

Working with Medical and Mental Health Experts in Asylum and Related Fear-of-Return Claims

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Body

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By Neela O. Chakravartula, J.D.; Christine Lin, J.D., M.A.; Stuart L. Lustig, M.D., M.P.H.; Katherine McKenzie, M.D., F.A.C.P.

Introduction

At a time of record global forced displacement,¹ collaboration between health care and legal professionals who work with individuals seeking asylum, withholding of removal, and protection under the Convention Against Torture (CAT)² in the United States is more important than ever. While those fleeing persecution or torture may establish eligibility for protection based solely upon their credible testimony,³ forensic evaluations⁴ from medical and mental health experts (“health experts”) may provide critical corroborating evidence in support of those claims.

¹ The United Nations High Commissioner for Refugees (UNHCR) reports 68.5 million displaced persons worldwide. UNHCR, *Figures at a Glance*, <https://www.unhcr.org/figures-at-a-glance.html> (last visited Feb. 20, 2019).

² This article collectively refers to asylum, withholding of removal, and CAT as “fear-of-return claims.”

³ Immigration and Nationality Act (INA) § 208(b)(1)(B)(ii), **8 U.S.C. § 1158(b)(1)(B)(ii)**; UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees at ¶¶ 196, 203-05, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, reedited 1992), available at <https://www.unhcr.org/4d93528a9.pdf> (last visited Jan. 9, 2019).

⁴ The term “forensic evaluation” refers to an evaluation in which the purpose is “to gather evidence for use in legal proceedings.” Katherine C. McKenzie, John Bauer, and P. Preston Reynolds, *Asylum Seekers in a Time of Record Forced Global Displacement: The Role of Physicians*, 34 J. Gen. & Internal Med. 137, 140 (2019), available at <https://doi.org/10.1007/s11606-018-4524-5>. Forensic evaluations differ in scope and purpose from therapeutic health care. In immigration proceedings, experts typically render forensic evaluations in the form of a declaration signed under penalty of perjury, or an affidavit, signed under oath before a notary or other official. Immigration Court Practice Manual (ICPM), Glossary 5, 1 (Aug. 2, 2018); 26 U.S.C. § 1746

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Successful collaboration between attorneys and health experts is important to obtain the best medical and mental health evidence for fear-of-return claims. Health experts benefit from guidance and direction from their legal colleagues as to how their contributions fit into an individual's case. Attorneys benefit from a better understanding of the process and approach that health experts take when assessing those who have been persecuted or tortured. Ultimately, enhancing the working relationship between health experts and legal advocates facilitates presenting the strongest possible case for those fleeing harm in their home countries. This article, co-authored by attorneys at the Center for Gender & Refugee Studies (CGRS) and two health experts, discusses the role health experts play in fear-of-return cases, identifies where forensic evaluations may be particularly helpful to address legal elements in such cases, and offers guidance on best practices for attorney and expert collaboration.⁵

Who Qualifies as an Expert?

In non-adversarial affirmative asylum interviews at the asylum office (AO),⁶ the qualifications of health experts providing forensic evaluations are generally not contested, and experts rarely testify. If a client is not granted asylum and has no legal status, the case is referred to immigration court (IC), where the client is placed in removal proceedings, an adversarial process.⁷ The client may raise asylum as well as withholding of removal or CAT, and any other relief as a defense to removal. The immigration judge (IJ) and opposing counsel⁸ has access to the asylum application and all evidentiary documents submitted to the AO. In contrast to affirmative cases, in defensive proceedings, opposing counsel may challenge health experts' qualifications and experts providing forensic evaluations must demonstrate to the IJ that they are qualified to offer expert opinions. Experts may also be requested to testify in court, either in person or telephonically. Because an affirmative case can become a defensive one, attorneys should retain experts with strong qualifications to withstand the scrutiny of IC proceedings.

