



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory¹

Direct Examination

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I. Introduction

Immigration court has become increasingly adversarial over the past three years. The attorney general has essentially eliminated immigration judges' (IJs') abilities to administratively close cases² or even to terminate cases.³ At the same time, the Department of Homeland Security (DHS) rarely exercises prosecutorial discretion and the attorneys general have criticized DHS for offering "concessions"—that is stipulating to the resolution of legal issues in their cases.⁴ As a result, practitioners should expect to litigate every issue in every case. As DHS takes a harder line in many cases, practitioners should anticipate more thorough cross examination by DHS and craft their direct examination to minimize the effects of this cross. And as IJs face more pressure to move cases "efficiently," practitioners should build their record in every case with the expectation that the case will be appealed, not just to the Board of Immigration Appeals (BIA), but potentially to the U.S. courts of appeals. This practice advisory will discuss the basics of direct examination and will give tips and strategies specific to eliciting testimony in immigration court. Of course, this practice advisory is just an introduction to the issues; becoming a skilled trial attorney is a lifelong endeavor that requires practice.⁵

II. Procedural Matters Before the Individual Hearing

It is imperative that practitioners be familiar with the *Immigration Court Practice Manual*⁶ (ICPM) before conducting hearings in immigration court. The ICPM gives important instructions on court submissions as well as conduct during hearings. It is also important to check and see whether the immigration court or IJ assigned to a particular case has issued any "standing orders" regarding court submissions or appearances.⁷ Practitioners must submit compelling documentary evidence, such as affidavits, supporting documents, country conditions, expert reports, and a legal brief both for the potential success of the case before the IJ, as well as to build a record for potential appeal.⁸ This advisory, however, focuses on direct examination and the documentary requirements related to witness testimony.

² *Matter of Castro-Tum* 27 I&N Dec. 271 (A.G. 2018). *But see, Morales v. Barr*, --F.3d --, No. 19-1999, 2020 WL 3478622 (7th Cir. June 26, 2020); *Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019), reh'g denied (Oct. 29, 2019) (concluding that "the relevant regulations confer the general authority to administratively close cases to IJs and the BIA.").

³ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

⁴ *See Matter of A-B-*, 27 I&N Dec. 316, 331 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581, 583 (A.G. 2019).

⁵ Parts of this Advisory are taken from Chapter 14 of CLINIC, REPRESENTING CLIENTS IN IMMIGRATION COURT, 5th Ed. AILA books (2018). The authors relied on and recommend the following resources: Maria Baldini-Potermine, IMMIGRATION TRIAL HANDBOOK (Thomson Reuters) (2017-18 Ed.); Thomas A. Mauet, TRIAL TECHNIQUES AND TRIALS (Wolters Kluwer Law & Business) (10th Ed. 2017); AILA trial skills resources available on AILA InfoNet; The National Institute for Trial Advocacy instructors and publications.

⁶ EOIR, Immigration Court Practice Manual (last updated June 11, 2020), [justice.gov/file/1250706/download](https://www.justice.gov/file/1250706/download) [hereinafter "ICPM"].

⁷ EOIR, Operational Status During Coronavirus Pandemic, [justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic](https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic).

⁸ *See* ICPM, Chapter 3.

A. Types of Witnesses

There are two types of witnesses in immigration court: lay witnesses and expert witnesses. Any witness who is not certified as an expert is considered a lay witness. Lay witnesses can testify as to facts but are not qualified to give opinions on the legal questions at issue in the case.⁹ The respondent in an immigration removal proceedings will testify as a lay witness. Other witnesses who may appear in proceedings are lay witnesses called by the respondent or DHS, including family members, or community members. Note that where there are lay witnesses beyond the respondent, it is most common for the respondent to testify first in immigration cases, though some IJs allow the respondent's counsel to determine the order of the testimony. It is important to assess if a witness will be a lay witness or an expert witness as different rules and procedures apply to proposed expert witnesses.

