

Robert S. Meyers

Conducting Psychological Assessments for U.S. Immigration Cases



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*The book is dedicated to my Family:
My wife—Susan (third generation U.S.
citizen)
My children—David, Daniel, Jonathan, and
Jeremy (seventh generation U.S. citizens)
My Parents:
Allan and Adrienne (thanks, Dad, for
reading each chapter and sending your
helpful comments!)
In loving Memory of my Grandparents:
Esther and Nathan Fried
Alma and Leon Meyers (my immigrant
grandfather)*

Preface

As I sit down to write this preface, the world is engulfed in a pandemic and the flow of human life has been slowed to a trickle. Domestic travel is curbed; international travel is at a near standstill. People are “sheltering in place” around the world, and here in the United States we are working from home or are out of work altogether. Despite this overwhelming crisis, anti-immigrant sentiment continues to spew from the current federal administration and from points across the country. Ironically, as the immigrants of this nation are vilified by the President, it is the immigrant population, in large part, exposing themselves to the deadly virus, that continues to work and keep this country operating while others stay at home.

In 2012, the Deferred Action for Childhood Arrivals (DACA), a relief program for the children of immigrants brought into this country without authorization, was put into effect by the Department of Homeland Security (DHS). This program allowed these children, also known as Dreamers, to apply for a 2-year forbearance from removal and be eligible to work and apply for various federal benefits. It was later expanded to include the parents of Dreamers.

With the change of presidential administrations in 2017, the DHS, citing legal flaws in the program, repealed the program sparking litigation across the country to prevent the rescission.

Today, June 18, 2020, the U.S. Supreme Court ruled that the Department of Homeland Security’s move to rescind DACA was “arbitrary and capricious and therefore not valid.” DACA remains in effect—at least for now.

The goal of this book is not to take a political or moral stance. It is not to convince you that those who act against the laws of this nation should be allowed to freely do so. In fact, it is because of the black letter of the law that the concepts of this book can exist. Our system of laws, stemming from the U.S. Constitution, guarantees that our citizens need to be protected from undue hardship—even if that means granting permission to remain here to someone who entered this country without the proper authorization.

It is because of the existing immigration laws that this book, and the lessons it provides, is more important now than in any time in recent history. As psychologists we are in the unique position of understanding human nature, diagnosing disorders,

and making educated prognoses. These skills can play an important role in not only upholding the law but in changing the course of lives at risk of experiencing excessive hardships.

As you will read in the pages ahead, conducting psychological assessments in immigration cases falls under the realm of forensic psychology. While many may at first shiver at the thought of engaging in legal proceedings, let me assure you that conducting assessments in immigration cases is a great way to dip your toe in the jurisprudential waters. I do not know—maybe I say that because of my training and experience as both an attorney and a psychologist but I really do believe that this is an important area and one that allows psychologists to expand their practice.

Bayside, NY, USA
June 18, 2020

Robert S. Meyers

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This book would not be in existence if it were not for Sharon Panulla, Executive Editor at Springer. She struck up a conversation with me at an ABCT Convention where I was presenting a workshop on conducting assessments in immigration cases. Thank you, Sharon, for believing in this project and seeing it through to completion.

I would also like to thank Hemalatha Velarasu, Production Coordinator at Springer. She kept me on task to make sure all the technical and mechanical requirements were met in order to maintain our production schedule. Also thanks to Kala Palanisamy, Project Manager at SPi Global, for the physical production of this book.

I know there are many others behind the scenes who have made this publication possible and I thank you for all your work.

I hope that you, the reader, will not only enjoy this volume but will be able to effectively employ the skills presented between its covers.

