Practical Considerations for the Pro Bono Asylum Practitioner

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Presentation Overview

• Ethical Obligations and Duties to Clients
  – Framework for Pro Bono Representation

• Legal Defenses and Forms of Relief
  – Unique Standards and Client Benefits for Each Form of Relief

• Mechanics of an Asylum Project
  – Engagement and Case Assessment
  – The Application Process
  – Immigration Court Proceedings
  – The Appeal Process

• General Observations
Ethical Obligations and Duties to Clients

• Pro Bono Attorneys Must Comply With:
  – Texas Disciplinary Rules of Professional Conduct
  – ABA Model Rules of Professional Conduct

• Ethical Obligations and Duties to Clients Include:
  – Duty of Loyalty
  – Duty of Confidentiality
  – Duty of Disclosure
  – Duty to the Rule of Law
  – Ethical Obligations to the Tribunal

• Pro Bono Clients are Entitled to the Same Level of Professionalism as Paying Clients.
Legal Defenses and Forms of Relief

- Asylum
- Withholding of Removal
- Convention Against Torture
- Additional Relevant Forms of Relief:
  - Voluntary Departure
  - Temporary Protected Status (TPS)
  - Special Immigrant Juvenile Status (SIJS)
  - T-Visa (Victims of Human Trafficking)
  - U-Visa (Crime Victims)
  - Violence Against Women Act
Legal Defenses and Forms of Relief

• Application for Asylum
  – Must Establish Past Persecution or a “Well-Founded Fear” of Future Persecution on Basis of Protected Grounds
    • Race, Religion, Nationality, Political Opinion, or Membership in a Particular Social Group
  – Must Submit a Form I-589
    • Procedural Differences Between Affirmative and Defensive Applications
  – Significant Benefits for Asylum Recipients
    • May Secure Derivative Asylum for Spouse and Minor Children
    • May Remain in the United States Indefinitely or Seek Citizenship
    • May Apply for Social Security Number / Driver License
    • Authorized to Work and Receive Government Benefits
Legal Defenses and Forms of Relief

• Withholding of Removal
  – Must Establish Clear Probability of Persecution by the Government or a Group the Government Cannot Control on Basis of One or More Protected Grounds
    • Difficult Burden to Meet
    • Generally Sought When the Applicant is Not Eligible for Asylum
  – Must Submit a Form I-589
    • Application Adjudicated by Immigration Court
  – Limited Benefits for Recipients
    • Authorized to Work
    • No Derivative Asylum for Family Members
    • Does Not Lead to Lawful Permanent Residence or Citizenship
    • Recipient Must Remain in the United States to Retain Status
Legal Defenses and Forms of Relief

Convention Against Torture (CAT)

- Prohibits the Return of a Person to a Country Where Substantial Grounds Exist for Believing the Person Would be Subjected to Torture
  - No Bars to Eligibility (e.g., Aggravated Felons Eligible)
  - Not Required to Establish Fear of Torture on Basis of Protected Groups

- Must Submit a Form I-589
  - CAT Protection May be Sought after Final Removal Order Issued

- Limited Benefits for Recipients
  - Authorized to Work
  - No Derivative Asylum for Family Members
  - Does Not Lead to Lawful Permanent Residence or Citizenship
  - Recipient Must Remain in the United States to Retain Status
  - May Be Sent to Another Country Where Torture Not Feared
Legal Defenses and Forms of Relief