B. Filing a Witness List

The ICPM requires generally that each party file a witness list specifying the witnesses who will testify at the hearing.¹⁰ As with other filings, the witness list should be filed at least 15 days in advance of the hearing, and should be accompanied by a cover page and proof of service on the opposing DHS attorney.¹¹ If the witness list is not filed by the 15-day deadline, the witnesses may be barred from testifying.¹² Note that some IJs give a "call up" date that is longer than the 15-day default in the ICPM, in which case the practitioner must meet that call up date. For detained cases, the ICPM states that the IJ will specify the deadline for filing evidence.¹³

For each witness, except the respondent, the witness list should include the person's full name, a number if applicable, a summary of the testimony, estimated length of the testimony, and language of the testimony.¹⁴ If the respondent presents a proposed expert witnesses, such as a medical expert or country condition expert, the ICPM requires expert witnesses to submit a curriculum vitae or resume in advance of the hearing.¹⁵

⁹ See F. R. Evid. 701.

¹⁰ ICPM Ch. 4.16(b)(ii).

¹¹ *Id.* Ch. 3.3(c)(i)(C). There is an exception to the 15-day deadline for rebuttal witnesses. *Id.* Ch. 3.1(b)(ii)(A).

¹² *Id.* Ch. 3.1(d)(2).

¹³ *Id.* Ch. 3.1((b)(ii)(B).

¹⁴ *Id.* Ch. 3.3(g).

¹⁵ *Id.*

C. Requesting Telephonic or Video Testimony

The respondent must appear in-person for their individual hearing. However, there may be situations in which a witness is not able to travel to the immigration court, for example if the witness lives in another part of the country, resides in another country, or has health issues.¹⁶ It is possible to request permission to allow a witness to testify by telephone or video.¹⁷ The IJ has discretion to grant or deny a request for permission to allow a witness to testify by telephone or by video. A request to present a witness's telephonic testimony can be made either by oral motion at a master calendar hearing, or by written motion.¹⁸ A request to permit a witness to testify by video must be made by written motion.¹⁹ The ICPM provides further instructions for the contents of these motions, including the need to explain why the witness cannot appear in-person. Practitioners should consult the ICPM and contact the local immigration court for more information about requesting telephonic or video witness testimony.

III. Direct Examination

No matter who the witness, the practitioner's main goal should be to treat direct examination as a conversation with the witness, allowing the witness to tell the story. As with any other conversation, this will involve making eye contact with the witness when he or she is speaking, showing interest in what the witness is saying, listening to the witness's answers, and asking follow up questions that pick up from the previous answers. The following discusses the reasons why this conversation goal matters and how to achieve the goal.

A. Case Analysis

Case analysis is the foundation for presenting a well-prepared case during the individual hearing. It is the process through which the practitioner understands the facts, determines the available evidence and witnesses, reviews the legal elements, and develops a legal theory. While practitioners may undertake the case analysis process in different ways, a case analysis chart is a useful tool to list the various legal elements in a case, the facts that prove those elements, and the witnesses that will testify to those facts. Based on the case analysis process, the practitioner can assess the content, scope, and organization of direct examination of the respondent and any other potential witnesses.

In addition to assisting with the direct examination preparation, case analysis will also allow practitioners to anticipate possible DHS objections to a particular witness's testimony (or a particular line of questioning) and prepare ahead of time for how to respond to such objections. Case analysis

¹⁶ Since the onset of the COVID-19 pandemic, courts have been more lenient on some rules regarding in-person appearances. See James McHenry, EOIR Practices Related To The COVID-19 Outbreak (June 11, 2020), justice.gov/eoir/page/file/1284706/download.

¹⁷ In general, if a witness is going to appear via video, the witness must go to an immigration court to do so.

¹⁸ ICPM Ch. 4.15(o)(iii).

¹⁹ *Id.* Ch. 4.15(o)(ii).

will also help the practitioner spot the weaknesses in the case and thus the likely DHS cross examination questions. Ultimately, while it is imperative to present a strong direct examination of the respondent and any supporting witnesses, that alone does not guarantee a successful outcome. An inability to respond to the likely DHS objections and cross examination may doom the case. Therefore, the practitioner should engage in the full case analysis process to derive all of the benefits and ensure that a strong direct examination pays off.