Guidance from the Federal Rules of Evidence (FRE). While the FRE are not binding in IC proceedings, they provide helpful guidance regarding who qualifies as an expert.⁹ In contrast to lay witnesses who generally testify to facts within their personal knowledge, expert witnesses are qualified based on their specialized "knowledge, skills, experience, training, or education"¹⁰ to opine on the meaning and interpretation of facts they are made aware of, but may not have personally observed.¹¹ Experts may use their "scientific, technical, or other specialized knowledge" to provide an opinion that "will help the trier of fact to understand the evidence or to determine a fact in issue."¹²

(generally matters that are "required or permitted" to be supported by affidavit may be supported by declarations signed under penalty of perjury). This article uses the term "evaluation" to refer to the expert's declaration or affidavit.

⁵This article developed from a CGRS webinar created by the authors: "Working with Medical and Mental Health Experts in Asylum and Related Fear-of-Return Claims" (Nov. 13, 2018). Email CGRS-TA@uchastings.edu to request the webinar recording. Additional resources include: Kelcey Baker, Katherine Freeman, Gigi Warner, and Deborah M. Weissman, Expert Witnesses in U.S. Asylum Cases: A Handbook (2018): <http://www.law.unc.edu/documents/academics/humanrights/expertwitnesshandbook.pdf> and Weill Cornell Center for Human Rights, Asylum Evaluation Training Manual (2nd ed. 2015): <https://wcchr.com/resources/training-manual>.

⁶The asylum office is part of the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS). In the affirmative process, individuals interview with an asylum officer.

⁷IC is part of the U.S. Department of Justice (DOJ), Executive Office for Immigration Review (EOIR).

⁸IJs are DOJ employees. Opposing counsel is an attorney with the Office of Chief Counsel of DHS's Immigration and Customs Enforcement (ICE) ("DHS attorney").

⁹"[T]he fact that specific evidence would be admissible under the [FRE] 'lends strong support to the conclusion that admission of the evidence comports with due process.'" *Matter of D-R-, 25 I. & N. Dec. 445, 464 n.9 (B.I.A. 2011)* (quoting *Felzcerek v. INS, 75 F.3d 112, 116 (2d Cir. 1996)*); see also *Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004)* (the "spirit of *Daubert*" applies in administrative proceedings).

¹⁰ [Fed. R. Evid. 702.](#)

¹¹ [Fed. R. Evid. 703.](#)

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The FRE defines expert very broadly, with no set criteria. Common ways health professionals may demonstrate their expertise include, but are not limited to: advanced degrees, state licenses, board certifications, clinical experience, forensic experience, and scholastic activities such as teaching, and writing and research. In addition to their education, health experts may undergo specialized training provided by asylum clinics and human rights groups that teach how to examine, describe, and assess physical and psychological scars related to trauma and persecution.¹³ Attorneys should ensure that all experiences demonstrating the expert's qualifications are included in the expert's curriculum vitae (CV) as well as in a section of the evaluation discussing educational and professional background.¹⁴ Including the number of individuals the expert has seen, the years performing forensic evaluations, and prior experience being qualified as an expert in IC may also be useful.¹⁵

Medical interns and residents as well as trainees or graduates in fields such as social work, psychology, therapy, and counseling, may provide expert opinions, typically under the supervision of a licensed medical or mental health professional. Social workers, marriage and family therapists, nurse practitioners, and other medical and mental health professionals with a variety of degrees and licenses may also evaluate clients and submit forensic evaluations in asylum cases.

Note that in IC proceedings, DHS attorneys have challenged whether health professionals without doctoral degrees, e.g. M.D., Ph.D., or Psy.D., are qualified to conduct forensic evaluations and provide expert testimony.¹⁶ While attorneys should be aware of potential challenges from DHS regarding experts without advanced or doctoral degrees, as explained earlier, the FRE do not require an expert to hold any particular degree.¹⁷ Attorneys can argue that a health professional who does not have an advanced degree qualifies as an expert in other ways, for example, based on special training or years of experience.¹⁸

Finding an Expert

Many attorneys share expert referrals by word of mouth or through professional legal organizations. Organizations such as Physicians for Human Rights and HealthRight International can assist with expert referrals. Law schools with asylum or immigration clinics, medical schools with asylum or torture documentation clinics, and schools of nursing and social work may also provide names of health experts who perform forensic evaluations. CGRS maintains a non-exhaustive referrals list of asylum clinics, organizations, and individuals willing to provide pro bono

¹² [Fed. R. Evid. 702](#).