• Voluntary Departure
  - Permits an Individual to Voluntarily Leave the United States
    • Departure at Applicant’s Expense
    • Significant Penalties if Applicant Fails to Depart (e.g., $5000 Fine, Automatic Removal, and Bar to Future Immigration Benefits)
  - Must Be Requested (a) Prior to Master Hearing or (b) at Conclusion of Merits Hearing as Alternative to Removal Order
    • Discretionary Form of Relief
    • Eligibility Requirements and Benefits May Depend on Timing of Request
  - Preferable Alternative to a Final Removal Order
    • Not Barred from Legally Reentering the United States (10 Year Bar on Reentry via Removal Order)
    • Ethical Consideration: Advocacy Groups and Client Goals
• Temporary Protected Status (TPS)
  – Available to Persons Whose Home Country is Designated as Being Unable to Handle the Return of their Nationals
    • Ongoing Armed Conflicts, Environmental, Natural, or Health Disasters, or Other Extraordinary and Temporary Conditions
    • TPS Designations are Temporary (6-18 Months)
  – Must Submit a Form I-821 (TPS) and Form I-765 (Work Authorization)
    • Must Submit Form I-765 Regardless if Work Authorization is Sought
    • May Need to Submit a Form I-601 for Inadmissibility Waiver
    • May Apply for TPS and other Forms of Relief
  – Temporary Benefits for Recipient
    • May Remain / Work in United States as Long as Country Remains Listed
Legal Defenses and Forms of Relief

- **Special Immigrant Juvenile Status (SIJS)**
  - Protects Undocumented Minors Subjected to Abuse, Neglect, or Abandonment from Return to Home Country
    - Must be Under 21 / Unmarried
    - Must be Declared a Dependent of a State Court / Agency and “Eligible for Long-Term Foster Care”
    - Caution: Must Secure Dependency Order Before Applicant Turns 18
  - Must Qualify for Adjustment of Status
    - Caution: Be Aware of Eligibility Bars (e.g., Drug Addiction, HIV Positive, Criminal History) and Waivers
    - Must Submit a Form I-360 (SIJS Petition)
      - May Also Need to Submit a Form I-485 (Adjustment of Status), Form I-601 (Inadmissibility Waiver), and Form I-765 (Work Authorization)
Legal Defenses and Forms of Relief

• **Special Immigrant Juvenile Status (SIJS)**
  
  – **Must Interact with Immigration and State Courts**
    • Account for Time Necessary to Secure State Court Order
    • Request Immigration Court to Stay or Terminate Removal Proceedings Pending Resolution of SIJS Petition

  – **Significant Benefits for Recipients**
    • Applicants Protected from Deportation and Authorized to Work Pending Resolution of SIJS Petition
    • May Remain in the United States Indefinitely and Apply for Citizenship
    • May Travel In and Out of the United States without Change in Status
    • May Receive Government Benefits (e.g., Financial Aid for College)

– **Ethical Considerations**
  • Representing Minors
  • Advocacy Groups and Legal Representation
  • Confidentiality and Privilege
• T-Visa (Victims of Human Trafficking)
  – Protects Victims of a “Severe Form of Trafficking” Who Would Suffer Extreme Hardship if Returned to Their Home Country
    • Includes Sex Trafficking Victims and Individuals Transported for Labor Services, Involuntary Servitude, or Slavery through Coercion or Fraud
    • Victim Must be in the United States “On Account of Trafficking”
    • Annual Limit on T-Visas (5000)
  – Must Submit a Form I-914
    • Application Evaluated by USCIS / Immigration Court Has No Jurisdiction
  – Significant Benefits for Recipients
    • May Remain in United States for Three Years then Seek Residency
    • May Secure Derivative T-Visa for Family Members
    • Housed in Support Facilities / Not Correctional Facilities
    • Authorized to Work and Receive Government Benefits (e.g., Medical Care)
Legal Defenses and Forms of Relief

• U-Visa (Crime Victims)
  – Protects Crime Victims who Suffered Abuse and Will Assist Law Enforcement Officials in the Criminal Investigation
    • Must Have Been a Victim and Have Knowledge to Aid Investigation
    • Crime Must Occur in the United States or Violate United States Law
    • Annual Limit on U-Visas (10000)
  – Must Submit a Form I-918
    • Application Evaluated by USCIS / Immigration Court Has No Jurisdiction
    • Must be Certified by Law Enforcement Agency / Certification No Guarantee of Successful Application
  – Significant Benefits for Recipients
    • May Remain in United States and Seek Residency
    • May Secure Derivative U-Visa for Family Members
    • Authorized to Work and Receive Government Benefits
  – Ethical Consideration
    • Scope of Engagement
Legal Defenses and Forms of Relief