B. Understanding the Importance of Credibility

In most cases, in which a respondent will testify, the respondent will bear the burden of proof.²⁰ It is critical that the respondent testify credibly, consistently, and compellingly to have a successful result in the case.²¹ Because the respondent generally has the burden of proof, it is unusual for DHS to call witnesses, but they can do so.²² The INA directs that an IJ in assessing credibility should consider the “totality of the circumstances” and “all relevant factors,” including:

the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.²³

Additionally the REAL ID Act states for asylum applicants that:

a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the

²⁰ 8 CFR § 1240.8 (d).

²¹ For asylum applicants, INA § 208 (b)(1)(B)(ii) specifies, “The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”

²² DHS sometimes calls witnesses in cases of alleged fraud (see *Matter of D-R- 25* I&N Dec. 445 (BIA 2011)) or gang membership by the respondent. Additionally, DHS does sometimes call expert witnesses. In recent cases of protections claims by Iraqis stemming from the *Hamama v. Adducci*, 946 F.3d 875 (6th Cir. 2020) litigation, DHS and respondents’ experts have sometimes gotten into “battles of the experts” concerning country conditions in Iraq. See *Francis v. Barr* 781 F. App’x 495, 497 (6th Cir. 2019) (unpublished).

²³ INA § 240(c)(4)(C). See also *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007) (holding that the IJ properly considered the totality of the circumstances in finding that the applicant lacked credibility based on his demeanor, implausible testimony, lack of corroboration, and inconsistent statements).

circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record.²⁴

Although there is no “presumption of credibility,” if the IJ does not explicitly make an adverse credibility determination, in asylum cases “the applicant or witness shall have a rebuttable presumption of credibility on appeal.”²⁵

Credibility is critical in immigration matters, however, because if an IJ does make an adverse credibility finding, it is very difficult to overcome that finding on appeal. Therefore, practitioners must recognize when an inconsistency between the testimony and the record has arisen and provide the respondent the opportunity to explain the reason for the discrepancy, such as memory failure during the hearing.²⁶ In *Matter of Y-I-M-*,²⁷ 27 I&N Dec. 724, 725 (BIA 2019), the BIA held that “if inconsistencies in the record are obvious or have previously been identified” by DHS or the IJ, the IJ is not required to give the respondent a specific opportunity to explain them.²⁸ New explanations for discrepancies cannot be raised for the first time on appeal.²⁹

For these reasons, direct examination is critical to the respondent’s case. The practitioner must ensure that the respondent’s testimony is internally consistent and plausible and that it is consistent with documentary evidence in the case and any testimony by other witnesses. To ensure consistency, the practitioner must listen carefully to every answer that the witnesses give and asks questions to clarify any ambiguity or potential inconsistency.

C. Preparing the Respondent for Direct Examination

The most important work an advocate does on direct examination happens before the court date. It is imperative that the practitioner takes time in advance of the hearing to prepare with the respondent, as well as any other witnesses. The respondent should understand the elements of the case—what they must prove to be successful—as well as the potential weaknesses in the case. No matter how

²⁴ INA § 208(b)(1)(B)(iii).

²⁵ INA § 240(b)(4)(C).

²⁶ The BIA reviews findings of fact, including credibility findings, deferentially, under the “clearly erroneous” standard. 8 CFR § 1003.1(d)(3)(i).

²⁷ *Matter of Y-I-M-*, 27 I&N Dec. 724, 725 (BIA 2019).

²⁸ For information on how to use the trial technique of refreshing recollection to potentially avoid an adverse credibility finding, see, CLINIC, *Practice Pointer: Refreshing Recollection in Immigration Court Proceedings*, (Mar. 13, 2020), cliniclegal.org/resources/removal-proceedings/practice-pointer-refreshing-recollection-immigration-court.

²⁹ *Matter of Y-I-M-*, 27 I&N at 730. See also *Garcia v. Barr*, 954 F.3d 1095, 1097 (8th Cir. 2020) (upholding adverse credibility finding where the petitioner inconsistently testified about when she began a relationship with her abuser, when he raped her, and when her grandmother, with whom she resided, died.); *Luna-Romero v. Barr*, 949 F.3d 292, 295 (6th Cir. 2020) (opining at length on why “adverse credibility findings are ‘usually fatal.’”).

well the witness is prepared, the IJ or DHS attorney may ask questions that the respondent has not prepared for and will need to answer them truthfully in a way that helps the theory of the case.