Contents

- 1 Why Are We Here? 1**
 - 1.1 What Can Psychologists Do to Assist in an Immigration Case? . . . 3
 - Ethical Considerations 4
 - 1.2 Clinical Psychologist vs. Forensic Psychologist vs. Attorney 6
- 2 A Brief History of Immigration Law in the United States 11**
- 3 Finding Your Way Around the Immigration System 17**
 - 3.1 Evidentiary Rules 18
 - 3.2 Hurry Up and Wait! 19
 - 3.3 Legal Representation 20
 - 3.4 Inside the Courtroom 21
 - 3.5 Immigration Court Procedure 23
- 4 Admissibility 25**
 - 4.1 Health-Related Grounds 26
 - 4.2 The 3-Year or 10-Year Bar for Being Unlawfully Present in the United States 27
 - 4.3 Certain Criminal Convictions 28
 - 4.4 Crimes Involving Moral Turpitude (CIMT) 29
 - 4.5 Multiple Criminal Convictions 30
 - Violation of Any Controlled Substance Law 30
 - Drug Trafficking 30
 - Prostitution 30
 - Assertion of Immunity for a Serious Crime 31
 - Violations of Religious Freedom 31
 - Human Trafficking 31
 - Money Laundering 31
 - 4.6 Immigrant Membership in the Communist or Any Totalitarian Party 31

4.7	Immigration Fraud or Misrepresentation	32
4.8	Aliens Previously Removed and Unlawfully Present After Previous Immigration Violations	33
5	Qualifying as an Expert Witness	35
5.1	Types of Evidence	35
	Real Evidence	35
	Demonstrative Evidence	36
	Documentary Evidence	36
	Testimonial Evidence	36
5.2	Evidentiary Rules Pertaining to the Expert Witness	39
	The Frye Evidentiary Rule	39
	The Daubert Evidentiary Rule	40
	Federal Rule of Evidence 702. Testimony by Expert Witnesses . . .	41
5.3	The Effect of Evidentiary Rules on Expert Testimony	41
5.4	Experience and the Curriculum Vitae	42
6	The “Extreme Hardship” Waivers	45
6.1	Evidentiary Standards	47
	Beyond a Reasonable Doubt Standard	47
	Preponderance of Evidence Standard	48
	Clear and Convincing Standard	48
6.2	Evidentiary Standard in Immigration Cases	49
6.3	Determining Qualifying Relatives	49
6.4	Defining Extreme Hardship	51
6.5	Qualifying Relative’s Ties to Family and Community	53
6.6	Economic Impact	54
6.7	Health Conditions and Care	54
6.8	Social and Cultural Impact	55
6.9	Loss of Legal Access/Rights in the United States	56
6.10	Country Conditions	56
6.11	Existing Mental Health Issues	57
6.12	Supporting Documentation	58
6.13	What Happens If an Extreme Hardship Cannot be Found?	59
7	The “Exceptional and Extremely Unusual Hardship” Waiver	61
7.1	Legal Permanent Resident Cancellation of Removal Vs. Non-Legal Permanent Resident Cancellation of Removal Case	62
7.2	Exceptional and Extremely Unusual Hardship Vs. Extreme Hardship Cases	63
7.3	Cancellation of Removal	63
7.4	What Is “Good Moral Character”?	66
7.5	Assessing Good Moral Character	68

