Terms so Plain and Firm as to Command Assent: Preparing and Conducting Optimal Direct Examination of the Respondent

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[T]o place before mankind the common sense of the subject, in terms so plain and firm as to command their assent.—Thomas Jefferson, describing the purpose of the Declaration of Independence[1]

Courtroom drama is a mainline artery in U.S. culture. From Atticus Finch to the ill-fitting glove, legendary trial-tales etch themselves into our bloodstreams, solidifying the core value of the rule of law. The centerpiece of these trials is direct examination, during which the skillful attorney is expected to draw the best possible answers from a story-filled witness. Immigration Court is also a part of this landscape. "Individual calendar hearings" go forward with great frequency, and, though often truncated compared to their federal counterparts, they do usually feature that great legal classic—direct examination. Still, despite its legendary importance, nothing in immigration trial practice is more overlooked than direct examination.

It is well known that the federal rules of immigration do not apply in immigration proceedings. Instead, "immigration judges have broad discretion to conduct and control immigration proceedings and to admit and consider relevant and probative evidence."[2] As a practical matter, however, certain types of evidence should be avoided as much as possible—most notably, leading questions. The basic tools of direct examination are open-ended, non-leading questions that call for a narrative response. The lawyer should effectively blend into the background, allowing the witness to be the featured act. It is the respondent, not the attorney, who must present the coherent and logical statement of facts that is essential to the court's decision.

In order to make that happen, both the attorney and the witness must be utterly prepared. Both must know the story that is being elicited—including the weak parts of the claim, which should be brought forward and addressed upfront. The attorney should have a list of every required element of the claim and know which facts are material to each. The witness must understand their own story and the trial process, be ready to work with an interpreter, know how to listen to the question posed and how to answer (truthfully) no more than the questioned asked, and be ready to remain calm on stand. All of this takes specific practice and thorough preparation. Simply telling the witness that they will be questioned on the stand is not enough. The attorney must ensure that everyone is thoroughly prepared.

When both attorney and witness know and understand the story to be told, questions can be formatted properly for direct examination. A leading question is one that suggests an answer; contains an answer within it; or, in the strictest application of the category, calls for a "yes or no" response. Non-leading questions are open-ended and begin with "who," "what," "when," "where," and "why," as opposed to "are," "did," "will," "won't," and "isn't." Here is an example of the same set of standard opening questions, in both leading and non-leading form:

Non-Leading:

What is your name?

Anna Ahmatova.

What is your birthday?

Sept. 19, 1962.

Where were you born?

Leningrad, USSR. Now, it's St. Petersburg, Russia, again, just like when my grandmother was born there.

Are you a citizen of any country or countries?

Yes.

What country are you a citizen of?

Russia. Used to be a Soviet citizen.

Are you a citizen of any other country?

USSR.

Leading:

Your name is Anna Ahmatova, right?

Yes.

And were you born on Sept. 19, 1962?

Yea.
In St. Petersburg, Russia?
No, in Leningrad, USSR.
But you told the ICE officer it was St. Petersburg, right?
Yes.
And Russia is the only country you are a citizen of, right?
Right.

Leading questions cannot be avoided altogether, but they must be avoided whenever possible because they compromise the accuracy of the evidence and the fundamental fairness of proceedings. And, even among non-leading questions, some are better than others. In particular, there is a difference between a "narrative" and a "specific" approach. Consider the following two sets of questions.

The first set:
Have you ever been convicted of a crime?
Yes.
What happened?
I had a DUI.
When was this?
June 15, 2003.
Where was the conviction?
Sevierville, Tenn.
What happened?
I was out drinking at a bar with my friends after work. This was before I met my girlfriend. I got pulled over because I was speeding, and I got a DUI. I went to jail for a few days, but I paid all my fines now.

Here is the second set:
Have you ever been convicted of a crime?
Yes.
How many times?
One.
What month and year did this conviction occur?
June 2003.
In what county and state did this conviction occur?
Sevierville, Tenn.
What sort of penalty, if any, did you receive?
A few days of jail time.
Was any person injured as a result of your drinking and driving that night?
No.

The first is the "narrative" approach, allowing the witness to tell her own story about how the DUI occurred. The second approach asks mostly non-leading, but highly specific questions designed to make sure the essential facts of the claim are elicited with efficiency. From a persuasive standpoint, the narrative approach is usually preferred. However, not every witness is able to tell their story effectively in that context. It is up to the attorney to be flexible and make sure that all essential facts are elicited in the manner that best works for the individual.

Direct examination should also be crafted so as to avoid objections. Though there are no set rules of evidence, immigration regulations do specifically require that all testimony be "material and relevant."[3] In addition, proceedings must be fundamentally fair and comport with due process.[4] Objections in immigration court are generally guided by those two standards. Information must not be more prejudicial than probative, and a "relevant" statement has a tendency to make the existence of a fact "more or less probable."[5] Objections to relevancy are common (if not commonly sustained) and counsel should be ready to articulate the materiality of any question being asked. Other immigration court objections include: calls for an unqualified opinion; compound question; calls for speculation; mischaracterizes earlier testimony; calls for a legal conclusion; and coaching of the witness. If a witness is being harassed, that objection can also be stated for the record, with a specific description of the objectionable conduct.

When direct examination metes out its purpose, the respondent's story is clear, complete, and, above all, persuasive. Says clinical professor David Chavkin: "If we think about the stories that have stayed with us over time, about the stories that have been most persuasive, these stories do not focus solely on a single critical event or a single moment in time…. Instead, they ordinarily represent a detailed, chronological narration of interrelated events with a beginning point, a connected point, and a termination point."[6] But, most importantly, to be legally effective, that chronology must be presented in its proper legal format: in terms so plain and firm, as to command assent. ⊙

The views expressed here do not necessarily represent the official position of the U.S. Department of Justice, the attorney general, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of the NAIJ. This article is solely for educational purposes, and it does not serve to substitute for any expert, professional and/or legal representation and advice.

Endnotes

[1]Letter from Thomas Jefferson to Henry Lee, May 8, 1825, *available at* tjrs.monticello.org/letter/436 (last visited Oct. 10, 2016).
This column is based upon a trials skills presentation by Judge Harbeck, "Probative and Fundamentally Fair: Testimony in U.S. Immigration Court" (Seton Hall Law School and New Jersey State Bar Association) and Judge Harbeck's article, "The Commonsense of Direct and Cross Examinations in Immigration Court," *New Jersey Lawyer Magazine* #296, expected publication Jan. 2017.
[2]*Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010), *citing* § 240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(l) (2006); 8 C.F.R. §§ 1003.36, 1240.1(c), 1240.7(a) (2010).
[3]8 C.F.R. § 1240.7(a) (2016).
[4]*See, e.g., Reno v. Flores,* 507 U.S. 292, 306 (1993); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598 (1953).
[5]Fed. R. Evid. 401.8.
[6]David F. Chavkin, Clinical Legal Education: A Textbook for Law School Clinical Programs 97 (LexisNexis 2002).