During preparation sessions, it is important to answer any questions the witness may have about their testimony. Practitioners should explain to the respondent and other witnesses what to expect during the hearing. This will include discussion of the following:

- How to dress on the day of the hearing
- Where and when to arrive, and any court security procedures
- Who will be in the courtroom and what the various roles are, including how this differs at the individual hearing from what they have observed at master calendar hearings
- Where the witness will sit during testimony, and where others will be located in the courtroom
- The order of examination and the difference between direct and cross examination
- In cases with two or more witnesses, that the witness(es) who have not testified will generally be sequestered during the prior witnesses' testimony and are not permitted to talk to prior witnesses about their testimony until all witnesses have testified
- Where to look when testifying
- How to address the IJ, and that the IJ may interject with their own questions during direct and cross examination
- The role of the court interpreter (if any), what the witness should do if he or she does not understand the interpreter, and that the witness should wait for a complete interpretation before responding in their language
- To listen carefully to the question and respond only to the question being asked
- The concept of the "record," the fact that everything is recorded, and the importance of answering questions verbally rather than through body language
- The meaning and use of objections by DHS during direct examination
- What the witness should do if he or she does not understand a question or does not know the answer to a question
- The importance of credibility, signs of credibility in U.S. culture, and how demeanor can affect the IJ's credibility assessment
- The fact that the witness will be placed under oath and the importance of telling the truth

D. Special Considerations When Using Interpreters

Most immigration court proceedings take place in a language other than English, with a court-appointed interpreter interpreting during the proceedings.³⁰ It is important for the practitioner to consider the impact of the interpretation when preparing the direct examination. Since an interpreter will translate every question, the practitioner should ask short questions with simple language. It is very important to avoid legalese and idioms that may not translate accurately into the witness's native language.

The practitioner should practice using an interpreter to prepare the witness for testimony, even if the practitioner speaks the witness's native language and generally communicates with the witness in that language. Learning how to ask short questions, and helping the witness learn how to answer in short, easily translated segments, takes practice.

E. Conducting Direct Examination

Practitioners should be familiar with the rules governing the proper form of direct examination questions and should carefully plan the scope and substance of the direct examination. Direct examination should sound like a conversation with the focus on the witness. It is an opportunity for the witness to tell their story in a persuasive manner that satisfies the IJ that the witness is credible. In planning direct examination, the practitioner should think about the goal of each witness's testimony and how that testimony will prove one or more elements of the respondent's case. In preparing the direct examination, the practitioner should remember that the best direct examination will be well-prepared yet flexible. That is, practitioners should be able to adjust the direct examination based on the witness's answers. This approach requires active listening and strong familiarity with the facts.

a. Leading Questions Versus Open-Ended Questions

A leading question is a question which suggests the answer in the question. The Federal Rules of Evidence generally do not allow leading questions on direct examination.³¹ Although the Federal Rules of Evidence are not binding in immigration court, they are still considered persuasive.³² More importantly, the concepts that led to the adoption of the rules of evidence are applicable in

³⁰ "Over 90 percent of individuals appearing in Immigration Court proceedings are non-English speakers who require interpreter services." National Association of Immigration Judges, *Statement of Judge A. Ashley Tabaddor, President National Association of Immigration Judges Before the United States House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship, "The State of Judicial Independence and Due Process in U.S. Immigration Courts,"* at 13 (Jan. 29, 2020), docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf.

³¹ F. R. Evid. § 611(c).

³² See *Tassi v. Holder*, 660 F.3d 710, 720–21 (4th Cir. 2011); *Matter of D-R-*, 25 I&N Dec. at 458 n. 9 ("[T]he fact that specific evidence would be admissible under the Federal Rules 'lends strong support to the conclusion that admission of the evidence comports with due process.'").

immigration court. Therefore, it is important for the practitioner to use open-ended questions rather than leading questions for direct examination.

More importantly, however, the reason that direct questions should be open-ended is to allow the witness to tell their narrative in their own words. The IJ will be assessing the credibility of the witness and can only do so if the witness is the one testifying, not the representative. There is an exception to this general rule for questions that are considered foundational. For example, it is okay to ask leading questions about place of birth, work history, family pedigree, etc., where the IJ would not have the opportunity to gauge the witness's credibility and asking open-ended questions would be inefficient.³³ Furthermore, it is very common for DHS to object to leading questions and for such objections to be sustained unless the practitioner can successfully argue that the leading question is foundational. Thus, one reason to avoid leading questions is to avoid objections which can break up the flow of the direct examination.