8	Domestic Abuse Waivers	71
8.1	Eligibility Requirements for a Spouse	75
8.2	Eligibility Requirements for a Child	76
8.3	Eligibility Requirements for a Parent	77
8.4	Domestic Violence	77
8.5	Physical Abuse	78
8.6	Sexual Abuse	78
8.7	Psychological/Emotional/Verbal Abuse	78
8.8	Economic Abuse	80
8.9	Identifying “Extreme Cruelty”	80
8.10	Intimate Partner Violence	81
8.11	Assessing the Victim of Domestic Abuse for Battery or Extreme Cruelty	84
9	Asylum, Withholding of Removal, and the Convention Against Torture	87
9.1	Affirmative Asylum Processing with USCIS	89
9.2	Defensive Asylum Processing with EOIR	89
9.3	Withholding of Removal Relief Under the INA	90
9.4	Convention Against Torture Protections	90
9.5	Withholding of Removal (Under CAT) and Deferral of Removal	92
	Withholding of Removal Under CAT	92
	Deferral of Removal	92
9.6	Conducting Forensic Psychological Assessments in These Types of Cases	92
	What’s a Forensic Psychologist to Do?	94
9.7	Conducting the Interview and Assessments	96
9.8	Persecution or a Well-Founded Fear of Persecution	97
9.9	Harm and Causation	100
9.10	Diagnosing Trauma	103
	Getting to the Truth: Poor Memory, Malingering, or Outright Lying	107
	Late Filing of Asylum Application	108
10	The Citizenship Waiver	109
10.1	Causation (Question 10)	114
11	Mitigation	117
11.1	Gathering Records	119
11.2	Forensic Psychosocial Interview of the Subject	122
11.3	Attorney Work Product Rule	122
11.4	Open-Ended and Close-Ended Questioning	123
11.5	Competency	124

11.6	What Should the Forensic Psychologist Include in an Interview with the Subject?	124
11.7	Record or Not Record? That Is the Question	125
11.8	Interview Location and License Violations	125
11.9	Interviews with Family, Friends, and Other Relevant Witnesses	125
11.10	Regret, Remorse, and Rehabilitation	126
	Adam Walsh Cases.	126
11.11	Psychological Assessment	131
11.12	Possible Assessment Tools	131
11.13	Other Immigration Matters (i.e., Cancellation of Removal, Waivers)	131
12	Report Writing and Testifying in Court	135
12.1	Cover Page	137
12.2	Preliminary Information Page	138
	Reason for Referral	138
	Referral Question	139
	Informed Consent	139
	Abstract of Findings	139
	Preliminary Statements	140
12.3	Expert Qualifications	140
12.4	Beginning of the Report	141
	Sources of Information	141
12.5	Background Information	143
	Subjects Personal/Psychosocial History	143
	Family History	143
	Psychological/Medical History	143
12.6	Allegations of ... (Extreme Hardship, Battery or Extreme Cruelty, Etc.)	143
12.7	Appearance and Behavioral Observations	144
12.8	Assessment Administration	144
12.9	Results of the Assessments	144
12.10	Supporting Research	145
12.11	Interpretation and Discussion of Findings	146
	Diagnosis	146
	Discussion	146
12.12	Conclusions and Recommendations	147
	Recommendations	147
12.13	Appendix	147

12.14 Preparing to Testify in Court 147

 Preparing for Testimony..... 148

 Qualifications as an Expert 150

 Reliability and Validity 150

 Jargon..... 152

 Manner of Presentation 152

Appendix A 155

Appendix B 163

Index..... 173

Chapter 1

Why Are We Here?



We are a nation of immigrants and the offspring of immigrants. From the theorized earliest settlers 12–15,000 years ago who traveled from Asia to the North American continent across the Bering Strait,¹ to the European settlers of the fifteenth century, to all those who landed on our shores from foreign realms, this land has taken in people searching for a better life or to escape horrendous conditions in their own homelands. Today, the United States is home to nearly 325,000,000 people.² More than 40 million people living here were not born in the United States and of those at least 11.1 million are here without official authorization.³

While every State in the Union has some unauthorized foreign aliens⁴ within its borders, almost half of this population is found in California, Texas, Florida, New York, and New Jersey.⁵ Interestingly, unauthorized immigrants, on average, live in the United States for almost 14 years.⁶ The majority of unauthorized immigrants are from Mexico but that number is declining.⁷

¹Stromberg, J. (2014). Ancient Migration Patterns to North America Are Hidden in Languages Spoken Today. <http://www.smithsonianmag.com/science-nature/ancient-migration-patterns-north-america-are-hidden-languages-spoken-today-180950053/#57s1iAAfMJDI5tz.99>

²U.S. Census (2017) https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2016_PEPANNRES&src=pt

³Passel, J.S. and Cohn, D. (2016) Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009. Pew Research Center. <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>

⁴Those entering the United States without legal status are called “aliens.” “Foreign national” is a synonym and used outside of statutes when referring to noncitizens of the United States.

