CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Rules of Evidence in Immigration Court Proceedings[1]

March 13, 2020

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 This practice advisory is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction. The authors of this practice advisory are Rebecca Scholtz, Senior Attorney with CLINIC's Defending Vulnerable Populations (DVP) Program, and Michelle Mendez, Director of CLINIC's DVP Program. The authors would like to thank the following individuals for their contributions to this advisory: Suzanne V. Katchmar, Assistant Federal Public Defender, Eastern District of Virginia; Katherine M. Lewis, Consulting Attorney with CLINIC's DVP Program; Victoria Neilson, Managing Attorney with CLINIC's DVP Program; Denise Noonan Slavin, retired Immigration Judge; and Virgil Wiebe, Professor of Law, University of St. Thomas.

I. Introduction

Immigration court proceedings are administrative hearings overseen by the Executive Office for Immigration Review under the Department of Justice. Even though these proceedings are conducted under federal law, the Federal Rules of Evidence do not strictly apply, nor is there a comprehensive code of evidence rules that governs immigration court proceedings. Practitioners must nevertheless be familiar with the Federal Rules of Evidence as well as the various statutory, regulatory, and judicial and administrative decisions that bear on what evidence immigration judges (IJs) may consider in immigration court proceedings and what weight IJs give the evidence.

This practice advisory is intended to provide guidance to immigration court practitioners on the evidentiary standards that apply in immigration court proceedings, as well as tips on how to make and respond to objections in order to protect clients' due process rights.[2] This advisory will discuss both documentary and testimonial evidence.[3] Part II describes the burdens of proof in immigration

[2] This practice advisory discusses evidence in the context of removal proceedings in immigration court. It does not discuss evidence issues that arise in bond proceedings, which are "separate and apart" from removal proceedings. 8 CFR § 1003.19(d); *see* CLINIC, *Practitioner's Guide to Obtaining Release from Immigration Detention* (May 2018), https://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention.
For other resources on evidentiary issues in immigration court proceedings, see, for example, Lilibet Artola, *In Search of Uniformity: Applying the Federal Rules of Evidence in Immigration Removal Proceedings*, 64 RUTGERS L. REV. 863 (2012); Simon Azar-Farr, *A Synopsis of the Rules of Evidence in Immigration Removal Proceedings*, 19 BENDER'S IMMIGR. BULL. 3 (Jan. 1, 2014); James Feroli, *Evidentiary Issues in Asylum Proceedings*, 10-11 IMMIGR. BRIEFINGS 1 (Nov. 2010); Hon. Dorothy Harbeck, *Objections in Immigration Court: Dost Thou Protest Too Much or Too Little?*, 5 STETSON J. ADVOC. & L. 1 (2018); Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93 (2007).

[3] This practice advisory focuses on documentary and testimonial evidence, since almost all evidence introduced in immigration court is testimonial or documentary. It is also possible to introduce non-documentary physical evidence such as recordings, maps, or physical objects. Most of the considerations in this advisory addressing documentary evidence would apply to other types of physical evidence as well.

court. Part III provides an overview of rules of evidence and how these rules may play out in immigration court. Part IV covers procedural and filing rules in immigration court. Part V offers practice tips for making and responding to objections in immigration court.

II. Burden of Proof in Immigration Court Proceedings

The Immigration and Nationality Act (INA) and immigration regulations describe which party has the burden of proof in immigration court proceedings. For respondents[4] who have been admitted to the United States, the Department of Homeland Security (DHS) has the burden to prove deportability by clear and convincing evidence.[5] An IJ's deportability ruling must be based on "reasonable, substantial, and probative evidence."[6] In cases of "arriving aliens" (other than returning lawful permanent residents), "the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged."[7] In cases of respondents who have not been admitted, DHS has the burden to prove alienage.[8] Once alienage is established, "unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged."[9] In some situations, a respondent can seek to have evidence suppressed because it was obtained illegally. If, for example, the IJ suppresses DHS's evidence of alienage and the government cannot meet its burden to prove alienage with other, admissible evidence, removal proceedings must be terminated.[10]

Respondents have the burden to prove eligibility for relief from removal, including, if the relief is discretionary, that the relief should be granted in an exercise of discretion.[11] If evidence in the record indicates that a ground for mandatory denial of the relief may apply, the respondent has the burden to prove that the ground does not apply, by a preponderance of the evidence.[12] An IJ, in evaluating

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[4] "Respondent" refers to an individual who has been placed into removal proceedings in immigration court.
[5] INA § 240(c)(3)(A); 8 CFR § 1240.8(a); *see also Woodby v. INS*, 385 U.S. 276, 277 (1966) (requiring "clear, unequivocal, and convincing" evidence to establish deportability).
[6] INA § 240(c)(3)(A).
[7] 8 CFR § 1240.8(b); *see* INA §§ 240(c)(2), 291. Returning lawful permanent residents (LPRs) are not considered "applicants for admission" unless they fall within one of six exceptions found at INA § 101(a)(13)(C). It is the government's burden to prove by clear and convincing evidence that a returning LPR is an applicant for admission. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).
[8] *See* 8 CFR § 1240.8(c). A person born abroad is presumed to be a noncitizen unless they can show otherwise. *See, e.g.*, *Matter of Ponco*, 15 I&N Dec. 120, 121 (BIA 1974).
[9] 8 CFR § 1240.8(c); *see* INA § 240(c)(2).
[10] A discussion of suppression of evidence is beyond the scope of this practice advisory. Practitioners exploring suppression should consult available resources. *See, e.g.*, American Immigration Council, *Practice Advisory, Motions to Suppression in Removal Proceedings: A General Overview* (Aug. 1, 2017), https://www.americanimmigrationcouncil.org/practice_advisory/motions-suppress-removal-proceedings-general-overview.
[11] INA § 240(c)(4)(A); 8 CFR § 1240.8(d).
[12] 8 CFR § 1240.8(d).

witness testimony, makes a determination about whether the evidence "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof," weighing witness testimony along with other evidence in the record.[13] The IJ may require that an applicant produce corroborating evidence, unless the applicant demonstrates that he or she does not have it and cannot reasonably obtain it.[14]

III. Rules of Evidence in Immigration Court

A. Rules of Evidence Generally

Rules of evidence govern what evidence the parties to a case can present and what evidence is not permissible in a particular adjudicative setting. The purpose of evidentiary rules is to promote fairness, justice, and efficiency.[15] Evidentiary rules help to ensure that only probative evidence is considered and that questions or evidence, even if probative, are not unduly prejudicial or unfair.[16] These principles apply in immigration court removal proceedings, where noncitizens are entitled to due process.[17] Rules of evidence are generally not self-enforcing, however. That means that the practitioner must make an objection in order to challenge evidence. Making a record by objecting is also necessary in order to preserve evidentiary issues for appeal.[18]

Different proceedings have different rules of evidence. The Federal Rules of Evidence[19] apply to proceedings in U.S. courts, including Article III courts.[20] State judicial systems follow their own evidence codes.[21] While the Federal Rules of Evidence are not binding in immigration court

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[13] INA § 240(c)(4)(B); *see also* 8 CFR § 1208.13(a) (stating that in asylum cases, "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration"). In asylum cases, "[a]lthough the burden of proof in establishing a claim is on the applicant, the Service and the Immigration Judge both have a role in introducing evidence into the record." *Matter of S-M-J-*, 21 I&N Dec. 722, 726 (BIA 1997).