¹³ See McKenzie et al., *supra* note 4, at 139.

¹⁴ In IC proceedings, the CV should be submitted with the witness list. ICPM Ch. 3.3(g); see CGRS, Strategies for Success: Responding to Challenges to Expert Witnesses in Defensive Asylum Proceedings (December 2018) (CGRS, *Responding to Challenges*), at 5 & n.24.

¹⁵ Experts who have testified in many cases may be vulnerable to a charge of bias. Attorneys should be prepared to point out how often their experts' qualifications have been accepted in IC to argue that their experts' experience supports that they provide objective, unbiased expert opinions. For additional details on this topic, See CGRS, *Responding to Challenges*, *supra* note 14, at 19.

¹⁶ See *id.* at 17.

¹⁷ See *id.*

¹⁸ It is worth noting that in the context of *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), [2013 U.S. Dist. LEXIS 186258 \(C.D. Cal Apr. 23, 2013\)](#), DHS agreed that appropriately trained physician assistants, clinical social workers, licensed nurse practitioners, and registered nurses were qualified to diagnose immigrant detainees as having serious mental disorders and were unable to represent themselves in immigration court. Summary Class Notice, available at <https://www.justice.gov/eoir/litigation-notices> (last visited Feb. 20, 2019).

or low-cost forensics evaluations, and has recently launched a searchable database of medical, mental health, and country conditions experts.¹⁹

The Role of Health Experts in Fear-of-Return Cases

While forensic evaluations may be useful in many fear-of-return cases, they are not necessary in every case. There are instances where obtaining such evaluations is difficult or impractical. For example, it may not be possible to obtain forensic evaluations for detained clients due to detention facility restrictions on access, expedited hearing schedules, and the need to prioritize obtaining other evidence and supporting documentation.²⁰

Factors to consider in determining whether or not to obtain a forensic evaluation include the following:

- **Explore whether there are medical/mental health records from a treating health professional** that are available and reasonably obtainable by the client, or if the client is willing to sign a confidentiality waiver to allow release of records from the health provider to the attorney. These records can provide useful clinical information to substantiate the severity of the impact of events described by the applicant. That said, adjudicators and opposing counsel may view information from treating physicians as less objective. Additionally, treating health professionals may see their role as advocating for the client in a legal matter in the interest of advancing the client's wellbeing, which could also affect the perceived objectivity of the treating professionals' observations.

If any such records are obtained, attorneys should carefully review them to assess whether they would be suitable as corroborating evidence. Medical records can be useful for review by a health professional who is performing an independent forensic evaluation. If it is not possible to arrange a forensic evaluation of the client, medical records from the personal caregiver can be helpful, but may contain irrelevant or harmful details which could unnecessarily complicate or undermine the case, and may not be the best evidence to submit. For example, consider a situation where a physician's notes indicate the client reported a particular scar resulted because she burned herself with hot water, but the client's declaration states her husband threw hot water and burned her. Submitting the physician's notes as evidence could potentially raise credibility concerns. In this case, attorneys ought to explore whether there is a reasonable explanation for the discrepancy. If an independent exam cannot be performed, the attorney will need to try to decide whether medical records will support the client's account of injury and persecution.