• Violence Against Women Act
  – Permits Battered Spouses, Children, or Parents to File Petition for Themselves without Knowledge of Abuser
    • Eligibility Requirements Depend on Petitioner Classification
  – Must Submit a Form I-360
    • Must Provide Evidence Establishing (a) Abuse and (b) Qualifying Relationship to the Abuser
    • Must be Submitted to USCIS Within Two Years of Last Incident of Abuse
  – Significant Benefits for Recipients
    • May Remain Seek Residency *Independent of Abuser*
    • May Secure Derivative Status for Family Members
    • Authorized to Work and Receive Government Benefits
  – Ethical Consideration
    • Confidentiality / Privilege Considerations During Fact-Finding Efforts
Mechanics of an Asylum Project

- Mechanics of an Asylum Project
  - Engagement and Case Assessment
  - The Application Process
    - Affirmative
    - Defensive
  - Immigration Court Proceedings
    - The Master Hearing
    - Trial Preparation
    - The Individual Hearing
  - The Appeal Process
Engagement and Case Assessment

- **Review the Intake Assessment Form**
  - Pay Careful Attention to: (a) Removal Status (b) Client Age (c) Entry Date (d) Hearing Dates (e) Language Proficiency (f) Client Address (g) Forms of Relief and Removal Defenses and (h) Status of Government Record Requests.

- **Conduct Conflicts Check and Prepare Engagement Documents**
  - Government Materials: Form G-28 (Notice of Entry for DHS), Form EIOR-28 (Notice of Appearance for Immigration Court), and Form EIOR-33 (Notice of Change of Address for Client)

- **Schedule Client Meeting**
  - Schedule with Client or, if Applicable, Advocacy Group (e.g., Catholic Charities). Advocacy Group Representative May be Present at Initial Meeting
  - Conduct Basic Research on Country Conditions as Related to Client Before Initial Meeting
Engagement and Case Assessment

• Client Meeting
  – Need to Establish Rapport (Sensitivity and Understanding)
  – Explain Confidentiality of Discussions and Your Role as the Attorney
  – Explain the Asylum Process and Timeline to Manage Expectations
  – Allow the Client to Tell His Story Without Significant Interruption
    • You Will Have Other Opportunities to Focus on the Factual Details
  – Make Sure You Have Correct Address and Contact Information
  – Have the Client Sign the Engagement Letter and Forms
    • Make Sure to Provide Client Copies
  – Set Date for Next Meeting and Provide Client with Contact Information

• Ethical Considerations
  – Client Meeting is an Excellent Opportunity to Identify and Avoid Problems with the Client and Your Relationship with the Client
The Application Process

• Factual Investigation and Case Development
  – Meet with the Client and Identify Problem Areas in the Application
  – Identify Evidentiary Gaps and Compile Material to Strengthen the Application
  – Plan Ahead to Allow Time to Gather Foreign Documents
    • Make Use of Firm Resources and Experience (e.g., Locating Physician to Conduct Medical Examination)
  – Expect Multiple Meetings with Client

• Application Preparation and Submission
  – Pay Attention to Filing Deadlines / Requirements
  – Review the Application with Client to Confirm Accuracy
    • Client Credibility Judged Against Application and Exhibits
  – Must Not Ignore Inconvenient or Troublesome Facts
  – Affirmative and Defensive Asylum Application Procedures Differ

• Ethical Consideration
  – Ethical Obligation of Candor
The Application Process

- Affirmative Asylum Application
  - Submit I-589 Application to USCIS
    - Date Submitted to Agency Governs Whether or Not Application Received within One-Year Deadline – Inflexible Cutoff Threshold
  - Biometric Appointment Scheduled by USCIS (Fingerprints)
    - Information Sent to FBI / CIA for Background Check
  - Client Interviewed by Asylum Officer (AO) with USCIS
    - Must Provide Own Interpreter
    - Questioned to Establish Credibility / Basis for Asylum
    - Ethical Obligations of Candor Apply
  - AO Will Make Determination on Eligibility
    - If Eligibility Denied, Client Referred to Immigration Court to Determine Whether or Not Initiate Removal Proceedings
      - AO Does Not Order or Recommend Removal
The Application Process