[14] INA § 240(c)(4)(B). This statutory corroboration requirement and similar requirements specific to asylum and withholding were enacted through section 101 of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302, 303-304 and apply to all applications filed on or after May 11, 2005. *See id.* § 101(h)(2). For cases that began before May 11, 2005, practitioners should research applicable corroboration case law in their jurisdiction.

[15] *See* Fed. R. Evid. 102.

[16] *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

[17] *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

[18] *See Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988) ("Objections to rulings of the immigration judge should be made on the record, or they cannot be adequately preserved for appeal.").

[19] Fed. R. Evid. 101(a). The Federal Rules of Evidence can be found on the U.S. courts website, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure.

[20] Immigration courts, part of the executive branch and housed within the Department of Justice, are administrative and do not fall under Article III nor do they otherwise fall under the scope of the Federal Rules of Evidence. *See* Fed. R. Evid. 1101.

[21] *See, e.g.*, California Evidence Code.

proceedings,[22] they provide helpful guidance for immigration court practice. This is "because the 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.'"[23] The Federal Rules of Evidence include the following:

- Rule prohibiting **leading questions** on direct examination "except as necessary to develop the witness's testimony," Fed. R. Evid. 611(c)
- Rule about **completeness**, Fed. R. Evid. 106, which allows the opposing party to introduce the rest of a writing or recorded statement if the other party introduces only a part of a particular piece of the evidence
- Rule that evidence must be **relevant**, Fed. R. Evid. 402; *see* Fed. R. Evid. 401
- Rules generally prohibiting **hearsay statements**, Fed. R. Evid. 801-802, along with many exceptions where hearsay evidence is admissible, Fed. R. Evid. 803-807
- Rules governing **privileges**, Fed. R. Evid. 501-502
- Rule that **non-expert witness testimony** must be based on personal knowledge, Fed. R. Evid. 602, and specifying when non-expert witnesses can testify to their opinions, Fed. R. Evid. 701
- Rules about **expert witness testimony**, Fed. R. Evid. 702-706[24]
- Rule that the court may exclude relevant evidence when its "**probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence**," Fed. R. Evid. 403
- Rule about **improper character evidence**, Fed. R. Evid. 404
- Rules about **witness impeachment**, Fed. R. Evid. 607-610, *see also* Fed. R. Evid. 801(d)
- Rules governing **authentication of evidence**, Fed. R. Evid. 901-903
- Rule governing when a court can take **judicial notice** of an adjudicative fact, Fed. R. Evid. 201
- Rules governing **writings, recordings, and photographs**, Fed. R. Evid. 1001-1008
- Rule about **refreshing a witness's memory**[25] with a writing, Fed. R. Evid. 612

In immigration court, the overarching principle governing admissibility of evidence is whether the evidence is "probative and its admission is fundamentally fair."[26] This standard stems from the

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[22] *See, e.g., Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015).

[23] *Id.* at 690 (quoting *Matter of D-R-*, 25 I&N Dec. 445, 458 n.9 (BIA 2011) (quoting *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996)).

[24] This practice advisory does not cover evidentiary considerations related to expert witnesses in immigration court. CLINIC plans to issue a separate practice advisory on that topic in the future.

[25] For a separate resource dedicated to this topic, see CLINIC, *Refreshing Recollection in Immigration Court Proceedings* (Mar. 13, 2020), https://cliniclegal.org/resources/removal-proceedings/practice-pointer-refreshing-recollection-immigration-court.

[26] *Matter of Y-S-L-C-*, 26 I&N at 690; *see Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995).

constitutional due process principle of fundamental fairness that applies to removal proceedings.[27] Some courts have defined fundamental fairness in this context as meaning that the proceedings were conducted in accordance with the reasonable opportunity to present and examine evidence afforded by INA § 240(b)(4)(B).[28]

While there is no immigration court code of evidence, practitioners must be familiar with the various statutes, regulations, administrative and judicial decisions, and agency guidance that discuss specific evidentiary issues. The INA and immigration regulations set forth some general principles about evidence in removal proceedings. The INA affords respondents the right to a "reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government."[29] The IJ can "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."[30] The IJ can also issue subpoenas,[31] order the taking of depositions,[32] rule on objections,[33] and "exclude from the record any arguments made in connection with motions, applications, requests, or objections."[34]

There is a tendency toward admissibility of evidence in removal proceedings, as these proceedings are administrative rather than judicial.[35] Nevertheless, practitioners can argue that the IJ should follow the Federal Rules of Evidence, where applicable, and make appropriate objections. If an IJ admits evidence despite a practitioner's objection, the practitioner can argue in the alternative that for the same reasons raised in the objection, the evidence should be given little weight.[36] Practitioners must also be prepared to defend against objections to their own evidence or questions. The following discussion covers common substantive evidentiary concepts—relevance, hearsay, privilege, the witness's knowledge or expertise, the unduly prejudicial nature of the evidence, the scope of the examination, authentication, and administrative notice—and their application in immigration court. This part also briefly discusses objections related to the form of the question during witness examination.

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[27] *See, e.g., id.*; *Hassan v. Gonzales*, 403 F.3d 429, 435 (6th Cir. 2005) ("[W]e review evidentiary rulings by IJs only to determine whether such rulings have resulted in a violation of due process." (internal citations and quotations omitted)).
[28] *See id.*; *Doumbia v. Gonzales*, 472 F.3d 957, 961-62 (7th Cir. 2007).
[29] INA § 240(b)(4)(B).
[30] INA § 240(b)(1); *see also* 8 CFR § 1240.7(b) ("Testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the immigration judge."). The IJ may take an active role in questioning the witness during testimony. Practitioners must be prepared to object to inappropriate or unfair IJ questioning.
[31] INA § 240(b)(1); 8 CFR § 1003.35(b).
[32] 8 CFR §§ 1003.35(a); 1240.7(c).
[33] 8 CFR § 1240.1(c).
[34] 8 CFR § 1240.9 (must allow affected party to submit brief).
[35] *See, e.g.*, 8 CFR § 1240.7(a) (stating that IJ "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial"); *Matter of Lam*, 14 I&N Dec. 168, 172 (BIA 1972).
[36] *See, e.g., Acosta v. Lynch*, 819 F.3d 519, 526 (1st Cir. 2016) (upholding IJ decision not to give polygraph results any weight); *Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) ("In administrative proceedings [the hearsay nature of an affidavit] merely affects the weight to be afforded such evidence, not its admissibility.").