- **Consider whether there is a sufficiently comprehensive universal declaration or scholarly article** on the specific topic that would be suitable as corroborating evidence. For example, universal declarations²¹ developed for submission in multiple fear-of-return cases and scholarly articles that attest to the impact of trauma on memory can be helpful, though their usefulness may be limited by the fact that they do not assess and discuss the symptoms of a particular client's case. Such resources also may not address all of the issues relevant to a particular case.
- **Consider whether obtaining an expert evaluation is reasonable and feasible in light of time and resource constraints.** Identify any challenges to obtaining an expert evaluation such as limited access to the client and compressed timelines, particularly for detained clients. Determine whether any filing deadlines, interview or hearing dates, expert availability, and lack of financial resources would make hiring an expert impractical. Forensic evaluations can be helpful evidence, but attorneys should be aware that working with an expert can be time-intensive for all involved. Attorneys will need to determine whether the time spent obtaining expert evidence is practical in a particular case.

¹⁹ Access CGRS's Expert Witness Database at: <https://cgrs.uchastings.edu/expert/search>.

²⁰ See CGRS, *Responding to Challenges*, *supra* note 14, at 4.

²¹ Universal declarations on various country-and-issue-specific topics are available through CGRS's technical assistance program at: <https://cgrs.uchastings.edu/assistance/request>.

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- **Determine whether there are any key legal elements (discussed below) that could benefit from additional corroboration from a health expert.** To make this determination, attorneys will want to explore the following with the client:
 - Has the client experienced any physical or psychological harm?
 - If the client has experienced physical harm, are there scars or functional impairments from the harm?
 - Does the client have any existing physical or mental health issues? If yes to either, has the client seen a health provider about these issues?
 - If client has seen a health provider, what was the diagnosis? What kind of treatment was provided?
 - From the attorney's observations and the client's self-assessment, could the client's demeanor (e.g. poor eye contact), affect (the outward expression of one's mood, which may be more restricted or exaggerated than what an adjudicator would expect), or inability to testify consistently (due to lapses in memory) potentially benefit from contextualization by a health professional?

Key Legal Elements that May Benefit from Health Experts' Evaluations

Depending on the individualized facts of each case, an expert evaluation may assist in corroborating certain legal elements of a fear-of-return claim. While not exhaustive, below are some areas in fear-of-return claims in which health expertise is particularly useful.

Documenting persecution or torture. Health experts may be able to corroborate the existence or probability that physical and psychological harm is related to persecution or torture suffered by the client. For example, by documenting physical or psychological trauma, an expert may be able to substantiate that past harm rises to the level of persecution, even where that past harm may not appear severe to an untrained observer. An expert might also be able to suggest a recommended course of treatment and explain the consequences of not being treated, e.g. if the individual were returned to the home country.

From a medical expert's perspective, attorneys should keep in mind that injury/torture often does not result in physical scars. Therefore, the absence of scars does not always indicate the absence of physical injury/assault/torture. Some individuals who have experienced physical attacks and do not have scars would still benefit from a forensic physical examination due to "functional impairments" which can be documented in a physical examination but are not scars. For example, if individuals were tortured in a forced position (e.g., suspension torture) they might have shoulder rotator cuff injuries that a physical examination can document, even if they do not have actual scars on the skin. Attorneys should ask about injuries or functional impairments and refer to a health expert for assessment.

Documenting past harm may be useful for humanitarian asylum claims which arise where a client "has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution"²² *or* "has established that there is a reasonable possibility" of "suffer[ing] other serious harm upon removal to that country."²³ Although asylum, withholding of removal, and CAT generally all require proof of a likelihood of future harm, asylum is the one remedy that can be granted on the basis of past harm alone, where the past persecution was severe and "atrocious."²⁴ This can be especially important in cases where it may be impossible to show risk of future persecution because of changed circumstances, e.g. persecutor is deceased or the client may have become victimized as a child because of her age, but is no longer a child. Documentation of ongoing medical/psychological consequences of past persecution could also help explain why someone with severe

²² [8 C.F.R. § 1208.13\(b\)\(1\)\(iii\)\(A\)](#).

²³ [8 C.F.R. § 1208.13\(b\)\(1\)\(iii\)\(B\)](#).

²⁴ [Matter of Chen, 20 I. & N. Dec. 16](#) (B.I.A. 1989).

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past trauma would be re-traumatized and therefore subjected to “other serious harm” if returned to their country of origin.

