proof without corroboration.¹⁸⁸ While there are many different sources for evidence in asylum cases, there are certain types of evidence that judges often

Expert Witnesses in U.S. Asylum Cases: A Handbook



favor. An asylum seeker's own testimony of the persecution they experienced or face in their home country is important evidence; however, many courts prefer, if not require, that asylum seeker's testimony be supported by other objective evidence, unless they can demonstrate why none can be provided.¹⁸⁹ Furthermore, because asylum requires that there be an individualized claim of persecution (unless they are brought as a pattern and practice claim), reports that mention the asylum claimant by name or that detail specific events that the claimant describes in their case will be particularly helpful.¹⁹⁰ Evidence such as police reports or newspaper articles that directly mention the claimant or detail a particular event about which the claimant has testified will often be given great weight by courts.¹⁹¹ Country condition reports and other generalized data and articles can provide a useful contextual framework, but the narrowly tailored evidence that corroborates the specific claim of persecution alleged by the asylum seeker will have a greater impact on the judge.¹⁹²



CONCLUSION

This handbook was created with the goal of expanding the roster of qualified persons willing to assist asylum seekers in the United States by serving as expert witnesses in these cases. It is also designed to identify best practices both for potential experts and for attorneys so that their collaboration is effective and efficient. The handbook provides important information about the asylum process and an explanation of the varied roles of experts, but it is not meant to be an exhaustive source of legal or other information related to asylum cases. The appendices identify additional resources that are especially useful to attorneys and experts in these matters.

The human rights of migrants and refugees have become entangled in political and ideological campaigns with the result that meritorious asylum cases have become increasingly difficult to win. Individuals willing to serve as experts are more vital than ever. Without such experts, gaining asylum will be even more of a challenge, especially for the majority of claimants who do not flee with the thought of collecting documentation or with the opportunity to gather evidence for their asylum claim. Similarly, attorneys who represent asylum seekers are often without sufficient resources and protocols that allow them to most effectively and efficiently collaborate with experts. It is our hope that this handbook has provided the necessary foundational information for those who may qualify as experts in asylum matters and to assist attorneys who work with them to aid the many people seeking to escape persecution and harm.

APPENDIX A – EXPERT CONFIDENTIALITY

Expert Witness's Agreement and Oath of Confidentiality, Impartiality and Other Assurances

I, _____, hereby agree and affirm that I shall protect the confidentiality of all privileged and confidential information that I may obtain in the course of providing expert opinion services or expert witness testimony in the matter of _____.

I understand, agree, and affirm that I will uphold the attorney-client privilege, which requires confidentiality with respect to any communication or information that I may obtain from an attorney and client or witness.

I agree and affirm that I will refrain from repeating or disclosing information obtained by me in the course of my expert opinion services or expert witness testimony in this matter.

I agree and affirm that I shall not publicly discuss, report, or publish information concerning a matter in which I have provided expert opinion services or expert witness testimony even when that information is not privileged or required by law to be confidential.

I agree and affirm that I shall limit myself to providing expert opinion services or expert witness testimony and that I shall not give legal advice to individuals for whom I am may be working with in the course of my expert opinion services or expert witness testimony, or engage in any other activity which may be construed to constitute a service other than expert opinion services or expert witness testimony while serving as an expert.

I agree and affirm that I shall assess my ability to provide expert opinion services or expert witness testimony in the course of delivering such service and shall disclose any reservation I may have about my ability to satisfy an expert opinion service or expert witness testimony assignment.

I affirm that I am impartial and unbiased with regard to the subject matter for which I am providing expert opinion services or expert witness testimony, and that my services are based upon my professional expertise and my personal first-hand experience in the field or in my area of expertise.

Signature

Date

APPENDIX B – MODEL AFFIDAVITS

The best place to find a range of useful model affidavits is through the Center for Gender and Refugee Studies (CGRS). CGRS provides Litigation Support Materials, including affidavits on various topics, upon request. The site includes a link to a form [here](#) that can be filled out to request any of their model affidavits.

In addition to CGRS other sources for model affidavits include:

- [The Institute for Justice and Democracy in Haiti](#)
- [Physicians For Human Rights](#)
- [The Atlanta Asylum Network](#)
- [Legal Services for New Americans](#)

APPENDIX C – AFFIDAVIT OUTLINE TEMPLATE

Graciously provided by Heather Scavone, attorney and professor in North Carolina, addressed to the expert.