B. Relevance

Federal Rules and Immigration Court Application

The Federal Rules of Evidence define relevant evidence as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."[37] Irrelevant evidence is not admissible under the Federal Rules of Evidence.[38] Immigration regulations and precedent also require that evidence be relevant. For example, 8 CFR § 1240.1(c) authorizes the IJ to "receive and consider material and relevant evidence."[39] More broadly, the overarching immigration court evidentiary principle governing admissibility of evidence in immigration court requires that evidence be "probative."[40]

Objecting and Responding

Practitioners should object to DHS Office of Chief Counsel (OCC) questioning about irrelevant matters. However, given that discretion is an element of many forms of immigration relief, IJs may allow latitude in questioning about a respondent's character and past conduct.[41] Practitioners should object to each question DHS OCC asks that is irrelevant, even if the IJ is overruling the objections, in order to preserve the record for appeal.[42] Practitioners should also be prepared to defend against

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[37] Fed. R. Evid. 401.

[38] Fed. R. Evid. 402.

[39] The BIA in *Matter of Teixeira* compared the meaning of "material" and "relevant" in a prior regulation. 21 I&N Dec. 316, 320 (BIA 1996) (noting that although a police report could be relevant to the issue of whether the respondent had been convicted of a certain crime, "inasmuch as it may make the existence of the 'fact' that the respondent was convicted . . . more probable than it would be without the police report," it was not material because it was not "by itself or in connection with other evidence . . . determinative" of the respondent's deportability for a firearms conviction).

[40] *See Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015).

[41] Practitioners should argue that fundamental fairness imposes limits on the scope of DHS OCC questioning and that DHS OCC should not be permitted to engage in a "fishing expedition" during cross examination. *Cf. United States v. Callipari*, 368 F.3d 22, 39 (1st Cir. 2004), *vacated on other grounds*, 543 U.S. 1098 (2005) ("Without such limits, unchecked cross-examination on a theory of bias may unfairly prejudice the opposing party's case and only bring forth 'marginally relevant' evidence."); *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996) ("Although evidence of criminal activity should be considered in discretionary determinations, an Immigration Judge may in the exercise of his sound discretion limit that inquiry to the extent necessary to conduct the discretionary phase of the application. This reduces the risks of protracted evidentiary hearings, particularly where an application involves multiple discretionary factors."). Relevance objections to DHS OCC "fishing expeditions" may be stronger given the immense pressure on IJs to complete cases expeditiously, particularly if the IJ cuts off the respondent's case presentation and then DHS OCC's cross examination focuses on issues of questionable relevance. In addition to relevance objections, practitioners could also object to questioning that is beyond the scope of direct, *see* Fed. R. Evid. 611(b), and that lacks a foundation in the record.

[42] The IJ may permit a standing objection when the practitioner has objected to a particular type of question (for example, relevance) and the IJ has overruled the objection. Instead of continuing to object to each question DHS OCC asks in the same line of questioning that is vulnerable to the same relevance objection, the IJ may permit counsel to make a standing objection to all questions related to that topic. The risk with standing objections is that "it may be difficult in the future to determine exactly which questions and answers were covered." STEVEN LUBET, MODERN TRIAL ADVOCACY, at 195 (3d Ed.

relevance objections made by DHS OCC, through explaining how the line of questioning relates to a legal element at issue in the case. In order to do this effectively, advance preparation is key. Responses should be succinct and state the applicable legal premise. The longer the objection or response, the more likely it will lack effectiveness.

C. Hearsay, Including Government Documents Such as Form I-213

Federal Rules and Immigration Court Application

Hearsay is generally admissible in immigration court proceedings.[43] Hearsay refers to an out-of-court statement offered to prove the truth of the matter asserted.[44] The regulations provide that the IJ may consider "any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."[45]

Being allowed to present hearsay evidence often benefits the respondent, particularly because the respondent carries the burden to establish eligibility for relief.[46] The respondent may have no other way of presenting certain crucial evidence other than through hearsay. For example, the respondent may want to testify about the statements a persecutor made to the respondent in the home country, or present supporting letters or affidavits from individuals who are not available to testify.

In other instances, DHS OCC may offer highly prejudicial hearsay documents of questionable reliability. Examples of these documents may include Form I-213, Record of Deportable/Inadmissible Alien, and police reports. The BIA has affirmed the admissibility of government hearsay documents, citing the "presumption of regularity" or "presumption of reliability" afforded to government documents.[47] For example, the BIA has held that Form I-213 is generally "inherently trustworthy" and reasoned that it "would be admissible even in court as an exception to the hearsay rule as a public record and report."[48] The BIA has also rejected challenges to the

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2010). Practitioners should ensure that the IJ's ruling on the standing objection is clear as to its scope, and, if there is any doubt, the practitioner should continue objecting to each question.

[43] *See, e.g., Vladimirov v. Lynch*, 805 F.3d 955, 964 (10th Cir. 2015); *Malave v. Holder*, 610 F.3d 483, 487 (7th Cir. 2010); *Dia v. Ashcroft*, 353 F.3d 228, 254 (3d Cir. 2003) (en banc); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974); *Matter of C-C-I-*, 26 I&N Dec. 375, 384 (BIA 2014); *Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011); *Matter of Grijalva*, 19 I&N Dec. 713, 721-22 (BIA 1988).

[44] Fed. R. Evid. 801(c).

[45] 8 CFR § 1240.7(a).

[46] *Cf. Duad v. United States*, 556 F.3d 592, 596 (7th Cir. 2009) (noting that a rule against hearsay "would severely penalize many asylum seekers, who manage to slip out of their country of origin with only a few crucial documents and other written materials that could never be authenticated by traditional courtroom practice").

[47] *See, e.g., Matter of J-C-H-F-*, 27 I&N Dec. 211, 212 (BIA 2018); *Matter of P-N-*, 8 I&N Dec. 456, 458 (BIA 1959).

[48] *Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976); *see Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) ("[A]bsent any evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage or deportability.") (citing *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988)); *see also Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002) (accepting

admissibility of police reports, reasoning that admitting them is "especially appropriate in cases involving discretionary relief from deportation, where all relevant factors concerning an arrest and conviction should be considered to determine whether an alien warrants a favorable exercise of discretion."[49]

Federal courts of appeals have generally agreed that Form I-213 and other government documents are inherently reliable and admissible absent evidence that the document contains erroneous information or was obtained by duress or coercion.[50] As discussed below, practitioners can overcome this presumption by challenging the reliability of such documents.[51] Practitioners should not give up on objecting, even if they believe the IJ will rule against them, so long as there is a good faith basis to preserve the objection.

Challenging Reliability of Hearsay

Even though hearsay alone generally will not be a winning objection in immigration court, sometimes the hearsay nature of the evidence, coupled with other factors that make the evidence unreliable, could support a winning hearsay objection. And even if the objection does not succeed in getting the evidence excluded, it goes to the weight the evidence should be afforded if it does come in. Instead

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I-213 as proof of removability of 8-year-old child who failed to appear, where source for information on I-213 was a man who said he was the child's father). An improperly authenticated I-213 should not be afforded a presumption of reliability. *See* Miguel Angel Reyes, AXXX XX1 626, 2018 WL 1872011, at *2 (BIA Jan. 26, 2018) (unpublished) (remanding where I-213 was improperly "certified" by DHS OCC and noting that "no such presumption can apply to an *improperly* authenticated I-213 form, for the simple reason that the lack of proper authentication precludes the DHS from establishing that the document is what it purports to be." (emphasis in original)).