Other than foundation questions, practitioners should frame their direct examination like "newspaper-style" questions³⁴ such as:

- Who
- What
- Where
- When
- How

In addition to these question starters, other question words to use that are even more open-ended include:

- Why
- Describe
- Explain
- Tell us about. . .
- Show us. . .

Example Leading v. Non-leading Questions:

Leading

Q: You were threatened by the gangs, right?

A: Yes

³³ Cf. F. R. Evid. § 611(c) ("Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.").

³⁴ When print journalism was the primary source of news, young reporters were trained to ask "the four W" questions to elicit information for their articles.

Q: They beat you so badly you had to go to the hospital?

A: Yes

Non-Leading

Q: You stated that you left El Salvador in 2019. Tell the court why you left.

A: The MS-13 came to my house and told me that if I didn't tell them where my son was hiding they were going to kill me.

Q: How many people came to your house?

A: Four

Q: How did you know they were MS-13 gang members?

A: They had tattoos.

Q: What did you do when the MS-13 gang members arrived at your house?

A: I asked them what they wanted.

Q: Describe their response.

A: They said they were looking for my son.

Q: What did you say?

A: I said that I didn't know where my son was. I hadn't seen him in a week and I was worried about him.

Q: How did the gang members respond?

A: One of them took out a baton, like the kind the police use, and he hit me across my ribs.

While it is important to allow the witness to tell their narrative in their own words, it is critical for the representative to organize the testimony and keep the witness's responses short and interesting. Some practitioners may be tempted to simply ask, "What happened next?" after each witness response, but then the practitioner gives up control of the direction of the testimony and makes the direct examination boring and thus unpersuasive for the IJ. Likewise, questions that are too open-ended, such as "Describe the harm you suffered in your country," could lead to a very long narrative that would be hard to follow. Questions that are too open-ended may also draw an objection from DHS that the question calls for a narrative.

b. Facts Not Conclusions

When questioning lay witnesses, practitioners should be sure that the witness is only testifying to facts based on their personal knowledge,³⁵ not conclusions. For example, a lay witness cannot testify to a question about whether the respondent has “good moral character” as the answer to that question requires a legal conclusion appropriate only for the IJ. It is the role of the IJ to apply the legal standard to the facts and many IJs will not look favorably upon witnesses drawing conclusions. It is not the job of the witness to make legal arguments or draw legal conclusions. It is important in preparing the witness that the witness understands this distinction. Instead of asking a lay witness a question that requires a legal conclusion, the practitioner should elicit all of the facts about the respondent that the witness knows, persuading the IJ to come to the conclusion that the respondent has good moral character. Testifying to facts allows the IJ to play their important fact-finder and evaluator role.

Example: Testimony with Improper Conclusion

Q: How will you be persecuted if you had to go back to Cuba?

A: I think I will be persecuted just like all other journalists have been persecuted since we are all part of the same social group of journalists.

Example: Factual Testimony

Q: What do you think would happen to you if you had to go back to Cuba?

A: I’m terrified that I’ll be arrested again.

Q: Why do you think you would be arrested?

A: I’m a well-known journalist and even in the United States, I’ve continued to publish online articles that are critical of the government.

Q: Why do you fear being arrested?

c. Laying a Foundation for Questions

A related point is the importance of laying a foundation during witness examination. The practitioner must ask questions that set the stage for the questions that will be relevant to the elements of the case. If the practitioner does not lay a foundation, DHS counsel may object to the question because it calls for speculation, lack of foundation, no personal knowledge, or assumes facts not in evidence.

³⁵ Under the Federal Rules of Evidence, a lay witness may give an opinion where it is “rationally based on the witness’s perception,” helpful to understanding the testimony or determining a relevant fact, and “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” F. R. Evid. 701.

Example: Improper Foundation

Q: Why are you applying for asylum?

A: I ran away from the gangs.

Q: Why were the gangs threatening you?

DHS: Objection—assumes facts not in evidence. The respondent never said that the gangs threatened him.

Example: Proper Foundation

Q: Why are you applying for asylum?