Here is an outline that you could follow:

Statement of Dr. SMITH:

- I. Qualifications: List current and previously held titles and describe your credentials.
- II. The Practice of FGM in Ghana: (Provides a description of FGM as practiced in Ghana and describes its harmful consequences.)
- III. Criminalization of FGM Has Not Eliminated the Practice: (Describes how efforts to criminally combat the practice have driven it underground, making it harder to document in some cases/cultures/ regions.)
- IV. FGM Exclusively Practiced Within Muslim Communities: (Here, it would be extremely useful to explain that although the overall rate of FGM in Ghana is low, because it is practiced exclusively within Muslim communities, the “national risk” of suffering FGM is far lower than the risk to women/girls in Muslim communities. I.e., if 70% of the women in Ghana are Christian and 30% are Muslim, and 5% of women in Ghana suffer of FGM then roughly 16% of Muslim women suffer FGM in Ghana. It will be great if this section can point out that the risk, although small as against the population at large, is much higher/ not insignificant within Muslim communities in Ghana.)
- V. FGM Practiced on Girls and Women: (Although most of the literature seems to emphasize the practice done on small children, all of my interactions with Ghanaian women have revealed that it was a “pre-marriage” ceremony and not done until a woman was betrothed. If you can speak to this, it would be wonderful. Evidently, if you cannot/ don’t have knowledge/ experience, I would understand.)
- VI. I declare under the penalty of perjury of the laws of the United States that the foregoing is true and correct. (This is the concluding sentence, followed by your signature.)

APPENDIX D – CHECKLIST FOR INITIAL CALL/MEETING WITH EXPERT

- Keep notes of the conversation
- Provide a basic explanation of immigration court/asylum process
- Explain why experts are so important to asylum cases
- Describe how experts can help with asylum cases; what each type of help looks like
- Assure expert that the attorney will provide a model affidavit
- Ask expert about their expertise
- Identify what type of help attorney wants from this expert
- Explain what the time commitment will be and what type of work it will entail
- Provide an overall timeline of the case
- Outline what materials the attorney will send to the expert to review before the expert agrees to help
- Review confidentiality
- Review compensation
- Set an expectation of how often the attorney will be in touch with expert; assure expert that attorney will be available along the way
- Give expert an opportunity to ask questions
- Set a deadline for when the expert needs to tell the attorney whether they agree to help
- Do not pressure expert to help by claiming that client's life depends on it

APPENDIX E – RESOURCES

PLACES TO SEARCH FOR AN EXPERT WITNESS (OR BE ADDED TO A LIST OF EXPERT WITNESSES)

Center for Gender and Refugee Studies

For nation-wide expert data base – <https://cgrs.uchastings.edu/expert/search>

For requests for case assistance-- <https://cgrs.uchastings.edu/assistance/request>

Rights in Exile Programme -- <http://www.refugeelaidinformation.org/>

Justice in Motion (formerly Global Workers Justice Alliance): Accessing researchers in countries that clients have fled for evidence -- <http://justiceinmotion.org/the-work#AccessToJustice>.

Human Rights Watch -- <https://www.hrw.org/contact-us>

Amnesty International -- <https://www.amnestyusa.org/contact-us/>

ProBono.net -- <https://www.probono.net/>

Center for Latin American Studies at American University: Provides support in the form of written reports in asylum cases from the Northern Triangle related to gangs and organized crime, gender-based violence, and political opinion -- clals@american.edu.

Colleges and Universities

HUMAN RIGHTS – ONLINE RESEARCH RESOURCES

Country Reports on Human Rights Practices -- <http://www.state.gov/g/drl/rls/hrrpt/>

Ref World -- <http://www.refworld.org/>.

PERTINENT INTERNATIONAL ORGANIZATIONS

United Nations -- <http://www.un.org/>

Expert Witnesses in U.S. Asylum Cases: A Handbook



United Nations Office of the High Commissioner for Human Rights --

<http://www.ohchr.org/EN/Pages/Home.aspx>

African Commission on Human and Peoples' Rights -- <http://www.achpr.org/>

Inter-American Commission on Human Rights -- <http://www.oas.org/en/iachr/default.asp>

Human Rights Bodies -- <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

INTERNATIONAL COURTS AND CASES

African Court of Human and Peoples' Rights (AfCHPR) -- <http://en.african-court.org/>

European Court of Human Rights -- <http://www.echr.coe.int/>

European Court of Justice -- http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