⁵Pew Research Center, (2016). U.S. unauthorized immigration population estimates. <http://www.pewhispanic.org/interactives/unauthorized-immigrants>

⁶Passel, J.S. and Cohn, D. (2016), *ibid.*

⁷*Ibid.*

The number of cases appearing before the Immigration Court to remove unauthorized immigrants from the United States has been increasing⁸ and, with the renewed anti-immigrant climate currently dominating our national conversation, will no doubt continue to rise. Under the present law, many of these unauthorized immigrants will be able to successfully defend against a deportation case and be permitted to remain in the United States.

In this book, we will examine some of the defenses an unauthorized immigrant can present in an immigration proceeding and how a psychologist can play an important role in helping the judge or adjudicator make the decision whether or not to allow an unauthorized immigrant to remain in these United States. We will focus on four issues that can be raised in an immigration case: the political asylum waiver, extreme hardship waiver, domestic abuse waiver, and the citizenship waiver. These are explored because each has a different focus and looks at defenses to remain in the United States from very different perspectives.

Why, you might ask, should we work to help people who broke our laws by entering or remaining in the United States illegally when so many others have done so following the proper procedures?

It is a good and valid question.

The answer is that everyone who wants to enter our country *should* do so legally. However, our national belief and moral spirit of humanitarianism compels us to look at each case on its own merits rather than paint with a broad stroke that brushes away all we wish to not think about. Consider this:

- A foreign national enters the United States and informs the authorities that he seeks asylum because he is being persecuted due to his religion and fears he will be tortured or killed.
- A woman of foreign nationality is brought into the United States under a visitor's visa for the purpose of marriage. She is promised that after the marriage her new husband will apply for her citizenship. When she arrives, she marries and is forced to engage in slave-like activities, submit to sexual embarrassments and is physically and verbally abused. Her visa expired and she is now considered "illegal" and in danger of deportation.
- A U.S. citizen marries a foreign national who has remained in this country illegally. They have children and establish a family. After some years, the alien spouse is discovered by the authorities and taken away for a hearing with the intent of deportation.
- A legal permanent resident (LPR) seeks citizenship but is unable to take the citizenship examination because he or she has a psychological disability as a result of a head trauma that prevents her from interpreting written language.

In each of these situations, there are extenuating circumstances which makes logical sense to address in a humanistic manner. We will address each of these sce-

⁸U.S. Department of Justice (2016). Executive Office for Immigration Review. FY 2016 Statistics Yearbook.

narios as we progress through this book. As a psychologist and as an attorney who has been practicing for more than 30 years, I will be presenting you with a practical guide to this interesting area of forensic psychology, interweaving many of my own experiences to help prepare you for this, at times, difficult professional arena.

1.1 What Can Psychologists Do to Assist in an Immigration Case?

The first thing many psychologists do when they hear they may be involved in litigation is shutter the doors and put out a “Gone Fishin’!” sign.

OK, so most psychologists aren’t interested in dealing with the court system. Who can blame them? To do so exposes the individual to extreme scrutiny and possible degradation in an environment that is mostly unfriendly, even at times hostile, to psychologists.

So why bother?

For one thing, it is a great source of income. But it isn’t an easy one—at least not at first. As with any forensic endeavor, the professional, aside from being on top of their game in their own profession (and having a thick skin), must be fully familiar with the laws and procedures in the area in which they wish to participate. In this instance, it is that of the immigration courts. This is a tricky area since the laws and rules change somewhat more often than in some other areas of the law.

But it is not undoable.