A: I ran away from the gangs.

Q: Why did you run away from the gangs?

A: They threatened me.

Q: Who threatened you?

A: The local MS-13 leader.

Q: Describe the threats.

Laying the foundation in this way allows the IJ to follow the flow of the conversation. Also, letting the witness tell their own story in their own words, adds to the witness's credibility rather than leaving an impression that the practitioner is feeding the story to the witness. Feeding the story to the witness suggests that the practitioner does not trust the witness or does not trust their own skills as a legal representative.

d. Headnotes

Headnotes are a trial technique that allow the practitioner to organize the examination. Similar to headings in legal briefs, headnotes signal to the IJ, as well as to the witness, the direction that the testimony will take. For example, in a non-LPR cancellation of removal case, it may be helpful to add headnotes as follows.

Example: Testimony with a Headnote

Headnote: Let's talk about your children.

Q: How many children do you have?

A: One, my daughter Luisa.

Q: How old is she now?

A: She just turned 8.

Q: What is Luisa's immigration status?

A: She's a U.S. citizen

Headnote: Let's talk about why you came to the United States.

Q: When did you come to the United States?

A: In 2008

Q: Why did you come to the United States in 2008?

A: I came to the United States because I was in danger in my country and the United States is the only country to which I could travel by land that I knew I could be safe.

Q: How did you enter the United States?

A: I crossed the border by foot.

Reading the above sequence without the headnotes, it would be confusing to the LJ, and possibly to the witness to shift abruptly from questions about the witness's daughter's immigration status to that of the witness, without providing a transition. The headnotes provide that transition and help the listener understand that the respondent is satisfying elements of the non-LPR cancellation standard.

e. Looping

Another useful technique to use during direct examination is looping—that is, using a portion of the witness's testimony in the next question to provide further emphasis of a fact.

Example: Looping

Q: Describe the conditions in the prison.

A: It was horrible. There were four of us in one small cell and the food they gave us was like garbage.

Q: Explain why the food was like garbage.

A: Half the time it was bread that had mold on it and sometimes there was a meat that made me sick.

Q: How did it make you sick?

A: It made me vomit.

Looping can be effective when the witness is testifying to key information because it reinforces that key evidence. However, the practitioner should not overuse the looping technique, or the IJ may find it tedious to keep hearing the same words repeated in each question.

f. Organization of the Direct Examination

An effective direct examination should be thoughtfully organized. Depending on the case theory, the practitioner may decide that chronological order is most effective, particularly when telling a story that has a beginning, middle, and end. Trial skills experts emphasize the importance of the concepts of “primacy” and “recency”—the idea that what is said first and last will stick with the listener most strongly. Thus, it is important to consider how to begin and end on a compelling note.

Similarly, practitioners may wish to “bury” bad facts in the middle, contextualizing them within the larger narrative and not spending too much time on them. Addressing bad facts during the direct examination, can bolster a witness’s credibility and limit the damage that can be done on cross examination if they had not been addressed already on direct. While practitioners may be reluctant to bring out bad facts during direct examination, DHS attorneys are skilled at finding negative facts in the file and constructing cross-examinations to attack the respondent’s credibility or character. It is usually better for the respondent to acknowledge and take responsibility for any negative facts, such as past crimes which are part of the record, before DHS brings out these bad facts themselves.

That being said, it is best to ask a few questions about negative facts and, once the practitioner has sufficiently covered the topic related to the bad facts, move on to facts that help the respondent’s case. In most cases for relief, such as asylum-related cases, and cancellation cases, the respondent will need to provide a great deal of testimony about potential harm—either fear of persecution in asylum cases, or concern for exceptional and extremely unusual hardship to family members in cancellation cases. Thus most of the time on direct should be spent on eliciting facts that prove these key elements of the respondent’s case, rather than focusing on negative facts.

The four questions below should suffice to insulate the respondent from the sting of DHS cross-examining about this arrest.³⁶

Example: Eliciting Negative Facts

Let’s turn now to your arrest on June 17, 2018.

Q: Describe the circumstances of your arrest.

A: I was sitting in the park smoking a marijuana cigarette and a police officer gave me a desk appearance ticket.