[49] *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988); *see also Carcamo v. U.S. Dep't of Justice*, 498 F.3d 94, 98 (2d Cir. 2007) ("[P]olice reports and complaints, even if containing hearsay and not a part of the formal record of conviction, are appropriately admitted for the purposes of considering an application for discretionary relief."); *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015) (holding that there was "no error in considering the police report even though it contained hearsay and the petitioner's arrest did not result in a conviction" where IJ had determined "that the police report was reliable and probative of the petitioner's character").

[50] *See, e.g.*, *Vladimirov v. Lynch*, 805 F.3d 955, 964-65 (10th Cir. 2015) (recognizing presumption of reliability afforded to Form I-213); *Angov v. Lynch*, 788 F.3d 893, 905 (9th Cir. 2015) (concluding that State Department report was "clothed with a presumption of regularity"); *Felzcerek v. INS*, 75 F.3d 112, 116-17 (2d Cir. 1996) (examining Form I-213 and DMV record); *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) ("We agree with the BIA that information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien."); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990); *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975) (concluding that Form I-213 was probative on the issue of entry, and that its admission was fair in the absence of evidence of coercion or that the statements were not those of the petitioner).

[51] *See, e.g.*, *Rodriguez-Quiroz v. Lynch*, 835 F.3d 809, 821 (8th Cir. 2016) (remanding where respondent rebutted the presumption of reliability of one government document and was not given opportunity to rebut statements in Form I-213); *Pouhova v. Holder*, 726 F.3d 1007, 1013 (7th Cir. 2013) ("In a specific case though, a particular Form I–213 may not be inherently reliable. For example, it may contain information that is known to be incorrect, it may have been obtained by coercion or duress, it may have been drafted carelessly or maliciously, it may mischaracterize or misstate material information or seem suspicious, or the evidence may have been obtained from someone other than the alien who is the subject of the form.").

of framing the objection as based on hearsay, the practitioner should explain why the proposed hearsay evidence is not probative or fundamentally fair. Reliability factors might include the following:

- Level of detail, including whether there is sufficient detail about how the investigation was conducted or the foundation for the allegations[52]
- Whether the document is signed by an officer[53]
- Whether the document contains multiple levels of hearsay[54]
- Whether the source of the statements is the respondent versus a third party or an unidentified source[55]
- Whether the contents of the document relate to the respondent[56]
- Whether the document is facially deficient[57] or contains erroneous information,[58] including where the respondent has offered evidence challenging the record's reliability[59]
- Whether the hearsay statements elicited were the result of coercion or duress or there is other evidence of the impropriety of the arrest or interrogation resulting in the hearsay document[60]

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[52] *See, e.g., Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (Department of State report was unreliable in part because it did not identify who the investigator was or what type of investigation was conducted); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2003) (concluding that it was a due process violation to rely on government document that reported the statements of "declarants who are far removed from the evidence sought to be introduced"); *Matter of Ponce Hernandez*, 22 I&N Dec. 784, 787 (BIA 1999). *But see Angov v. Lynch*, 788 F.3d 893, 905-906 (9th Cir. 2015) (concluding that a consular letter, a government document "clothed with a presumption of regularity," need not have a "multitude of additional details" about the investigator and investigation to be admissible).

[53] *See, e.g., Ponce Hernandez*, 22 I&N Dec. at 785.

[54] *See, e.g., Banat v. Holder*, 557 F.3d 886, 893 (8th Cir. 2009) (concluding that government document should not have been relied on due to, *inter alia*, fact that it contained "multiple levels of hearsay"); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 272 (2d Cir. 2006) (concluding that a government document was unreliable in part because it "contain[ed] multiple levels of hearsay that exacerbate its myriad reliability problems"); *Ezeagwuna*, 325 F.3d at 406 (concluding that the BIA erred in relying on letter from State Department official that contained "multiple hearsay of the most troubling kind").

[55] *See, e.g., Banat*, 557 F.3d at 892-93 (concluding that government evidence was unreliable in part because it relied on unidentified sources without any attempt to verify the claims made by the source or any showing of the qualifications or experience of the unidentified sources); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 680 (9th Cir. 2005) (I-213 entitled to "no evidentiary weight" where the source of the information was statements from third parties); *Ponce-Hernandez*, 22 I&N Dec. at 785. *But see Matter of Gomez-Gomez*, 23 I&N Dec. 522, 526 (BIA 2002) (accepting I-213 as proof of removability of 8-year-old child who failed to appear, where source for information on I-213 was a man who said he was the child's father, reasoning that the fact that the man "was in the company of the respondent, in the setting of a bus depot or on the bus . . . reinforces the likelihood of a genuine familial relationship between them, as he has asserted").

[56] *See, e.g., Ponce-Hernandez*, 22 I&N Dec. at 785; *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

[57] *See, e.g., Ponce-Hernandez*, 22 I&N Dec. at 786.

[58] *See, e.g., Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (government memorandum unreliable because, among other things, it contained significant errors); *Barcenas*, 19 I&N Dec. at 610.

[59] *See, e.g., Matter of Wadud*, 19 I&N Dec. 182, 188 (BIA 1984) (appropriate to consider sentencing memorandum where respondent "has not denied the truth of the statements" in it); *Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976).

[60] *See, e.g., Barcenas*, 19 I&N Dec. at 611.

- Whether the source of the statement had a bias or motivation to lie[61]
- Whether the hearsay document (particularly in the arrest report context) lacks corroboration by other evidence[62]
- Whether the hearsay statements of an absent witness could easily have been video or audio recorded by the law enforcement officer who prepared the report and thus it would be fundamentally unfair to admit the hearsay evidence rather than this best evidence video or audio recording which the government did not produce.

Challenging Hearsay in Immigration Court Based on Lack of Opportunity to Cross Examine the Declarant

Practitioners can also consider challenging hearsay evidence on due process or statutory cross examination right grounds based on the fact that the declarant is not made available for cross examination. The success of this type of challenge may vary depending on the jurisdiction and the type and source of the hearsay. In *Matter of De Vera*, 16 I&N Dec. 266, 268 (BIA 1977), a noncitizen had challenged rescission of his permanent resident status based in part on an affidavit introduced by the government from his wife which called into question the bona fides of the marriage. The officer who had taken the statement testified and explained that the government had tried without success to locate the wife and serve a subpoena on her. The BIA concluded that where "the Government has established that it has been unable to secure the presence of the affiant by subpoena, the admission of an affidavit without cross-examination of the affiant by the respondent does not . . . violate the respondent's due process right to a fair hearing."[63] In giving the affidavit weight, the BIA noted that it would have been admissible under the Federal Rules of Evidence as a statement against interest.[64]

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[61] *See, e.g., Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 269 (2d Cir. 2006) (consular report submitted by DHS was unreliable where it was based on the opinions of Chinese government officials who had "powerful incentives" not to be candid and lacked detail). *But see Ogbolumani v. Napolitano*, 557 F.3d 729, 734 (7th Cir. 2009) (in challenge of visa petition denial, allowing summaries from USCIS investigators of statements made by third parties, noting that there was "nothing that suggests that the summaries are inaccurate or unreliable beyond the general 'inherent risks' that come with using a synopsis and suspicions, ungrounded in the record, that [the declarant] lied out of spite for [the noncitizen]").