Inter-American Court of Human Rights -- <http://www.corteidh.or.cr/>

International Court of Justice -- <http://www.icj-cij.org/>

International Criminal Court -- <http://www.icc-cpi.int/>

EISIL: General International Law -- Courts and Tribunals

Links to international tribunal websites, as well as some research guides

http://www.eisil.org/index.php?sid=896531960&t=sub_pages&cat=706

WorldLII International Courts & Tribunals Library -- <http://www.worldlii.org/int/cases/>

TREATIES

Bayefsky.com -- <http://www.bayefsky.com/>

HeinOnline World Treaty Library -- <http://www.heinonline.org/HOL/Welcome>

Expert Witnesses in U.S. Asylum Cases: A Handbook



RESEARCH GUIDES

EISIL: Electronic Information System for International Law -- <http://www.eisil.org/>

ASIL Guide to Elec. Resources for International Law -- International Human Rights

by Marci Hoffman

http://www.asil.org/sites/default/files/ERG_HUMRTS.pdf

Update: International Human Rights Research Guide

By Grace M. Mills

http://www.nyulawglobal.org/globalex/Human_Rights1.htm

ASIL Guide to Electronic Resources for International Law -- United Nations

by John Heywood

http://www.asil.org/sites/default/files/ERG_UN.pdf

United Nations Documentation: Human Rights -- <http://research.un.org/en/docs/humanrights>

The Inter-American System of Human Rights: A Research Guide

By Cecilia Cristina Naddeo

http://www.nyulawglobal.org/globalex/Inter_American_human_rights.htm

International Human Rights, specifically within the Inter-American System

by Siomara Umaña

<http://avemarialaw.libguides.com/interamericanrights>

Forced Evictions and Disability Rights in Africa

By Angelo Dube

http://www.nyulawglobal.org/Globalex/Forced_Evictions_Disability_Rights_Africa1.htm

Towards the Human Rights Protection of Minority Languages in Africa

By Innocent Maja

http://www.nyulawglobal.org/Globalex/Minority_Languages_Africa.htm

Expert Witnesses in U.S. Asylum Cases: A Handbook



FOREIGN LAW

Globalex -- <http://www.nyulawglobal.org/globalex/>

Foreign Law Guide (via Library catalog) --

<http://referenceworks.brillonline.com/browse/foreign-law-guide>

World Legal Information Institute -- <http://www.worldlii.org/>

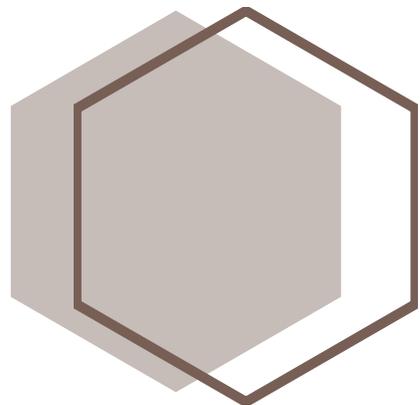
Coverage varies widely by country

JOURNAL DATABASES

HeinOnline International & Non-U.S. Law Journals -- Extensive list of non-U.S., English-language journals

WestlawNext -- Secondary Sources > Law Reviews & Journals (mostly U.S. and Canadian journals)

Lexis.com -- Area of Law > International Law



Expert Witnesses in U.S. Asylum Cases: A Handbook



¹ In an effort to use gender-neutral pronouns, this handbook will use the gender-neutral pronoun “they/them/their,” in order to remain as inclusive as possible.

² UN General Assembly, CONVENTION RELATING TO THE STATUS OF REFUGEES, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; PROTOCOL RELATING TO THE STATUS OF REFUGEES, 19 U.S.T. 6225, T.I.A.S. No. 6577 (1968); Immigration and Nationality Act, 8 U.S.C.A. § 1158.

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; see also 8 C.F.R. § 208.16 (Domesticating CAT).

⁴ INA § 101(a)(42).

⁵ INA § 101(a)(42); INA § 208(b)(1).

⁶ USCIS Asylum - <https://www.uscis.gov/humanitarian/refugees-asylum/asylum>. Children must be under 21 and unmarried to be included on an asylum claim.

⁷ INA § 241(b)(3); 8 USC § 1231(b)(3).

⁸ INA § 101(a)(42).

⁹ *Id.*

¹⁰ *Id.*; In immigration law cases, these are the following legal standards that may be encountered at various points in the process:

Preponderance of the Evidence: That an event is more likely than not to have occurred or that a fact is more likely than not to be true. Sometimes defined as 51% or greater likelihood of having occurred.

Clear and Convincing Evidence: A particular fact is substantially more likely than not to be true. This is a higher standard than preponderance of the evidence.