• Defensive Asylum Application
  – Submit I-589 Application to Immigration Court
    • Defensive Process Occurs When Client Requests Asylum as a Defense to Removal (e.g., Client Caught by DHS Illegally in the United States)
    • No USCIS / AO Interview
  – Immigration Court Hears Defensive Applications in Adversarial Hearings
    • Government Represented by Attorney from ICE
    • Court Determines Whether the Client is Eligible for Asylum
    • Court Provides Interpreter upon Request
    • Ethical Obligations of Candor Apply
  – Immigration Judge Ruling May Be Appealed by Either Party
    • Appeals Sent to Board of Immigration Appeals / Federal Court of Appeals
    • VE Attorneys Have Briefed / Argued at the Appellate Court Level
• Immigration Court Procedures the Same for Affirmative and Defensive Applicants
  – Consult the Immigration Practice Manual
  – Evaluate Whether Forms of Relief Necessitate Action (e.g., Motion for Continuance / Termination as Part of SIJS Petition)

• Preparation Will Require Considerable Time and Effort
  – Account for Project Time Demands in Your Firm Workload
  – Assess the Need to Supplement the Application and Exhibits
  – Make Sure Client is Aware of Appearance Dates - Failure to Appear May Lead to the Immigration Court Ordering Immediate Removal
    • If Transportation Arrangements Need to be Made, Make Them in Advance
• Master Hearing is a Calendar Hearing / Merits Not Addressed

• Immigration Judge Will Ask Client / Counsel a Series of Questions:
  – **Biographical Data**: Confirm Accuracy and Submit Form EIOR-33 (Change of Address) if Necessary
  – **Client Language**: Allows Immigration Court to Locate Translator for Individual Merits Hearing
  – **Designate Country of Removal**: Client Should Decline to Designate a Removal Country - Country of Origin Will Be Entered as Default
  – **Pleading to Allegations**: In a Defensive Application, Client Asked to Enter Plea - Review Allegations and Admit / Deny as Appropriate
  – **Forms of Relief**: Notify the Immigration Court of Alternative Defenses / Relief (e.g., T-Visa or SIJS Petition) and Address Scheduling Issues
  – **Filing / Hearing Dates**: Immigration Court Will Set Filing and Hearing Dates. Make Careful Note and Advise the Immigration Judge of Scheduling Issues if Applicable
The Master Hearing

• Address Administrative Issues with the Immigration Court
  – Notify Immigration Court that Representation is Pro Bono
  – Submit Form EIOR-28 (Notice of Appearance for Immigration Court) and Form EIOR-33 (Notice of Change of Address for Client)
    • Take Copies for the Government Attorney
  – Do Not Be Afraid to Request Additional Time for Filing or Hearing Preparation

• Secure Contact Information for the Government Attorney
  – Recognize the Assigned Attorney May Change

• Meet with Client Prior to the Master Hearing
  – Remember the Client is Unfamiliar with the Process
  – Explain the Purpose of the Hearing, Explain What the Client Must Do, and What the Client Should Expect

• Master Hearing May Take 15-30 Minutes
  – Prepare to Wait Longer for the Client Name to Appear on the Docket
• Use Time Effectively to Prepare Client
  – *A Sympathetic Story is Not Enough — Must Meet the Legal Standard*

• Expect Multiple Meetings with Client
  – Familiarize Client with Types of Questions Expected from the Government
    • Use Attorneys Unfamiliar to Client to Play Role of Government Attorney
    • Use Different Approaches in the Mock Questioning (e.g., Aggressive or Deceptively Pleasant Questioning Styles)
  – Review Application and Exhibit Material Critically
  – Remember the Government Attorney Primary Goal is to *Undermine the Credibility of the Client*

• Meet with Experts and Testifying Witnesses
  – Conduct a Similar Preparation Session
  – Be Considerate of Schedules and Make Sure the Hearing Date is Clearly Communicated
Trial Preparation

• Consult the Immigration Court Practice Manual
  – Confirm Exhibits Conform with Rules
  – Determine if Any Motions Must be Filed Prior to the Individual Hearing (e.g., Motion to Permit Telephonic Testimony)