[62] *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (finding error in giving "significant weight to uncorroborated arrest reports" where the respondent "denied any wrongdoing" and "was not prosecuted or convicted after these arrests, and there was no corroboration introduced at the immigration hearing"); *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) ("Absent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence that there is reason to believe Garces engaged in drug trafficking."); *Henry v. INS*, 74 F.3d 1, 6-7 (1st Cir. 1996) ("In fine, the lesson of *Arreguin* is that, when the Board appraises the considerations on both sides of the discretionary balance to determine whether they are in equipoise, it will accord virtually no weight to an arrest record remote in time and unsupported by corroborating evidence."); *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) (affording an arrest record little weight where respondent denied smuggling allegations contained in it, prosecution had been declined, and "there is no corroboration, from the applicant or otherwise").

[63] 16 I&N Dec. at 269.

[64] *Id.* at 271; *see also, e.g.*, Emmanuel Djokou, AXX XX4 454, 2008 WL 3861928, at *4 (BIA July 10, 2008) (unpublished) (reasoning that sworn statement of absent declarant "bears some indicia of reliability even without cross examination because it appears to qualify for admission in federal court" as a declaration against interest made by an

Federal courts have remanded where the IJ refused to issue a subpoena for a declarant of an affidavit introduced by the government, relying on INA § 240(b)(4)(B), which provides noncitizens with the right to a "reasonable opportunity . . . to cross-examine witnesses presented by the Government."[65] Other courts have required that the government make reasonable efforts to produce the hearsay declarant before affidavits from absent witnesses may be admitted.[66] For example, in *Karroumeh v. Lynch*, 820 F.3d 890 (7th Cir. 2016), the Seventh Circuit concluded that the government had not made "reasonable efforts" to secure a declarant's appearance. In that case, the government had asked the IJ to issue a subpoena for an earlier hearing, but did not serve the subpoena on the witness and did not ask for another subpoena when the IJ rescheduled the hearing.

To fully preserve the argument about the right of cross examination, practitioners should request cross examination after DHS offers the hearsay document and seek a subpoena if DHS does not make efforts to produce the witness.[67] Practitioners should also consider the possible drawbacks of in-person testimony from a DHS witness, which will depend on the individual circumstances.[68]

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unavailable witness); Ashraf Saleem Mohamed Abu Tahoun, AXX XX4 198, 2008 WL 655972, at *3 (BIA Feb. 12, 2008) (unpublished) ("In order to insure that the proceedings on remand comport with due process, the DHS should make a reasonable effort to produce [affidavit declarants] at the respondent's hearing.").

[65] *See, e.g.*, *Patel v. Sessions*, 868 F.3d 719, 724 (8th Cir. 2017); *Malave v. Holder*, 610 F.3d 483, 486-87 (7th Cir. 2010) (IJ erred in refusing to issue a subpoena for declarant of statement introduced by government, relying on INA § 240(b)(4)(B) and *Richardson v. Perales*, 402 U.S. 389 (1971)). Which party bears the burden to request the subpoena may depend on which party bears the burden of proof with respect to the facts asserted in the declaration. *Compare* Maria de Jesus Rodriguez de Medrano, AXXX XX6 349, 2013 WL 8338044, at *2 (BIA Dec. 23, 2013) (unpublished) (acknowledging that DHS must make reasonable efforts to produce the declarant for cross only when they offer a statement to prove a fact with respect to which DHS has the burden of proof), *with Olabanji v. INS*, 973 F.2d 1232, 1236 (5th Cir. 1992) (burden of producing the witness is on government "when it submits affidavit testimony" as evidence to establish deportability).

[66] *See, e.g.*, *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 682 (9th Cir. 2005); *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) (but denying petition for review because petitioner failed to object to the admission of evidence before the IJ); *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988) ("Because the government failed to make any reasonable effort to produce . . . its hearsay declarant[] for cross-examination, the BIA's reliance on the hearsay documents was fundamentally unfair."); *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983).

[67] *Cf. Vidinski v. Lynch*, 840 F.3d 912, 917 (7th Cir. 2016) (permitting affidavit from absent witness who had not appeared despite IJ subpoenas where neither attorney asked the IJ "to follow through and request enforcement through the district court" nor did the respondent "seek a continuance of the hearing so that further efforts could be made to compel" the testimony); *Matter of Lemhammad*, 20 I&N Dec. 316, 325 (BIA 1991) (counsel failed to object at hearing to government not producing the declarant of an affidavit and waived cross examination of the agent who prepared the statement and conducted his own investigation; thus no prejudice shown).

[68] If DHS OCC does offer witnesses, practitioners should move the immigration court to order DHS to produce any previous statements of the witness related to the subject matter about which the witness testifies. *See* 18 U.S.C. § 3500(b) (providing that after a government witness testifies on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified"). While this statute, the Jencks Act, applies to federal criminal prosecutions, practitioners should argue that due process requires the same protection in removal proceedings. *See Matter of C-*, 8 I&N Dec. 696 (BIA 1960); *Matter of L-*, 9 I&N Dec. 14 (BIA 1960); *see also Carlisle v. Rodgers*,

In cases of government documents such as Form I-213, courts may be less likely to sustain an objection for lack of opportunity to cross examine the author. This may be due to the presumption of regularity.[69] However, if the respondent can show lack of reliability, such as multiple levels of hearsay, this might provide strong grounds for arguing that cross examination of each declarant must be afforded.[70]

Objecting and Responding to Hearsay Evidence in Immigration Court

Practitioners should make weight arguments if the IJ overrules an objection to hearsay evidence and allows the evidence to come in. Such arguments can be reinforced during closing argument and in any post-hearing briefing. The BIA has recognized that "the hearsay nature may affect the weight of the evidence."[71] Weight arguments may be particularly persuasive where there is no corroboration for the hearsay statements.[72]

To bolster weight arguments, practitioners should point out, if true, that the particular hearsay evidence offered by the government would not be admissible under the Federal Rules of Evidence. For example, if applicable case law allows, practitioners should counter any argument that Form I-213 falls within the public records hearsay exception.[73] Federal Rule of Evidence 803(8) provides

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262 F.2d 19 (D.C. Cir. 1958). Counsel should seek a continuance to review any statements before conducting cross examination.