³⁶ Of course, depending on the particular case, the practitioner may need to ask more questions. For example, where the respondent a waiver for a criminal conviction.

Q: Why were you smoking marijuana?

A: At the time I was very depressed about my divorce. But after the arrest, I stopped using marijuana.

Q: What was the outcome of the case?

A: I performed twenty hours of community service and the case was dismissed.

Q: Looking back at this arrest on June 17, 2018, how do you feel about the conduct that led to the arrest?

A: Ashamed, but happy that I learned a valuable lesson.

g. Exhausting the Topic

Before transitioning to a new topic, the practitioner should “exhaust” the prior topic by eliciting all of the desired information, rather than having to return to a previous topic later in the direct examination. It is especially important to draw out as many details as possible about critical aspects of the case such as past persecution in asylum cases or exceptional and extremely unusual hardship in cancellation cases. Otherwise, the direct examination will be shallow and superficial. This said, practitioners should also prioritize and sharpen the direct examination to its essential, persuasive core rather than crowding it with unnecessary detail. To strike this balance, some practitioners may write full questions, while others may prepare a list of facts that they plan to elicit from a particular witness, perhaps one page dedicated to each subtopic. If writing full questions, it is important to be flexible in response to witness answers, DHS objections, and perhaps IJ admonishment to “wrap it up.” If the IJ will not allow the practitioner to “exhaust” a topic thus depriving the respondent of essential testimony, the practitioner should consider an offer of proof to preserve the record on that point.³⁷

h. Preserving the Direct Examination Record at the Hearing

While it is impossible to predict every possible scenario, practitioners need to anticipate common issues and be prepared to respond in a way that protects the respondent’s interest while preserving the record. These include:

- The DHS attorney objects to a question;
- The IJ sustains the objection and does not allow testimony on a significant point;³⁸

³⁷ See CLINIC, *Practice Advisory: Rules of Evidence in Immigration Court Proceedings*, at 32 (Mar. 13, 2020), [cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings](https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings).

³⁸ If this happens the practitioner should make an offer of proof, explaining clearly on the record why the evidence is necessary for the case. See CLINIC, *Practice Advisory: Rules of Evidence in Immigration Court Proceedings* (Mar. 13, 2020), [cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings](https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings).

- The IJ interrupts the questioning to ask his or her own series of questions (and being able to resume questioning after an IJ's questions);³⁹
- The IJ will not let the witness testify, stating that the written declarations are sufficient;
- The witness forgets;
- The witness gets emotional;
- There are problems with the interpretation; or
- The IJ goes off the record and makes problematic comments.

Practitioners should remember the importance of preserving the record in the event of an appeal, ensuring that any objections or problematic off-record statements⁴⁰ are clearly stated on the record.

i. Requesting Other Witness Accommodations

If the respondent has special needs that require accommodations or modifications of typical immigration court testimony procedures, practitioners can request accommodations by pre-hearing motion.⁴¹ For example, the *Immigration Court Practice Manual* discusses "reasonable modifications" that the IJ may make for children, including allowing them to bring pillows or toys, letting them sit next to a trusted adult, or allowing them to testify next to a trusted adult rather than on the witness stand.⁴² An EOIR memorandum on children's cases discusses further child-appropriate options, such as the IJ removing his or her robe, allowing for more frequent breaks during testimony, and other modifications that allow the child to "participate more fully in the proceedings."⁴³ In cases of adult respondents, practitioners should consider whether mental or physical disability, including trauma-related diagnoses, merit requesting tailored, reasonable accommodations to protect the respondent's right to fundamentally fair removal proceedings.⁴⁴ One example would be to request permission to ask leading questions on direct examination and asking the IJ to rely on the

³⁹ Note that while IJs are permitted to ask witnesses questions, at times IJ conduct may cross over from appropriate to inappropriate. If this happens practitioners should be prepared to object on the record. See CLINIC, *Immigration Court Practitioner's Guide Responding To Inappropriate Immigration Judge Conduct* (Aug. 10, 2017), cliniclegal.org/resources/removal-proceedings/immigration-court-practitioners-guide-responding-inappropriate.