Substantial Evidence: Enough evidence that a reasonable mind could accept as adequate to support a particular conclusion.

U.S.C.I.S. ADJUDICATOR’S FIELD MANUAL, Chapter 11.1(c) (2010).

¹¹ 8 C.F.R. 1208.13(b)(1)(i)(A).

¹² ESSENTIALS OF ASYLUM LAW, Immigrant Legal Resource Center, § 3-1. (2d ed. 2008).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

¹⁶ *Id.*

Expert Witnesses in U.S. Asylum Cases: A Handbook



¹⁷ *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir.1997).

¹⁸ *Id.* In 1996, Congress enacted legislation amending asylum laws to legally protect victims of China's one-child policy. 8 U.S.C. § 1101(a)(42)(B) (2000)).

¹⁹ See *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (applicant was targeted and persecuted by the Mara-18 gang); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004) (anti-foreigner Nazi group targeting applicant on the basis of her race and nationality); *Cruz v. Sessions*, 853 F.3d 122, 126 (4th Cir. 2017) (applicant persecuted by her late husband's boss).

²⁰ *McMullen v. I.N.S.*, 658 F.2d 1312, 1315 n. 2 (9th Cir. 1981).

²¹ *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010); *Aliyev v. Mukasey*, 549 F.3d 111, 119 (2^d Cir. 2008); U.N. High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, par. 65 (1979).

²² *Chanco v. I.N.S.*, 82 F.3d 298, 302 (9th Cir. 1996).

²³ *Mikhael v. I.N.S.*, 115 F.3d 299, 304 (5th Cir. 1997)

²⁴ *Prasad v. I.N.S.*, 47 F.3d 336 (9th Cir. 1995).

²⁵ *Ozdemir v. I.N.S.*, 46 F.3d 6, 7 (5th Cir. 1994) (finding this was part of police interrogation practice and that Ozdemir had not suffered persecution on account of his political opinion).

²⁶ *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004), as amended (Nov. 2, 2004), *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (death threats can rise to the level of persecution).

²⁷ H.R. Rep. No. 95-1452, at 5, as reprinted in 1978 U.S.C.C.A.N. 4700, 4704, 1978 WL 8575. *In re T-Z-*, 24 I. N. Dec. 163, 171 (BIA 2007).

²⁸ 8 CFR § 208.13(b)(1) (2008).

²⁹ *Matter of Y-T-L-*, 23 I & N Dec. 601, (BIA 2003).

³⁰ 8 C.F.R. § 1208.13(b)(1)(iii)(A).

³¹ *Matter of B-*, 21 I & N Dec. 66, 72 (BIA 1995).

³² *Matter of S-A-K- & H-A-H-*, 24 I & N Dec. at 46 (BIA 2008).

³³ 8 CFR § 208.13(b)(1)(iii)(B).

³⁴ 8 C.F.R. 1208.13(b)(1).

³⁵ 8 C.F.R. 1208.13(b)(2).

³⁶ *Id.*

Expert Witnesses in U.S. Asylum Cases: A Handbook



³⁷ See, e.g., *Matter of Kasinga*, 21 I & N Dec. 357 (holding that “subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution”) and *Pitcherskaia*, 118 F.3d at 647 n. 9 (noting that proof of a persecutor’s malignant intent is not required to show persecution).

³⁸ *Matter of Mogharrabi*, 19 I & N Dec. at 445 (quoting *Matter of Acosta*, 19 I&N Dec. at 226 “the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it, that a persecutor is aware or could become aware the alien possesses this characteristic, that a persecutor has the capability of punishing the alien, and that a persecutor has the inclination to punish the alien.”)

³⁹ It is worth noting that in the 9th Circuit, withholding of removal claims only require “a reason” and not “a central reason.” *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017).

⁴⁰ INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, entered into force Jan. 4, 1969.

⁴¹ See *Eduard v. Ashcroft*, 379 F.3d 182 (5th Cir. 2004); see also *Xiaodong Li v. Gonzales*, 420 F.3d 500 (5th Cir. 2005).

⁴² *Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Matter of C-A-*, 23 I & N Dec. 951, 957 (BIA 2006), *aff’d*, *Castillo-Arias v. U. S. Attorney Gen.*, 446 F.3d 1190 (11th Cir. 2006).

⁴⁶ For example, in the 9th Circuit, the social group analysis is a case-by-case determination based on the particular society in question. See *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

⁴⁷ Martin, Aleinikoff, Motomura, & Fullerton, *Forced Migration Law and Policy*, 250, 2013 West Academic Publishing.