Addressing potential credibility issues. Under U.S. law, an adjudicator may consider various factors in determining an asylum-seeker’s credibility.²⁵ Many of these factors are inherently problematic because suffering persecution or torture can greatly impact memory and ability to articulate past experiences.²⁶ An expert can link memory problems to disorders or trauma and can address particular concerns specific to children, or vulnerable clients with competency issues or developmental disabilities. Attorneys should remember that adjudicators make credibility determinations by “[c]onsidering the totality of the circumstances and in light of all relevant factors.”²⁷ Accordingly, attorneys should consider whether an expert could provide helpful context for problematic demeanor like emotionally detached testimony, or help explain how health, developmental stage or cognitive ability could impact the ability to testify consistently or coherently.

Overcoming the one-year filing deadline. U.S. law requires that individuals file for asylum within one year of their last arrival in the United States.²⁸ However, the one-year filing deadline may be excused if the client can demonstrate changed or extraordinary circumstances preventing timely filing.²⁹ Documentation of medical or psychological conditions, such as post-traumatic stress disorder (PTSD), may help establish extraordinary circumstances such that the individual should be excused from the one-year filing deadline.³⁰ The medical or psychological condition must be the cause of the failure to timely file, and the application must be filed within a “reasonable period” given the circumstances.³¹ An expert evaluation may provide critical evidence to explain both the condition constituting extraordinary circumstances and whether the application was filed within a reasonable period.

Adjudicators sometimes have the misconception that if individuals are able to function upon arrival (e.g. work, go to school, care for one’s children), they should have been able to file for asylum. An expert evaluation could explain, for example, why it would be reasonable for individuals to perform day-to-day tasks despite suffering past trauma while their inability to confront any reminders of the traumatic event(s) could simultaneously prevent them from seeking out an attorney and pursuing a claim for asylum within a year of their arrival in the United States.

A health expert could also address how a child’s developmental stage or a physical or mental disability might contribute to extraordinary circumstances excusing a delay in filing.

Explaining how developmental stage, disability, or trauma impacts decision-making to mitigate or overcome criminal bars to relief or negative discretionary factors. Mental health experts may be able to assist in overcoming bars to eligibility due to juvenile delinquency or criminal convictions by documenting and explaining how the client’s developmental stage, disability, or the impact of trauma or compound trauma, may have resulted in the commission of acts that could be construed as negative (e.g. arrests, criminal activities, substance abuse, juvenile delinquency issues). Mental health experts also may help explain whether an individual was acting under

²⁵ [INA § 208\(b\)\(iii\)](#); [8 U.S.C. § 1158\(b\)\(iii\)](#).

²⁶ See, e.g., Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, [56 Santa Clara L. Rev. 457, 484 \(2016\)](#) (“[Trauma] will certainly impact a survivor’s demeanor and memory, but it may also introduce a large degree of uncertain[t]y, even with regard to the central details of the survivor’s story.”).

²⁷ [INA § 208\(b\)\(iii\)](#); [8 U.S.C. § 1158\(b\)\(iii\)](#).

²⁸ [INA § 208\(a\)\(2\)\(B\)](#); [8 U.S.C. § 1158\(a\)\(2\)\(b\)](#); [8 C.F.R. § 208.4\(a\)\(2\)](#).

²⁹ [INA § 208\(a\)\(2\)\(D\)](#); [8 U.S.C. § 1158\(a\)\(2\)\(d\)](#); [8 C.F.R. § 208.4\(a\)\(4\)-\(5\)](#).

³⁰ [8 C.F.R. § 208.4\(a\)\(5\)\(i\)](#) (identifying “[s]erious illness or mental or physical disability, including any effects of persecution” as circumstances which may excuse a late-filed application).

³¹ [8 C.F.R. § 208.4\(a\)\(5\)](#).

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duress or coercion, so that attorneys can use the evaluation to argue that certain defenses to a given bar should apply, or that mitigating circumstances should be considered, e.g. acting under duress, coercion, or in self-defense.