[69] *See, e.g., Dominguez-Pulido v. Lynch*, 821 F.3d 837, 842 (7th Cir. 2016) (noting "no automatic right to cross-examine an officer who prepared a Form I-213" which is inherently trustworthy unless there are indicia of unreliability); *Angov v. Lynch*, 788 F.3d 893, 899 (9th Cir. 2015) (no error to admit State Department letter without producing a witness, where government could not produce State Department witness because of that agency's "policy of not releasing follow-up information regarding its overseas investigations"); *Antia-Perea v. Holder*, 768 F.3d 647, 658 (7th Cir. 2014) (no error in not producing I-213's creator for cross examination, where respondent was the interviewee and "could have chosen to tell his side of the story or otherwise called into question the circumstances surrounding the I-213's creation"); *Vladimirov v. Lynch*, 805 F.3d 955, 962–65 (10th Cir. 2015); *Espinoza v. INS*, 45 F.3d 308, 311 (9th Cir. 1995) (no "automatic right to cross-examine the preparers of" Form I-213, particularly in absence of any "evidence that contradicts anything material on the I-213"); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 n.2 (BIA 1981) (no error to not require government to produce agents who recorded respondent's statements for cross examination, where "respondent did not challenge the authenticity or accuracy of those documents").

[70] *See, e.g., Pouhova v. Holder*, 726 F.3d 1007, 1016 (7th Cir. 2013) (concluding that it was not fundamentally fair and in violation of petitioner's statutory rights to admit unreliable Form I-213—documenting an interview with a third party years after it took place—without giving her an reasonable opportunity to cross examine the source).

[71] *Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011); *see Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) (hearsay "affects the weight to be afforded such evidence, not its admissibility").

[72] *Cf. Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) ("Considering that prosecution was declined and that there is no corroboration, from the applicant or otherwise, we give the apprehension report little weight.").

[73] *But see, e.g., Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004) (noting that German arrest record "might well qualify for admission . . . under the public records exception"); *Renteria–Gonzalez v. INS*, 322 F.3d 804, 817 n.16 (5th Cir. 2002) (observing that Form I–213 would "come within the public records exception to the hearsay rule"); *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996) (observing that Form I-213 and DMV record would "probably be admissible" under Rule 803(8)); *Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976) ("In the absence of any proof that the Form I-213

an exception to the rule against hearsay for public records that set out (1) the office's activities; (2) a matter observed while under a legal duty to report but not including observations by law enforcement agents in a criminal matter; or (3) factual findings from a legally authorized investigation. Such records are allowed so long as the "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." To the extent that a Form I-213 incorporates information from a third party, practitioners should argue that such information does not fall within the public records hearsay exception. The Notes of Advisory Committee on Proposed Rules observe that "[p]olice reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer."[74]

Practitioners can also point out that in order to establish a public or business record hearsay exception, DHS OCC would need to lay a foundation through written declarations or testimony to show that the I-213 in fact meets the requirements for the exception. Also, even if the Form I-213 is found to be a public record or business record, the Federal Rules still provide for exclusion if the document lacks reliability.[75] Practitioners should point out reliability concerns in the specific Form I-213, drawing on case law questioning the reliability of police reports, given that I-213s, like police reports, are prepared by a law enforcement agency to use against an individual in an adversarial proceeding.[76] Practitioners can also challenge the document's reliability by seeking disclosure of

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contains information which is incorrect or which was obtained by coercion or force, we find that this form is inherently trustworthy and would be admissible even in court as an exception to the hearsay rule as a public record and report.").

[74] 28 U.S.C. Appendix, at 416; *see also* Notes of Advisory Committee on Proposed Rules, 28 U.S.C. Appendix, at 415 (stating, regarding the business records exception at Fed. R. Evid. 803(6), that where a police report incorporates information obtained from a third party, the officer qualifies as acting in the regular course of business but the informant does not).

[75] Fed. R. Evid. 803(6)(E), Fed. R. Evid. 803(8)(B); *see Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976) (concluding that Form I-213 was admissible and would fall within the public records exception "[i]n the absence of any proof that the Form I-213 contains information which is incorrect or which was obtained by coercion or force").

[76] *See, e.g., Olivas-Motta v. Holder*, 746 F.3d 907, 918 (9th Cir. 2013) ("It has long been clear that police reports are not generally reasonable, substantial, and probative evidence of what someone did.") (internal quotation marks and citations omitted) (Kleinfeld, J., concurring); *id.* at 919 ("[P]olice reports are not especially useful instruments for finding out what persons charged actually did. All the defects of hearsay, double hearsay, and triple hearsay apply, since people may speak to the police despite lack of personal knowledge and lack of adequate observation, may be misunderstood, and what they say may be misreported. People sometimes lie or exaggerate when they talk to the police."); *Prudencio v. Holder*, 669 F.3d 472, 483-84 (4th Cir. 2012) ("[P]olice reports . . . often contain little more than unsworn witness statements and initial impressions. Indeed, these materials are designed only to permit a determination of probable cause. Further, because the[y] are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections. To confer upon such materials the imprimatur of fact . . . accords these documents unwarranted validity."); *see also* Notes of Committee on the Judiciary, House Report No. 93-650, found at 28 U.S.C. Appendix (police reports in criminal cases are not admissible under the public records hearsay exemption because "observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases"); *cf. Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995) (noting that court's holding that I-213 is presumptively reliable "closely tracks the Federal Rules of Evidence, which exempt public records containing factual findings from an official investigation from the prohibition on hearsay '*unless the sources of information or other circumstances indicate lack of trustworthiness*'" (emphasis added)).

criminal history of any third party sources of information in the document, seeking previous complaints made against the reporting officer, and pointing out common narratives lacking detail authored by the same officer in different cases. In sum, given that hearsay is generally admissible in immigration court proceedings, practitioners should frame arguments about why Form I-213 does not fall within the public records exception as showing why the particular document lacks reliability.

Often DHS OCC will introduce DHS records of alleged statements by the respondent made during a border or airport interview to undermine the respondent's credibility. Practitioners should be familiar with the case law about factors to consider in determining the reliability of such documents,[77] argue where appropriate for their exclusion and/or that they be given minimal weight, or subpoena the officer who took the statement. Reliability factors include:

- Whether the interview was conducted in the noncitizen's native language, and if not, whether an interpreter was provided
- Whether the interviewer asked specific and detailed questions relevant to the topic at issue and designed to elicit relevant details, and whether the interviewer asked pertinent follow-up questions
- Whether the record shows a "detailed and reliable recitation of the questions and answers from the interview"
- Whether there are "persuasive reasons to doubt the alien's understanding of the interviewer's questions"
- Whether special circumstances might affect the reliability of the answers provided (for example, history of sexual abuse)[78]

When a practitioner seeks to introduce hearsay evidence such as letters, affidavits, or declarations, they should be prepared to address any questions regarding reliability or authenticity that the IJ may have to ensure that the evidence is afforded full weight.