⁴⁸ *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277 (9th Cir. 1985).

⁴⁹ Learn About the Asylum Application Process, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> (last updated October 2015).

⁵⁰ Obtaining Asylum in the United States, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated October 2015).

⁵¹ *Id.*

⁵² INA § 208(b)(2)(A).

⁵³ 8 U.S.C. 1158(a)(2)(B), (D); 8 C.F.R. 1208.4(a)(4), (5).

⁵⁴ Asylum Seekers & Refugees, NATIONAL IMMIGRANT JUSTICE CENTER, <http://immigrantjustice.org/index.php/issues/asylum-seekers-refugees> (last visited April 3, 2018).

⁵⁵ INA § 208(b)(2)(A).

Expert Witnesses in U.S. Asylum Cases: A Handbook



-
- ⁵⁶ Asylum Seekers & Refugees, NATIONAL IMMIGRANT JUSTICE CENTER, <http://immigrantjustice.org/index.php/issues/asylum-seekers-refugees> (last visited April 3, 2018).
- ⁵⁷ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, Article 1, Dec. 10, 1984, 1465 U.N.T.S. 85.
- ⁵⁸ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, Article 3, Dec. 10, 1984, 1465 U.N.T.S. 85.
- ⁵⁹ *Matter of S-V*, I & N Dec. 1306, 1311-1312 (BIA 2000).
- ⁶⁰ *Amir v. Gonzales*, 467 F.3d 921 (6th Cir. 2006); *Suarez-Valenzuela v. Holder*, 714 F.3d 241 (4th Cir. 2013).
- ⁶¹ *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, TRAC IMMIGR., (Nov. 28, 2017), <http://trac.syr.edu/immigration/reports/491/>.
- ⁶² *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2012-2017*, TRAC IMMIGR., (2017), <http://trac.syr.edu/immigration/reports/490/include/denialrates.html>.
- ⁶³ *Id.*
- ⁶⁴ *Judge Agnelis L. Reese*, TRAC IMMIGR., (2017), <http://trac.syr.edu/immigration/reports/judgereports/00168OAK/index.html>.
- ⁶⁵ See e.g., *Wang v. Attorney Gen. of U.S.*, 423 F.3d 260, 267 (3d Cir. 2005) (describing various instances of aggressive and patently biased brow-beating by immigration judges); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 333 n. 65 (2010) (identifying the need for further investigation with regard to inappropriate judicial biases); *Asylum Outcome Increasingly Depends on Judge Assigned*, TRAC IMMIGR., (DEC. 2016), <http://trac.syr.edu/immigration/reports/447/>.
- ⁶⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963); see *Turner v. Rogers*, 563 U.S. 431 (2011).
- ⁶⁷ U.S. Const. amend. VI.
- ⁶⁸ See *Padilla v. Kentucky*, 559 U.S. 356 (2010); *INS v. St. Cyr*, 533 U.S. 289 (2001); and *Bridges v. Wixon*, 326 U.S. 135 (1945).
- ⁶⁹ *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, TRAC IMMIGR., (Nov. 28, 2017), <http://trac.syr.edu/immigration/reports/491/>.
- ⁷⁰ *Id.*
- ⁷¹ *Id.*
- ⁷² STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 23 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.
- ⁷³ SABRINEH ARDALAN, ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY 151 (Benjamin N. Lawrence & Galya Ruffer eds., 2015).
- ⁷⁴ Sabrineh Ardanal, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum*

Expert Witnesses in U.S. Asylum Cases: A Handbook



Representation, 48 U. MICH. J. L. REFORM 1001 (2015), available at <http://repository.law.umich.edu/mjlr/vol48/iss4/4>; see also STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 22-23 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

⁷⁵ Robert H. Etnyre, Jr., *Preparing and Presenting an Asylum Case in Immigration Court*, 12-08 Immigration Briefings 1, 12 (August 2012).

⁷⁶ Gary Malphrus, *Expert Witnesses in Immigration Proceedings*, 4 Immigration Law Advisor 1, 11-13 (2007).

⁷⁷ *Id.*

⁷⁸ STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 23 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf. See also The Advocates for Human Rights, *Pro Bono Asylum Cases* (on file with authors); Stephen K. Loehner and Estelle McKee, *How to Handle Your First Pro Bono Deportation Case* 57 (2017), available at <https://www.lawschool.cornell.edu/alumni/reunion/upload/DeportationDefense06-15-17.pdf>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 4.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ PUBLIC COUNSEL, ASYLUM MANUAL FOR PUBLIC COUNSEL'S VOLUNTEER ATTORNEYS 58 (2012).