• Review Record to Assess Whether Any Action Must be Taken to Validate the Materials Provided to the Immigration Court
  – Ensure Foreign Documents are Authenticated and Translated
  – Ensure Affidavits Satisfy Immigration Court Requirements

• Ethical Considerations
  – Obligations of Candor with the Tribunal Apply
    • Attorneys Must be Focused on Ensuring False Testimony or Evidence is Not Presented to the Immigration Court
  – Advocate for Your Client
    • Hold Government Attorney to Applicable Rules
The Individual Hearing

• The Immigration Court Will Render a Decision on the Eligibility of the Client for Asylum

• Client Should Expect Extensive Questioning from the Immigration Judge as well as the Government Attorney
  – Immigration Judge Will Repeatedly Interrupt the Flow of Direct and Cross-Examination to Ask Questions
  – Must Prepare Client for Judicial Questioning to Avoid the Client Being Rattled

• Government Attorney Likely Will Not Call Witnesses
  – Government Will Focus on Identifying Inconsistencies

• Key Point for Immigration Court: Is the Client Credible?
  – If the Immigration Court Does Not Believe the Client, the Case May Be Over Before It Begins
The Individual Hearing

• Opening Statements Not Allowed / Closing Statements Allowed
  – Closing Statements Are A Valuable Opportunity to Frame the Issues / Facts
  – Be Prepared to Adjust Closing Statements to Address Issues Raised in the Hearing

• Direct and Cross-Examination in Immigration Court Operates Like Federal / State Court
  – Be Prepared to Deal with Objections and Ensure Questioning Does Not Invite Government Objections
  – Objections Generally Sustained

• Immigration Judge Generally Renders an Oral Decision at the Conclusion of the Hearing
  – Immigration Judge May Conclude the Hearing and Set Date for Parties toAppear to Receive the Decision
  – Immigration Judge May Grant Asylum on Discretionary Basis if the Legal Threshold Not Met
The Appeal Process

• Both Parties May Appeal the Decision of the Immigration Court

• Appeal Sent to the Board of Immigration Appeals (BIA)
  – Appeal Must be Filed Within 30 Days of the Decision Must Submit a Form EIOR-26 (Notice of Appeal)
    • No Leeway in the 30-Day Deadline for Appeal
  – Removal Order Automatically Stayed on Filing of the Appeal
  – BIA Will Send a Transcript and Briefing Schedule to the Appellant after the Notice of Appeal is Filed
    • Briefing Schedule Permits 21-Days for the Filing of Brief / Appellant May Request an Additional 21-Days
    • DHS May, But Does Not Generally Submit an Opposition Brief

• Applicant May Petition a Federal Court of Appeals to Review the BIA Decision
General Observations

• Pro Bono Engagements Frequently Present Ethical Questions and Considerations
  – Sensitive Facts
  – Obligations of Candor to the Federal Agencies and Immigration Court
  – Representation of Unaccompanied Minors
  – Language / Cultural Considerations
  – Who is the Client?

• Important Reminders
  – Pro Bono Clients are Entitled to the Same Level of Professionalism as Paying Clients (e.g., Priority, Quality of Work, Responsiveness, Prudent Use of Firm Resources)
  – Suggestions for Meeting Client Expectations Along with Other Work Matters
General Observations

• Why Should We Work on these Cases?
  – Develop Legal Skills in Managing Client Relationships, Case Strategy, Motions Practice, Legal Writing, and Oral Advocacy
  
  – Gain “First Chair” Trial Experience with Life-Changing Implications for the Client
    • “… suffering so severe, so extreme …”
  
  – National Statistics Paint a Grim Picture for Clients without Representation
    • Denial Rate of Asylum Applications w/o Representation: 93%
    • Denial Rate of Asylum Applications w/ Representation: 64%
  
  – “You mean the world to us. Our lives have changed for the better. Thank you again!”
For further information regarding pro bono asylum issues, please contact Vinson & Elkins attorneys Ted Bosquez (tbosquez@velaw.com) or Taylor Pullins (tpullins@velaw.com).