Best Practices in Trial Advocacy
For Unaccompanied Alien Children in Immigration Court Matters
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- **Mastering Court Room Dynamics**

  Know Your Audience- Research your Judge's background and asylum grant rate based on TRAC study http://trac.syr.edu/immigration/reports/160/ .

  Ask private bar and public interest colleagues about the particular DHS Trial Attorney handling the case and the Immigration Judge including their idiosyncrasies such as whether the Judge allows for telephonic testimony of witnesses in the United States and abroad (some do, some do not); whether the Judge is a stickler for format re- filings (in terms of tabs and pagination); and whether and how the Judge accepts amendments to asylum or other immigration applications.

  Check and follow your local Immigration Court rules to a T available at http://www.usdoj.gov/eoir/sibpages/ICadr.htm

  Watch "What Happens When I Go To Immigration Court?" with your child client http://www.hklaw.com/CST/WomensCommission.asp .

  Watch "Best Practices in Representing Asylum Seekers: A Video resource for Pro Bono Attorneys" (ALI-ABA 2005) available at www.ali-aba/org/aliaba/rdvd01.asp .

  Observe both master calendar and individual hearings conducted by your Immigration Judge and with your particular DHS trial attorney to gain better insight into their characters and approaches to adjudication and prosecution respectively.

- **What to Do to Make the Hearing Process More Child Friendly?**

  Advocate for the Judge to schedule pre-trial conferences under 8 C.F.R. 1003.21 to discuss and streamline issues, testimony and witnesses and possible stipulations – if the Judge refuses, attempt to schedule a pre-trial meeting/discussion with the DHS Trial Attorney prior to the individual hearing to discuss the case and possible stipulations to a list of facts and legal theories that can be presented to the Judge. N.B. Such stipulations are not binding on the Court but in practice the Court respects stipulations between parties.

  During your pre-trial deliberations, the DHS Trial Attorney may let you know that he/she is inclined to stipulate to the Immigration Judge granting a particular form of relief and only require limited testimony by your client. Caveat emptor: know the form of relief and its benefits and limitations and confer with your client. Unlike asylum, in the case of withholding of removal, unaccompanied children

granted withholding are ineligible for Office of Refugee Resettlement benefits whereas asylees are eligible for benefits until age 21. Additionally, unlike asylees, withholding recipients are ineligible to adjust of status to permanent residence after one year and proceed to apply for naturalization in five years. Withholding of removal provides for employment authorization renewable on an annual basis. However, in cases lacking in merits or with unfavorable discretionary factors where an Immigration Judge is unlikely to grant asylum, a stipulated offer of withholding may be the preferable course of action.

For negotiation purposes, most DHS Trial Attorneys prefer that all evidence has been submitted to the Court. Additionally, you can and should prepare a list of facts and legal theories for the DHS Trial Attorney to consider stipulating to at the individual hearing.

Familiarize yourself and submit for the record DHS Children's Asylum Guidelines (albeit not binding on EOIR) available at http://www.asylumlaw.org/docs/united_states/guidelines/children.pdf#xml=http://www.asylumlaw.org/cgi-bin/texis.cgi/webinator/search4/xml.txt?query=%2Basylum+%2Bguidelines+%2Bchildren+%2BINS&pr=asylumlaw&sufs=1&order=r&id=4532b34c6

Familiarize yourself and submit for the record EOIR Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children 04-07 (2004) available at http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-07.pdf

Advocate to the Judge to apply the EOIR Guidelines where relevant to your client such as allowing your client to be seated next to you and that the Judge not wear a robe.

Advocate for the use of the DHS Gender Asylum Guidelines available at http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf to have a male/female DHS Trial Attorney assigned for the individual hearing to facilitate the child's trust and candor where relevant, e.g., cases of domestic violence, sexual abuse, sexual identity.

Advocate for a particular witness order. Typically, Immigration Judges want to hear from the respondent first. However, depending on lay and expert witnesses' schedules, Immigration Judges may accommodate that other witnesses testify before the respondent. In cases of children with trauma, consider that a mental health witness can either testify first to explain the trauma and set the stage for the applicant and possible difficulties which may arise in the child client's live testimony or testify after the client to explain the difficulties which may have emerged in the child client's testimony. Typically, you want to sandwich weak witnesses with strong witnesses sequentially and end with powerful, persuasive testimony. Also, please note that all witnesses besides the respondent will be

sequestered. It is of course beneficial for the respondent to hear the other witnesses testify since it will reinforce his/her testimony.

If you are appearing *pro bono* for a child client, make this clear on every pleading and in every representation to the Immigration Court that you are *pro bono* counsel.