⁸⁸ *Document Analysis Questions*, NEW YORK TIMES, https://static01.nyt.com/images/blogs/learning/pdf/2013/13-1553_K12_DocAnalysis_LearnNet_RP3-f.pdf.

⁸⁹ *Medical Evidence in Refugee Status Determination Procedures*, RIGHTS IN EXILE PROGRAMME, <http://www.refugeelegalaidinformation.org/medical-evidence-refugee-status-determination-procedures>.

⁹⁰ *Id.*

⁹¹ SABRINEH ARDALAN, ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY 154 (Benjamin N. Lawrence & Gayla Ruffer eds., 2015) (describing the case of a Ugandan asylum seeker who had difficulty recounting his story).

⁹² *Id.*

Expert Witnesses in U.S. Asylum Cases: A Handbook



-
- ⁹³ *Medical Evidence in Refugee Status Determination Procedures*, RIGHTS IN EXILE PROGRAMME, <http://www.refugeelegalaidinformation.org/medical-evidence-refugee-status-determination-procedures>.
- ⁹⁴ *Id.*
- ⁹⁵ *Id.*
- ⁹⁶ Katherine Lee, *Seeking sanctuary: Psychologists are playing a vital role in helping asylum seekers convince courts that they cannot be sent back to their native countries*, 48 *Monitor On Psychology* 38, 38 (2017).
- ⁹⁷ *Id.*
- ⁹⁸ See *Can I Apply for Asylum if I Missed the One-Year Deadline?*, NALBANDIAN LAW, <http://www.nalbandianlaw.com/can-i-apply-for-asylum-if-i-missed-the-one-year-deadline/> (providing an example of an instance in which the addition of a psychological evaluation in an asylum application allowed the client to apply for asylum despite having missed the one year filing deadline since the evaluation explained the effect of the client's PTSD on their ability to focus on such things like the procedural details of an asylum case).
- ⁹⁹ *Id.*
- ¹⁰⁰ SABRINEH ARDALAN, *ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY* 154 (Benjamin N. Lawrence & Galya Ruffer eds., 2015); see also ANTHONY GOOD & TOBIAS KELLY, *EXPERT COUNTRY EVIDENCE IN ASYLUM AND IMMIGRATION CASES IN THE UNITED KINGDOM: BEST PRACTICE GUIDE 3* (Univ. of Edinburgh, 2013).
- ¹⁰¹ SABRINEH ARDALAN, *ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY* 154 (Benjamin N. Lawrence & Galya Ruffer eds., 2015).
- ¹⁰² Derrick Silove et al., *Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-migration Trauma and Post-migration Stressors*, 170 *British Journal of Psychiatry* 351, 356 (1997).
- ¹⁰³ *Id.*
- ¹⁰⁴ STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, *ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 3* (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.
- ¹⁰⁵ Fed. R. Evid. 702.
- ¹⁰⁶ Garry Malphrus, *Expert Witnesses in Immigration Proceedings*, 4 *IMMIGRATION LAW ADVISOR* 1, 3 (May 2010) <https://www.justice.gov/sites/default/files/eoir/legacy/2010/06/07/vol4no5.pdf>
- ¹⁰⁷ *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002)
- ¹⁰⁸ *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (“[The] Federal Rules of Evidence do not apply in asylum proceedings.”).
- ¹⁰⁹ *Nyama v. Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004) (quoting *Espinoza v. I.N.S.*, 45 F.3d 308, 310 (9th Cir. 1995)); see also, e.g., *Ramirez v. Sessions*, 707 Fed. Appx. 930, 931 (9th Cir. 2017); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 565 (7th Cir. 2008); *Matter of Grijalva*, 19 I & N Dec. 713, 721-22 (BIA 1988).
- ¹¹⁰ EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS*, 397 (Ninth Ed., 2015).

Expert Witnesses in U.S. Asylum Cases: A Handbook



¹¹¹ Garry Malphrus, *Expert Witnesses in Immigration Proceedings*, 4 IMMIGRATION LAW ADVISOR 1, 9 (May 2010) <https://www.justice.gov/sites/default/files/eoir/legacy/2010/06/07/vol4no5.pdf>.

¹¹² *Id.* at 8.

¹¹³ *Id.* at 9.

¹¹⁴ *Matter of Ponce-Hernandez*, 22 I. & N. 784 (BIA 1999); see also *Matter of Toro*, 17 I. & N. Dec. 340 (BIA 1980).