Even if an act such as a criminal conviction does not outright bar eligibility for asylum, clients who meet the legal requirements for asylum may still be denied in the exercise of discretion,³² which involves a balancing of positive and negative factors. Humanitarian factors, such as age, health, and family, should be considered, but the “[d]anger of persecution should outweigh all but the most egregious adverse factors.”³³ A mental health expert may assist by providing context for the client’s behavior in participating willingly or unwillingly in acts that may be construed as negative. An expert’s evaluation may also serve to objectively identify and document remorse and rehabilitation expressed by the client to mitigate negative discretionary factors.

Presenting Medical and Mental Health Expertise

Attorney and expert collaboration. When referring a client to a health professional for a forensic evaluation, attorneys should first explain the scope and focus of the evaluation and determine if the health professional has the necessary expertise to competently evaluate the client. Prior to retaining an expert, attorneys should communicate whether telephonic or in-person testimony will be expected (and time needed for testimony preparation), outline the overall timeline for the process (including relevant filing, interview, and hearing dates; and setting due dates for reviewing, editing, and finalizing the expert’s evaluation) and discuss compensation. Discussing at the outset expectations around the frequency and method (email, fax, in-person, or telephone) of attorney-expert communication helps foster a productive working relationship. Memorializing these expectations in a retainer agreement will ensure both attorney and expert are on the same page.

Best practices in collaboration while developing the expert’s written evaluation. Individual attorneys and experts have varying practices and preferences concerning the feedback and revision process as the expert develops the written evaluation, including the format and extent of any attorney input. Most health experts request a copy of the client’s declaration before the evaluation. Reviewing the client’s declaration allows health experts to understand any persecution experienced by the asylum seeker and allow them to frame some of their queries. Health experts are expected to conduct their own independent evaluation, but may use the client’s declaration for reference before, during, and after the appointment.

From the legal perspective, attorneys will want to review the expert’s evaluation before its completion to ensure it is consistent with other evidence (discussed below), and does not otherwise complicate the client’s legal case.

Content of an expert evaluation. An expert’s forensic evaluation should be objective and neutral in tone, using words that are factual, non-judgmental, and non-emotional. It should be presented in an organized fashion using vocabulary that someone outside of the health profession would understand, and define any specialized terms that must be used. Diagrams and photos may be included if appropriate and if the client consents. The evaluation should explain the diagnostic tools and/or examination methods used. To highlight the objective nature of the expert’s conclusions, reference to an externally validated schema can also be useful.

In the medical context, evaluations should use terminology from the Istanbul Protocol (IP). Mental health evaluations will often include diagnoses as categorized in the Diagnostic and Statistical Manual (DSM-V)³⁴ published by the American Psychiatric Association. This research-based volume is widely recognized by clinicians, researchers and third-party payers as the definitive listing of diagnosable psychiatric conditions.³⁵

³² *INA 242(b)(4)(D); 8 U.S.C. § 1252(b)(4)(D)*.

³³ *Matter of Pula, 19 I. & N. Dec. 467* (B.I.A. 1987).

³⁴ American Psychiatric Association (2013). *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.)

³⁵ Reprinted by permission from Springer Nature. See McKenzie et al., *supra* note 4 at 141.

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Consistency with other record evidence. Attorneys should avoid creating a factual record that conflicts with the client's testimony or any other evidence. Discrepancies between different pieces of evidence can lead to credibility concerns which may be difficult to overcome. Moreover, clients will generally be testifying on their own behalf, sometimes months or years after the expert's evaluation has been completed and years after a traumatic event occurred. Even discrepancies reasonably attributable to the limitations of human memory could have serious consequences for the client's case.

In light of potential credibility concerns, it is critical that attorneys review the forensic evaluation to ensure the facts included are indeed relevant to the expert's findings and do not conflict with the client's testimony and other evidence submitted in the case. It is also preferable for the evaluator to include only clinically relevant factual information, and to use approximate time frames ("about" or "around") and general numerical references ("several" or "a few"). Experts may be amenable to suggestions from attorneys about minor changes in content that are unrelated to the clinical findings and that could adversely predispose an adjudicator against the client. For example, a statement about the client working at night and sleeping during the day to avoid comparatively worse nightmares overnight could be edited to omit the detail about working if the client does not have work authorization, without changing the clinical report about the timing of sleep or the temporal variation in the severity of the nightmares.