⁴⁰ See EOIR, Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum 03-06: Procedures for Going Off-Record During Proceedings (Oct. 10, 2003), justice.gov/sites/default/files/eoir/legacy/2003/10/15/03-06.pdf; see also CLINIC, *Immigration Court Practitioner's Guide: Responding to Inappropriate Immigration Judge Conduct* (Aug. 10, 2017), cliniclegal.org/resources/Inappropriate-Immigration-Judge-Conduct.

⁴¹ See CLINIC, *Representing Noncitizens with Mental Illness* (May 12, 2017), cliniclegal.org/resources/removal-proceedings/representing-noncitizens-mental-illness.

⁴² ICPM Ch. 4.22(d).

⁴³ See EOIR Memorandum, M. Keller, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, at 5 (Dec. 20, 2017), justice.gov/eoir/file/oppm17-03/download.

⁴⁴ The Rehabilitation Act applies in removal proceedings and requires that reasonable accommodations be afforded to individuals with disabilities. See 29 USC §794(a); 28 CFR §35.130(b)(7); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

documentary evidence for facts that would trigger trauma in the respondent rather than requiring oral testimony on those facts. Immigration rules also allow a respondent to request a closed hearing through oral or written motion explaining why he or she requests that the hearing be closed.⁴⁵

j. Special considerations with video conferencing

Increasingly, immigration courts are conducting hearings using video conferencing (VTC).⁴⁶ VTC hearings in immigration court are authorized under statute and regulation.⁴⁷ While practitioners have brought broad challenges to the use of VTC in federal district courts, the challenges have been dismissed for lack of subject matter jurisdiction because pursuant to INA § 242(b)(9) all challenges to removal proceedings must be brought by petition for review after entry of a final order of removal.⁴⁸

Practitioners should be aware of the special challenges of VTC and prepare themselves and their witnesses for these challenges. There are often technical difficulties with the audio and video in VTC hearings. Practitioners should make objections on the record to preserve due process arguments if they cannot hear or see the judge, the DHS attorney, or their client.

Nonetheless, practitioners should try to employ the same general concepts of direct examination in the VTC setting. Practitioners should be sure to speak slowly and enunciate clearly especially if the interpreter, witness, and representative are not all in the same room. The direct examination should still sound like a conversation between the representative and the witness, and the representative should be sure to make eye contact with the witness, even if they must do so through a video screen. It will be especially important for the practitioner to use humanizing techniques with their client, such as referring to them by their name. It may be more tempting to read from prepared questions or notes since the paper may be off-screen for the IJ, but, because it is harder to hold the IJ's attention through a video screen, it is even more important for the practitioner to be engaging, to speak clearly and forcefully, and to adopt as many persuasion techniques as possible.

⁴⁵ 8 CFR § 1003.27(b) (IJ may hold a closed hearing for the "purpose of protecting witnesses, parties, or the public interest"); ICPM Ch. 4.9. Certain types of cases, such as those involving an "abused alien child," are closed to the public. *Id.*

⁴⁶ See James McHenry, EOIR Practices Related To The COVID-19 Outbreak (June 11, 2020), justice.gov/eoir/page/file/1284706/download.

⁴⁷ INA § 240(b)(2), 8 C.F.R. § 1003.25(c).

⁴⁸ See *Rivas Rosales v. Barr*, No. 20-CV-00888-EMC, 2020 WL 1505682, at *8 (N.D. Cal. Mar. 30, 2020); *P.L. v. U.S. Immigration & Customs Enft*, No. 1:19-CV-01336 (ALC), 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019).

IV. Conclusion

Direct examination is generally the most important part of removal proceedings for the respondent. It provides the opportunity for the respondent to tell their story to the IJ, and it is critical to the success of the case that the representative skillfully and persuasively helps guide the respondent and other witnesses through their narrative to put the strongest case before the IJ and build the best record in the event of an appeal.



The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 375 affiliates in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC’s BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP’s primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist practitioners; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program’s initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeals, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice pointer on the Supreme Court’s decision in *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062 (2020), a practice pointer on refreshing recollection in immigration court, a practice advisory on strategies and considerations in light of the Supreme Court’s decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client’s release from immigration detention, an article in Spanish and English on how to get back one’s immigration bond money, and a report entitled “Presumed Dangerous: Bond, Representation, and Detention in the Baltimore Immigration Court.” These resources and others are available on the [DVP webpage](#).