¹¹⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

¹¹⁶ *Id.*

¹¹⁷ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (U.S. Mar. 23, 1999) (NO. 97-1709).

¹¹⁸ *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005).

¹¹⁹ Garry Malphrus, *Expert Witnesses in Immigration Proceedings*, 4 IMMIGRATION LAW ADVISOR 1, 13 -14 (May 2010) <https://www.justice.gov/sites/default/files/eoir/legacy/2010/06/07/vol4no5.pdf>.

¹²⁰ *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503 (BIA 1980).

¹²¹ *Probative*, Black's Law Dictionary (2d Free ed.) <https://thelawdictionary.org/probative/> (last accessed May 1, 2018).

¹²² Garry Malphrus, *Expert Witnesses in Immigration Proceedings*, 4 IMMIGRATION LAW ADVISOR 1, 13 -14 (May 2010) <https://www.justice.gov/sites/default/files/eoir/legacy/2010/06/07/vol4no5.pdf>.

¹²³ Fed. R. Evid. 801, available at https://www.law.cornell.edu/rules/fre/rule_801.

¹²⁴ See *Chen v. Gonzales*, 434 F.3d 212, 218 (3d Cir. 2005) (finding an affidavit less probative, in part because it was based on hearsay and the affiant was not subject to cross-examination).

¹²⁵ Michele R. Pistone, *Working with Country Conditions Experts in Immigration Cases* (PowerPoint Presentation prepared for Conference for the Safe Passage Project at New York Law School).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ THE ADVOCATES FOR HUMAN RIGHTS, PRO BONO ASYLUM REPRESENTATION MANUAL: AN OVERVIEW OF ASYLUM LAW & PROCEDURE 31 (2009)

¹²⁹ STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 12 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹³⁰ *Id.*

¹³¹ *Id.*

Expert Witnesses in U.S. Asylum Cases: A Handbook



¹³² *Id.*

¹³³ Tahhirih Justice Center, *Guidelines for Expert Witnesses: Serving as Country or Subject Matter Experts in Asylum or Withholding of Removal Cases*, RIGHTS IN EXILE PROGRAMME (Mar. 2015), http://www.refugeelegalaidinformation.org/sites/default/files/uploads/Guidelines%20for%20Serving%20as%20a%20COI%20Expert%20Witness%20UK_0.pdf.

¹³⁴ STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 12 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹³⁵ *Id.* at 13.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Deborah Weissman, *Expert Witness: General Approach* (Word Document provided to students).

¹³⁹ STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 11-12 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Hamid v. Gonzales*, 417 F.3d 642, 645-46 (7th Cir. 2005).

¹⁴⁵ STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 11 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 11-13 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹⁴⁹ *Id.* at 11.

¹⁵⁰ *Id.* at 10.

¹⁵¹ Bruce Burk, *How to Qualify an Expert Witness: A Sample Voir Dire*, THE EXPERT INSTITUTE (Jul. 18, 2017), <https://www.theexpertinstitute.com/how-to-qualify-an-expert-witness-a-sample-voir-dire/>.

Expert Witnesses in U.S. Asylum Cases: A Handbook



¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ For instance, as is addressed in later sections, attorneys can run through practice direct and cross-examinations with experts to prepare them to provide testimony.

¹⁵⁵ These recommendations are based on interviews with individuals who have served or may serve as experts in asylum cases and attorneys who regularly use experts in asylum cases.

¹⁵⁶ Webinar: Working with Country Condition Experts in Immigration Court: A Training for Asylum Attorneys (Center for Gender and Refugee Studies Mar. 16, 2017).

¹⁵⁷ *Id.*

¹⁵⁸ See Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J. L. REFORM 1001 (2015), available at <http://repository.law.umich.edu/mjlr/vol48/iss4/4>; see also STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 22-23 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹⁵⁹ *Id.*

¹⁶⁰ *Request Expert Consultation for Asylum Case*, CENTER FOR GENDER AND REFUGEE STUDIES, <https://cgrs.uchastings.edu/assistance/request> (last visited Apr. 29, 2018).

¹⁶¹ U.S. DEPT. OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REVIEW, IMMIGRATION COURT PRACTICE MANUAL, 3.3(g), (Dec. 3, 2013), available at https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf.

¹⁶² *Resources by State*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, <http://www.aila.org/infonet/state> (last visited Apr. 29, 2018).

¹⁶³ AN ENCYCLOPEDIA OF TRAUMA: AN INTERDISCIPLINARY GUIDE 136-39 (Charles R. Figley, ed., 2012).