Written evaluation red flags. Below is a non-exhaustive list of "red flag" contents which should be generally avoided in an expert's evaluation.

- Avoid an overly lengthy, detailed factual section.
- Minimize irrelevant/extraneous information and focus on clinical findings/expert opinion.
- Don't use judgmental language, e.g. "unfortunately," "very convincing," "naturally."
- Refrain from drawing conclusions outside of expert's expertise, e.g. "Ms. X would not be able to get treatment for [health condition] in Z country."
- Don't make legal conclusions or arguments, e.g. "Ms. X deserves asylum," "Ms. X is credible," "Ms. X has a well-founded fear of persecution, etc."

Sample outline. Below is a sample outline of information that forensic evaluations typically include:

I. Introduction and Expert Credentials

- a. Current position
- b. Education and training
- c. Relevant experience, including specific training, with asylum seekers/torture/trauma survivors

II. Evaluation Overview

- a. Explains basis for evaluation: referral information, individual's biographical information, date, location, duration of evaluation, language, materials reviewed prior to evaluation

III. Brief overview of relevant medical, trauma history

IV. Description of methods of assessment and physical and mental symptoms

- a. Expert's clinical/professional observations/conclusions

V. Assessment

- a. Links observations/conclusions to the facts of the individual's experience, e.g., client may have witnessed the killing of close family members, and may report, among other symptoms, re-experiencing the trauma by recurrent dreams, and intrusive images of the event. The evaluation may reference the fact that such symptoms, which are associated with PTSD, are consistent with the facts recounted by the client.

VI. Summary and recommendations for further assessment, treatment, and care, as appropriate

Best Practices: Expert Testimony in Immigration Court³⁶

While attorneys generally should be prepared to present the testimony of any expert who submits an evaluation in support of an asylum seeker's case, expert witnesses will not always testify in IC; their written evaluation alone may be sufficient. If a strategic decision is made to have an expert testify either telephonically or in court, preparation by both the attorney and expert is key. The attorney will want to draft questions to elicit the expert's qualifications and substantive opinions, as well as anticipate what challenges DHS may raise. Conducting a mock-examination with the expert prior to the IC hearing will enable attorneys to ensure they are able to elicit helpful testimony, and address any concerns the expert may have about testifying.

Tips to Help Prepare Experts to Testify in Immigration Court

- Review and be familiar with your CV.
- Review and be familiar with your evaluation.
- Only answer the question asked.
- Be succinct: yes or no answers are perfectly fine.
- Do not guess, exaggerate, or provide answers outside area of expertise.
- Use neutral, non-judgmental language in answers.
- Remain calm, even if pressed (by the IJ or the DHS attorney) on qualifications, skills, or bases for expert opinions.
- Pause before responding to reflect on the most accurate answer.
- During the DHS attorney's cross-examination, pause to allow time for the respondent's attorney to object before you answer.

Conclusion

Expert medical or mental health testimony can be critical in asylum and related fear-of-return claims. An objective health expert can contribute powerful, tailored evidence for a client's case and increase the likelihood that protection will be granted.³⁷ It is the authors' hope that by explaining our perspectives and roles in this article, we can strengthen the collaboration between attorneys and experts to achieve protection for those who have been forcibly displaced.

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³⁶ For a more detailed exploration of defending expert witnesses in IC, see CGRS, *Responding to Challenges*, *supra* note 14.

³⁷ Stuart L. Lustig, Sarah Kureshi, Kevin L. Delucchi, Vincent Iacopino & Samantha C. Morse, *Asylum Grant Rates Following Medical Evaluations of Maltreatment among Political Asylum Applicants in the United States*, 10 J. Immigr. & Minor. Health 7 (Feb. 2008).