D. Privilege; Confidentiality Protections

Federal Rules and Immigration Court Application

Just as the government may invoke national security interests to prevent the respondent from examining certain evidence against him or her pursuant to INA § 240(b)(4)(B),[79] a respondent or

[77] *Matter of J-C-H-F-*, 27 I&N Dec. 211 (BIA 2018); *see, e.g.*, *Nadmid v. Holder*, 784 F.3d 357 (7th Cir. 2015); *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004); *Senathirajah v. INS*, 157 F.3d 210 (1998).
[78] *Matter of J-C-H-F-*, 27 I&N Dec. 211, 211-215 (BIA 2018).
[79] *But see* 8 CFR § 1240.33(c)(4) (directing that, in asylum or withholding cases where government introduces classified information, the agency "may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source," and the summary "should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence"); *Kaur v. Holder*, 561 F.3d 957, 961 (9th Cir. 2009) ("Here, the DHS neither provided a meaningful

other witness can assert various common law, statutory, or constitutional privileges or protections to avoid testifying about a certain subject matter or to exclude evidence that would violate the privilege or confidentiality provision. Examples of such protections include:

- The Fifth Amendment testimonial privilege against self-incrimination[80]
- The attorney-client privilege[81]
- Marital privilege[82]
- State law confidentiality provisions regarding juvenile or other protected records[83]
- Statutory protections under 8 U.S.C. § 1367 that prevent government officials from using information obtained solely from an abusive family member to make an adverse determination of admissibility or deportability
- Statutory confidentiality provisions protecting information provided on applications for amnesty under the Immigration Reform and Control Act[84]

Objecting and Responding

Practitioners should examine evidence they intend to submit to ensure that providing it does not violate any confidentiality law or privilege and should make appropriate objections if DHS attempts to offer evidence (or elicit it through questioning) in violation of confidentiality or privilege protections.

If a witness invokes the Fifth Amendment privilege against self-incrimination and refuses to answer questions, the IJ may draw an adverse inference from the witness's silence.[85] While removability cannot be established based solely on an adverse inference,[86] a noncitizen seeking discretionary

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summary nor claimed that a more detailed summary could not be provided because of the necessity to "safeguard[ ] both the classified nature of the information and its source.").

[80] *See, e.g., Matter of Sandoval*, 17 I&N Dec. 70, 72 (BIA 1979).

[81] *See Matter of Athanasopoulos*, 13 I&N Dec. 827 (BIA 1971) (generally recognizing attorney-client privilege in removal proceedings but concluding that communications for purpose of perpetrating a fraud were not privileged); *see also* Ann Naffier, *Attorney-Client Privilege for Non-Lawyers? A Study of Board of Immigration Appeals-Accredited Representatives, Privilege, and Confidentially*, 59 DRAKE L. REV. 583 (2011), https://lawreviewdrake.files.wordpress.com/2015/06/irvol59-2_naffier.pdf.

[82] *See, e.g., Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) ("[T]he marital privilege applies in a deportation proceeding."); *Matter of Yaldo*, 13 I&N Dec. 374, 376 (BIA 1969) (applying marital privilege test found in *Lutwak v. United States*, 344 U.S. 604 (1953), to rescission proceeding).

[83] *See, e.g.*, Immigration Legal Resource Center, Practice Advisory, *Confidentiality of Juvenile Records in California: Guidance for Practitioners in Light of California's New Confidentiality Law* (Apr. 2016), https://www.ilrc.org/confidentiality-juvenile-records-california-guidance-immigration-practitioners-light-california%E2%80%99s; *see generally* Juvenile Law Center, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* (2014), https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf.

[84] 8 U.S.C. § 1255a(c)(5); 8 CFR § 245a.2(t)(3).

[85] *See, e.g., Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1990).

[86] A respondent's "silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage." *Guevara*, 20 I&N at 242.

relief may not be able to meet their burden of proof if they refuse to testify invoking the Fifth Amendment privilege.

Practitioners should also be careful not to inadvertently waive privilege. In the context of the attorney-client privilege, for example, this could be done by introducing evidence about what the client said to the lawyer. In this circumstance, the court could find that the client has waived the attorney-client privilege with respect to all related communications concerning the same subject matter. The rules about whether waiver has occurred and the scope of privilege waiver are complicated and can vary based on the facts (*e.g.*, whether the disclosure was inadvertent) and jurisdiction.[87]

E. Personal Knowledge; Opinion Testimony

Lack of Personal Knowledge

Generally, witnesses (other than expert witnesses) may only testify to facts about which they have personal knowledge.[88] It may be necessary to lay an evidentiary foundation for a witness's testimony on a given subject by first eliciting facts that show how the witness has personal knowledge of the topic of questioning.[89] Along similar lines, a witness may not guess or "speculate" about something they do not have personal knowledge of, such as the motivations behind another person's decisions or actions. In this situation, an objection that the question calls for speculation is appropriate. However, some speculation may be necessary particularly where the claim requires the respondent to show the likelihood of future events, such as showing future persecution for asylum or the likelihood of family members suffering hardship in the future for cancellation of removal or certain waivers.[90]

Improper Lay Opinion Testimony

A lay witness is typically not permitted to give opinion testimony, unless the opinion is "rationally based on the witness's perception," helpful to understanding the witness testimony or determining a fact in issue, and not based on "scientific, technical, or other specialized knowledge" within the scope of the rules on expert witnesses.[91] While these principles derive from the Federal Rules of Evidence and are thus not binding in immigration court, practitioners should adhere to them to the extent possible in preparing witness testimony and making objections to DHS witness testimony, as they are grounded in principles of reliability and fairness. Further, even if permitted, a witness's unfounded opinions or conclusions will not be as persuasive or compelling as testimony based on

[87] *See, e.g.*, Fed. R. Evid. 502; Restatement (Third) of the Law Governing Lawyers § 79 (2000).
[88] Fed. R. Evid. 602.
[89] *See id.* ("Evidence to prove personal knowledge may consist of the witness's own testimony.").
[90] *Cf. Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015) (predictive findings by IJs); *Matter of D-V-*, 21 I&N Dec. 77 (BIA 1993) (sustaining appeal and granting asylum, where IJ had concluded that respondent failed to show a well-founded fear of persecution, reasoning in part that her fear of rape and other harm by previous attackers was "pure speculation").
[91] Fed. R. Evid. 701.

personal knowledge. Practitioners wishing to introduce opinion testimony should consider engaging an expert witness and submitting peer-reviewed treatises or articles.

Objecting and Responding

If the IJ sustains an objection for lack of personal knowledge, calling for speculation, or improper lay opinion testimony, the practitioner may be able to remedy the problem by laying an evidentiary foundation through the witness's own testimony. For example, if the IJ sustains a DHS OCC objection based on lack of personal knowledge where the practitioner asked the respondent how MS-13 gang members dress, the practitioner could ask a series of questions to show how the witness knows the answer to this question—establishing that they have personally seen MS-13 gang members, where they have seen them, how often they have seen them, and how they knew the people they observed were MS-13 members.

F. Fundamental Fairness

The Federal Rules contain a catch-all provision that allows the court to exclude relevant evidence where its "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[92] This objection might be used to protect witnesses from harassing or embarrassing questioning. To the extent that parts of this rule map onto the immigration court evidentiary standard of fundamental fairness, practitioners could invoke it to protect clients from unduly prejudicial and minimally probative evidence being used against them. For example, if in a hearing where the respondent is seeking only protection under the Convention Against Torture DHS OCC seeks to admit gory photographs of a victim allegedly injured by the respondent, counsel might object to this evidence as fundamentally unfair given its prejudicial nature and lack of probative value, since there is no discretionary element to CAT protection. Practitioners could also make a relevance objection in this situation.