The assessment report, and potentially the testimony, of a psychologist can play a decisive role in an immigration matter. Under the law, as will be described more fully below, there are circumstances that allow an undocumented immigrant to remain in the country if there is an existing “extreme hardship” or “exceptional and extremely unusual hardship” to the individual filing the application on behalf of the immigrant. In order to do this effectively, the clinical psychologist must be able to separate him- or herself from their traditional training and experience because, unlike the typical psychological assessments and evaluations we are accustomed to performing, immigration evaluations do not necessarily focus on mental health issues. These evaluations are psychosocial in nature and require a different analysis than the standard psychological assessment.

What can a psychologist report if there is no clinical finding of a mental health issue? Psychologists are uniquely trained to understand people. A psychosocial evaluation takes a look at the whole person and can provide the immigration court adjudicator with an understanding of the individual whose fate they are deciding. While constructing an empathetic description of the individual to put forward to the court, it also weaves together various aspects of the applicant’s life to provide a psychosocial understanding of the applicant’s issues and presents to the adjudicator

legal mitigating factors upon which to make a decision.⁹ The report can help neutralize or dispel existing biases against the applicant or immigrant. It may also explain past bad or questionable behaviors of the immigrant that may interfere with a positive outcome (more on this in the chapters to come). If there are mental health issues, then those can be explained in detail in a manner that makes it easy for the adjudicator to digest.

Ethical Considerations

Guideline 1.01: Integrity

Forensic practitioners strive for accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to resist partisan pressures to provide services in any ways that might tend to be misleading or inaccurate.

Guideline 1.02: Impartiality and Fairness

When offering expert opinion to be relied upon by a decision maker, providing forensic therapeutic services, or teaching or conducting research, forensic practitioners strive for accuracy, impartiality, fairness, and independence (EPPCC Standard 2.01).

Guideline 2.04: Knowledge of the Legal System and the Legal Rights of Individuals

Forensic practitioners recognize the importance of obtaining a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, rules, and precedents that govern their participation in legal proceedings and that guide the impact of their services on service recipients (EPPCC Standard 2.01).

Guideline 5.02: Fee Arrangements

Forensic practitioners are encouraged to make clear to the client the likely cost of services whenever it is feasible, and make appropriate provisions in those cases in which the costs of services is greater than anticipated or the client's ability to pay for services changes in some way.

Forensic practitioners seek to avoid undue influence that might result from financial compensation or other gains. Because of the threat to impartiality presented by the acceptance of contingent fees and associated legal prohibitions, forensic practitioners strive to avoid providing professional services on the basis of contingent fees. Letters of protection, financial guarantees, and other security for payment of fees in the future are not considered contingent fees unless payment is dependent on the outcome of the matter.¹⁰

⁹Silver, M. (2015). Extreme hardship factors immigration case. In *Handbook of mitigation in criminal and immigration forensics*. Revised 5th Edition. Silver, NY, NY.

¹⁰American Psychological Association. (2013). Specialty guidelines for forensic psychology. *American Psychologist*, 68(1), 7–19.

The American Psychological Association Specialty Guidelines for Forensic Psychology provides the basic structure under which a psychologist practicing in the forensic field should operate. Make no mistake—if you have decided to engage in conducting assessments in immigration cases you are undertaking the role of forensic psychologist and with it comes a number of duties, responsibilities, and pitfalls together with the potential to help those who are in need (and create an additional income stream).

When discussing the ethical boundaries of forensic psychology, starting with money is as good a place as any to begin. I know, some of you reading this now might be thinking that it is crass to talk about money in a profession that prides itself in helping those in need. Maybe this is a profession-wide problem—the thought that money is dirty and needs to be “hush-hush” in the psychologist/patient/client relationship. I can recall, as I am sure many of you can as well, some of my graduate school professors bragging proudly about patients of means who hadn’t paid them in years and how that was a part of our profession and the therapy. Personally, I thought those professors were morons. There is certainly room for the provision of pro-bono services but to ignore the financial aspects of the business of professional practice is, in itself, a malpractice. Maybe that is the reason why psychologists have always seemed to lose when it comes to issues that involve the economic security of this honorable profession.