- **Open/Closing Arguments and Briefs- When and Why?**

  Some Immigration Judges and Trial Attorneys welcome and carefully read briefs- others do not and frankly would prefer bullet points. Hence, your intelligence-gathering is key as to whether to develop a record with or without briefs. Some Judges allow one brief per case- others entertain an opening brief and a brief at the close of evidence and testimony. Some Judges allow opening statements, others do not or else allow you to make a oral and/or written closing statement. Some restrict the opportunity to either oral closing statement or written brief. In cases where the Judge appears favorably impressed with the testimony and evidence at bar, it may be preferable to just offer a closing statement to facilitate the Judge ruling from the bench in favor of your client. In cases where it does not appear that the Judge will rule in your favor, a written brief or closing statement could prove persuasive to alter the Judge's approach and lead to a favorable decision. N.B. The Judge typically provides opposing counsel the same opportunities for oral/written opening and closing statements/briefs- thus, if your adversary is weak orally on his/her feet, it might be preferable to stick to oral closings. In the rare case you are confident that it cannot be salvaged, it might be preferable to waive closing argument if DHS waives their closing argument so that the Judge will rule orally or in writing in order to preserve issues for appeal, i.e., given the elasticity of asylum law, the more you educate some Immigration Judges, the more they can use it against you in their oral or written decisions. Without your education, the Immigration Judge might commit more reversable error for purposes of appeal.

- **Qualifying and Using an Expert Witness – Federal Rule of Evidence 702 and 703**

  Familiarize yourself with FRE 702 and 703 re "expert" witnesses for mental health and human rights conditions experts you seek to call. The threshold is extremely low for experts i.e. specialized information that a layperson does not have which will assist the trier of fact. First, you must *voir dire* their expertise typically through their Curriculum Vitae. Once qualified to testify, you will of course need to lay the foundation for your questions. N.B. Experts should refrain from using legal terms of art such as "persecution" which is decided by the Immigration Judge. However, experts can offer opinions on the credibility of the respondent and ultimate fate which awaits the child client if deported.

- **Witness Preparation**

Witness preparation is an art form. Each witness including your client needs to be prepared for each and every question you anticipate asking and that you anticipate arising during cross-examination. Practice makes perfect and role play/mock hearings are key where you and your colleagues replicate the roles of attorney, client, Judge and Trial Attorney and pepper one another with question after question- in the area of asylum, you also cannot anticipate every seemingly extraneous question which could be asked tied to every element of the refugee definition. In role play, the client can also assume the role of Trial Attorney and Judge to pepper you with questions. N.B. The issue of the method of witness preparation for the hearing may arise during the hearing as well as compensation, objectivity, neutrality and bias. Reviewing possible questions to be asked is appropriate; compensation for expert witness testimony is permissible; compensation for lay witness testimony is inappropriate; expert witnesses by nature of their profession maintain objectivity and neutrality and free from bias.

- **Eliciting Superlative Witness Testimony- Foundation, Foundation, Foundation**

  For any witness, laying the foundation is key, keep it simple, prevent the witness from narrating, refresh the witness' recollection based on documents admitted to the record (if they appear to be forgetting key facts), and never ask any witness a question you never asked the witness. And remember to ask questions on redirect if they failed to answer the question on direct (in immigration proceedings, there is latitude for Judges to allow cross- and re-direct and re-cross to exceed the scope of what was asked previously).

  N.B. Some Judges offer to accept your witness affidavits for full evidentiary value on direct examination and pressure counsel to forego the witness testimony or else limit the testimony to areas and issues not included in their affidavits. It is inadvisable to accept this offer *in toto* since the Immigration Judge typically ultimately credits the discrepancies arising in cross-examination and does not credit the full evidentiary value for direct examination. For purposes of appeal, it is important to have witness testimony as part of the record including testimony that goes to key elements of the client's claim. Otherwise, you have an assurance that will not appear in the record on appeal in the form of testimony and be disadvantaged by the potentially devastating adverse information arising in cross-examination of your witness.

- **Preempting Objections and Immigration Judges Commandeering the Proceedings**

  The better the witness testimony based on foundation, the less likelihood for objections and the Immigration Judge commandeering the hearing based on impatience (which happens frequently). Remember to avoid leading yes/no questions though with child clients, Judges are more inclined to allow some

leading questions. Remember to rein in clients who narrate ad nauseam to preempt the objection of narration. Remember to avoid confusing compound questions that will trigger an objection. If the Immigration Judge intervenes and leads the testimony to a different area in your plan, go back to your plan to keep your client or witness on track.