¹⁶⁴ *Id.* at 783-86.

¹⁶⁵ *Preparing the Application: Corroborating Country Conditions*, IMMIGRATION EQUALITY (2015), <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/preparing-the-application-corroborating-country-conditions/#.WseDPIgbO01>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Preparing the Application: Indexed Country Conditions Sample*, IMMIGRATION EQUALITY (2015), <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/preparing-the-application-indexed-country-conditions-sample/#.WsbWgYgbO01>.

¹⁶⁹ *Reports*, HUMAN RIGHTS WATCH, <https://www.hrw.org/publications>.

¹⁷⁰ *Country Conditions Reports*, UNHCR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/en-us/country-reports.html>.

Expert Witnesses in U.S. Asylum Cases: A Handbook



-
- ¹⁷¹ *Preparing the Application: Corroborating Country Conditions*, IMMIGRATION EQUALITY (2015), <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/preparing-the-application-corroborating-country-conditions/#.WseDPIgbO01>.
- ¹⁷² See *Zarouite v. Gonzales*, 424 F.3d 60, 64-65 (1st Cir. 2005).
- ¹⁷³ *National Documentation Packages*, IMMIGRATION AND REFUGEE BOARD OF CANADA (Apr. 22, 2016), <http://www.irb-cisr.gc.ca/Eng/ResRec/NdpCnd/Pages/index.aspx>.
- ¹⁷⁴ *Where We Work: The IRC Worldwide*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://www.icrc.org/en/where-we-work>.
- ¹⁷⁵ *Countries*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/countries/>.
- ¹⁷⁶ *Inter-American Commission on Human Rights: Country Reports*, ORGANIZATION OF AMERICAN STATES (2011), <https://www.oas.org/en/iachr/reports/country.asp>.
- ¹⁷⁷ Teresa Chapa, *Forced Migration: Law and Law Practice 523.1*, UNC UNIVERSITY LIBRARIES (Feb. 1, 2018 12:58 PM), <http://guides.lib.unc.edu/c.php?g=793572>(The class page created by Teresa Chapa contains links to various different resources that can be useful for asylum cases and includes vocabulary for help researching in Spanish).
- ¹⁷⁸ *Newspapers and News*, LANIC: LATIN AMERICAN NETWORK INFORMATION CENTER (July 2015), <http://lanic.utexas.edu/la/region/news/>.
- ¹⁷⁹ *World News Guide: Latin America*, THE GUARDIAN (Feb. 5, 2002), <https://www.theguardian.com/world/2002/feb/05/world-news-guide-latin-america>.
- ¹⁸⁰ ZONA LATINA: LATIN AMERICAN MEDIA & MARKETING, <http://www.zonalatina.com/index.htm>.
- ¹⁸¹ *Definition of NGOs*, NGO GLOBAL NETWORK, <http://www.ngo.org/ngoinfo/define.html>.
- ¹⁸² *Non-Governmental Organizations*, LANIC: LATIN AMERICAN NETWORK INFORMATION CENTER (July 2015), <http://lanic.utexas.edu/la/region/ngos/>.
- ¹⁸³ *Worldwide NGO Directory*, WANGO: WORLD ASSOCIATION OF NON-GOVERNMENTAL ORGANIZATIONS, <http://www.wango.org/resources.aspx?section=ngodir>.
- ¹⁸⁴ Joni L. Andrioff, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 CHICAGO-KENT L. REV. 107, 131.
- ¹⁸⁵ *The World's Women 2015*, UNITED NATIONS STATISTICS DIVISION (2015), <https://unstats.un.org/unsd/gender/worldswomen.html>.
- ¹⁸⁶ *Regional Panorama of Latin America and the Caribbean: Selected Indicators*, CEPALSTAT: DATABASES AND STATISTICAL PUBLICATIONS, <http://estadisticas.cepal.org/cepalstat/Portada.html?idioma=english>.
- ¹⁸⁷ ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), STATISTICAL YEARBOOK FOR LATIN AMERICA AND THE CARIBBEAN (2016).
- ¹⁸⁸ 8 C.F.R. § 208.13(a) (2005).

Expert Witnesses in U.S. Asylum Cases: A Handbook



¹⁸⁹ Joni L. Andrioff, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 CHICAGO-KENT L. REV. 107, 127-128.

¹⁹⁰ *Id.* at 131-34. 8 C.F.R. 1208.13(b)(2)(iii)(A).

¹⁹¹ *Id.*

¹⁹² *Id.*