The reality is that the economic landscape for psychologists today is grim, so it is understandable that one would look for new areas in which to expand one’s practice and increase revenue. After going through the rigors (and expense) of graduate school and training, there is no shame in making a living that allows you to afford braces for your kids, take vacations, send them to college, establish your retirement account and everything else in-between. Do not be deceived by the blabber that many of you were indoctrinated with in graduate school—Making a good living can be achieved while at the same time maintaining the high professional and moral standards of our profession. (How many graduate schools even bother to offer courses on how to establish a viable practice? The profession is still stuck in the “academician” and “scientist” mode while continually neglecting the “practitioner.”)

It is crucial to know that, unlike the attorney in any matter you might participate in, it is improper for a psychologist to work on a contingency fee basis—meaning that the psychologist is paid only if the party on whose side they were hired wins and/or receives a monetary award. While this is also true of the clinical psychologist (who may be called to testify regarding the treatment of a patient), for the forensic psychologist this becomes an ethical and practical dilemma. A valid and fair line of questioning by the opposing attorney at a deposition or trial would undoubtedly concern fees paid to the expert or fee arrangements agreed upon. If the fee for the expert is dependent upon the outcome of the case, what is the likelihood that the expert would ever testify to anything that even remotely reduces the chances of the subject winning the case and receiving a large award? Ethics aside, the testimony of the expert is automatically tainted by the mere appearance of impropriety. The label of “gun for hire” becomes a strong one that could forever destroy a career.

I once did an assessment for an attorney which successfully demonstrated his client's psychological deficits in a complex personal injury matter. The attorney was very satisfied with my work but wasn't so happy about paying the fee (rarely in personal injury cases do the clients pay for the expenses of a case outright. Attorneys carry the burden of laying out the expenses and are reimbursed at the end of the case only if they are successful. This financial risk is one of the reasons for allowing the "one-third" or percentage contingency attorney's fee). When the matter was over, the attorney contacted me and told me he had ten or more matters that needed forensic assessment, most of them with a potential value much greater than the matter I had worked on previously. He said he wanted me to do these forensic assessments but only on a contingency basis. I told him I couldn't do that and explained to him the ethical and practical issues involved. It became immediately obvious that he was not pleased that I didn't jump at the chance to have ten new assignments—I have never heard from that attorney or any of the other attorneys in his office suite (who had also expressed interest in my conducting forensic evaluations for them) again.

But that's alright. Throw a stone anywhere in the New York metropolitan area or any densely populated area and you are bound to hit a lawyer. There is plenty of work out there to be had that won't compromise ethical standards.

1.2 Clinical Psychologist vs. Forensic Psychologist vs. Attorney

When a treating psychologist is asked to be a witness in a legal proceeding, the findings of that psychologist are already known to the party seeking the testimony—the assessment, diagnosis, treatment, and results of that treatment, if any, have been completed and are known and presumably the reason that treating psychologist was called to testify by one of the parties.

The forensic psychologist, on the other hand, is called in *to determine* what the psychological condition of the individual is *in support of* that individual's case or *in opposition to* it. Forensic assessment is a costly endeavor. As will be discussed later in this book, it includes: conducting an intensive clinical interview or interviews; assessments; interviews with third parties; investigating; finding and reviewing records; analyzing all of the accumulated data; and writing an extensive report for judicial and public consumption. There may be the need for travel, sometimes extensive travel. On top of that, there is the need, in some cases, to appear at a judicial proceeding and testify. This can run thousands and thousands of dollars to the retaining party.

Now imagine that you are retained by an attorney or an individual party to assess the psychological issues in support of their case (or the exact opposite, if you are retained to show that there are no psychological issues for the opposing party) and after concluding the assessment process you realize that the results show the opposite of what they came to you for in the first place. In other words, your findings do