- **Cross-Examination and Re-Direct for Rehabilitation**

  Cross-examination is particularly painful for attorneys to witness. However, do not object to questions solely for the sake of objecting lest it antagonize the Trial Attorney and the Immigration Judge- save your objections for the most important issues.
  On re-direct, this is your opportunity to rehabilitate your client if adversely affected by cross-examination, re-ask the same questions you asked on direct (even though you might trigger DHS to object based on "asked and answer") to reinforce the narrative. Ask questions which you forgot on direct which may have arisen in cross- to clarify the information.

- **Reading the Tea Leaves- Decision from the Bench or On Reserve**

  Upon conclusion of the evidence and after oral argument, some Judges might render oral decisions or take the decision on reserve to issue a written decisions. While oral decisions might be welcome, written decisions might be preferable to be artfully crafted to avoid reversal on appeal. However, if DHS appears inclined to agree to a grant without appeal, an oral decision is welcome. Sometimes the Judge will go off the record to ascertain whether parties agree to a grant and whether DHS will/will not appeal. In cases where withholding of removal is offered in lieu of asylum, the attorney should confer with the child client as to whether to accept this remedy despite its limitations. Some clients would prefer to accept withholding to avoid protracted immigration proceedings and the uncertainty of the Board of Immigration Appeals ruling favorably on either the asylum or withholding claim. If the Judge grants, the attorney will want to confer with the trial attorney as to whether they will appeal to the Board of Immigration Appeals- and convince DHS not to- based on the equities and evidence at bar.

- **Appellate Practice – Board of Immigration Appeals (BIA)**

  A Notice of Appeal with a fee of $110 or fee waiver is due within 30 days of the Judge's decision at the Board of Immigration Appeals (BIA) in Falls Church, VA. N.B. There have been problems with Federal Express for delivery to the BIA- hence, it is better to use a courier service from Washington, D.C. or Virginia to ensure its delivery and to secure a date-stamped copy of the filing. If the child client is detained, you can expect the transcript of proceedings in 1-2 months. If non-detained, it can take 6 months to 1 year. If you are appearing in a *pro bono* capacity, you can request a continuance of 21 days on filing the brief after the briefing schedule is issued. Regarding the brief, if you are the victor, you will not

be requesting a 3 judge panel with the BIA since you have the law on your side. If you are the vanquished, you will request a 3 judge panel. For purposes of the BIA appeal, you will need to write the brief as if for a federal Court of Appeals and preserve all statutory and constitutional issues- otherwise, they may be deemed waived. Factual findings are reviewed by the BIA under a clearly erroneous standard; legal findings are reviewed *de novo*. There is an automatic stay of removal for aliens on appeal to the BIA. If the BIA affirms the decision granting your case or else overturns the Immigration Judge and grants, congratulations- it's over and DHS cannot appeal!

- **Appellate Practice – Federal Court of Appeals**

  If your case is denied by the BIA, you have 30 days to file a petition for review with the federal court of appeals for the circuit with jurisdiction over your client at the time of his/her individual hearing before the Immigration Judge- irrespective of whether he/she has subsequently moved. There is a filing fee of $450.00 (waivable for indigence but more paperwork than with BIA- it is easier to pay the filing fee)- and it will take 1-2 years for briefing, oral argument and a decision. If your client is detained, you will need to seek a stay of removal in addition to the petition of removal demonstrating likelihood of success on the merits and substantial harm if the case is denied. If your client is non-detained, it is not advisable to seek a stay of removal (since if denied, DHS will strive to detain your client). You should always ask for oral argument. For the federal appeal, you will want to emphasize the statutory and regulatory violations in the proceedings including but not limited to infringement on your client's right to present evidence and witnesses; cross-examine DHS witnesses; and Immigration Judge prejudgment, speculation and conjecture and bias affecting the Judge's adverse credibility determination. N.B. The scope of appellate review is narrow such that factual findings are reviewed under a deferential standard such that no reasonable fact-finder would be compelled to find to the contrary whereas legal issues are reviewed with deference to the agency if the agency's interpretation is reasonable.

- **Motions to Reopen/Reconsider to the BIA**

  It’s never over until the alien wins is the adage of seasoned immigration practitioners. If you lose, consider the possibility of filing a motion to reopen with the BIA based on new evidence previously unavailable within 90 days of the BIA's decision that would alter the decision, e.g., the missing smoking gun fact witness who was out of the country last time you tried to find him/her. Otherwise, you can base your motion on changed circumstances or country conditions which have declined raising the risk of harm to your client. Additionally, for legal errors committed by the BIA, consider a motion to reconsider to be filed within 30 days- but beware- this gives the BIA the opportunity to perfect the decision based on your criticism. Finally, please note that the Immigration Judge and BIA retain the

authority to reopen proceedings *sua sponte* based on exceptional circumstances even if you are outside their requisite filing period.