Objecting and Responding

Consider filing a motion in advance of the hearing to prohibit questioning of the witness related to a particular topic if it would be unfairly prejudicial, and if the practitioner is confident that DHS OCC will otherwise seek to ask questions related to that topic. A motion to exclude a document or testimony before a hearing is called a "motion in limine."[93] As always, practitioners should apply the key principles of due process and fundamental fairness when at all applicable.

[92] Fed. R. Evid. 403.

[93] WRIGHT & MILLER, 21 FED. PRAC. & PROC. EVID. § 5037.10, *The Motion in Limine* (2d ed.).

G. Beyond the Scope

Under the Federal Rules of Evidence, cross examination's scope must typically stay within the confines of what was covered on direct examination and "matters affecting the witness's credibility."[94] In immigration court, however, most IJs will allow DHS OCC to cross examine a witness beyond the scope of what may have been covered on direct examination. However, IJs will typically apply the scope rule to re-direct and re-cross. That is, practitioners should anticipate an objection if their re-direct examination goes beyond the scope of cross, and should object if DHS OCC's re-cross goes beyond the scope of the re-direct preceding it.

H. Objections Based on Form of the Question During Witness Examination

Objections during a witness's testimony to the form of the question serve several purposes. They can help ensure that the manner in which the witness is being questioned is fair. They also ensure that the question itself is clear so that the answer is more likely to be responsive. Objections to form also help ensure that there will be a clear record, rather than, for example, having the witness answer "yes" to a confusing or unintelligible question.[95]

Common objections to the form of the question include:

- Leading on direct or re-direct examination[96]
- Compound
- Vague or confusing
- Argumentative or badgering
- Asked and answered
- Assumes facts not in evidence
- Mischaracterizes prior testimony or evidence
- Calls for a narrative

None of these objections is "codified" in any immigration law authority. However, practitioners can argue that they are part of the overarching standard of ensuring fundamental fairness because a clear and accurate question allows the witness to testify fully in a similarly clear and accurate manner. Clear testimony is all the more important in immigration proceedings given that credibility is typically critical to a respondent's success in winning relief and there are often interpreters, so a clear question will ensure a clear interpretation.

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[94] Fed. R. Evid. 611(b).

[95] *See* Hon. Dorothy Harbeck, *A View from the Bench: The Commonsense of Direct and Cross-Examinations in Immigration Court*, 304-FEB. N.J. LAWYER 30, 32 (Feb. 2017) (noting good objections in immigration court and importance of objecting to form in order to ensure a clear record).

[96] *See* Fed. R. Evid. 611(c) ("Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.").

I. Authentication

A common evidence rule that comes up in the context of documentary evidence specifically is authentication. Authentication refers to the process of proving that a piece of evidence "is what the proponent claims it is."[97] Authentication rules govern all exhibits—not just documents—for example, video and audio recordings. This section focuses on authentication of documents since documentary evidence is the most common type of evidence in immigration court proceedings, aside from testimony. Given the tendency toward admissibility in immigration court proceedings, practitioners should prepare for the fact that likely most documents will be admitted and consider the issues discussed below as they relate to weight, not just admissibility.[98]

The Federal Rules of Evidence provide examples of how evidence can be authenticated, including through testimony by a witness with knowledge.[99] The Federal Rules also specify situations in which a document is self-authenticating, for example a certified public record.[100] The immigration regulations discussed below contain certain rules about how official records and criminal conviction documents can be authenticated in immigration court proceedings.

Immigration Regulations on Proof of Official Records - 8 CFR § 1287.6

Immigration regulations provide specific directions for authentication of official U.S. records, *see* 8 CFR § 1287.6(a), as well as official foreign records, *see* 8 CFR § 1287.6(b)-(d). While courts have recognized that 8 CFR § 1287.6 is not the sole method for authenticating official records, official documents must be authenticated in some manner.[101] This might include methods described in the Federal Rules of Evidence.[102]

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[97] Fed. R. Evid. 901(a).

[98] *See Le Bin Zhu v. Holder*, 622 F.3d 87, 92 (1st Cir. 2010) ("It is well within the BIA's discretion to find that lack of authentication undermines the evidentiary value of a document.").

[99] Fed. R. Evid. 901(b).

[100] *See* Fed. R. Evid. 902.

[101] *See, e.g.*, *Yong Xiu Lin v. Holder*, 754 F.3d 9, 15 (1st Cir. 2014); *Xiu Ling Chen v. Holder*, 751 F.3d 876, 879-80 (8th Cir. 2014); *Wanrong Lin v. Holder*, 771 F.3d 177, 186-87 (4th Cir. 2014); *Qiu Yun Chen v. Holder*, 715 F.3d 207, 211-12 (7th Cir. 2013); *Ying Chen v. U.S. Att'y Gen.*, 676 F.3d 112, 117 (3d Cir. 2011); *Vatyan v. Mukasey*, 508 F.3d 1179, 1182-83 (9th Cir. 2007); *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 404-405 (2d Cir. 2005); *Gui Cun Lil v. Ashcroft*, 372 F.3d 529, 532-33 (3rd Cir. 2004) (asylum applicants); Fatimo Eyitayo Renke Smith Joda, AXXX XXX 441 (BIA June 15, 2016) (unpublished), https://www.scribd.com/document/318590392/Fatimo-Eyitayo-Renke-Smith-Joda-A079-134-441-BIA-June-15-2016 (IJ erred in admitting unauthenticated interview notes of immigration officer).

[102] *See* Fed. R. Evid. 901-902; Fed. R. Civ. Pro. 44 (describing means of proving an official record). Rule 902 describes evidence that is self-authenticating, which includes signed and sealed domestic public documents, signed and certified domestic public documents, foreign public documents that meet certain requirements, and certified domestic and foreign records of a regularly conducted activity. *See also Fei Yan Zhu v. U.S. Att'y Gen.*, 744 F.3d 268, 274 (3d Cir. 2014) (describing possible alternative methods of authentication of official documents).

Regulations on Proof of Official U.S. Records

The immigration regulations provide that for official domestic records, "an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy."[103]

BIA and federal appellate decisions provide examples of successful evidentiary challenges to DHS-introduced official domestic records based on lack of authentication. For example, the BIA in unpublished decisions has excluded Form I-213 based on authenticity when it did not comply with the official records regulation, for instance where a DHS OCC attorney signed the certification rather than the DHS official with personal knowledge.[104] In a 1981 decision, the Ninth Circuit ruled inadmissible an application to change nonimmigrant status purportedly filed by the respondent, which was introduced by the government to prove deportability, noting that there was "no evidence on the record that the form was completed by petitioner, that the form was not altered after it was completed, that the form contains information provided by the petitioner, or even that the form constitutes part of his INS file."[105] In many cases, however, practitioners may have a stronger challenge to Form I-213 based on lack of reliability than based on lack of authentication (see discussion in Part III.C above).

Regulations on Proof of Official Foreign Records

The regulations also provide procedures for authenticating official foreign records, which vary depending on whether the country is a signatory to the Convention Abolishing the Requirement of Legislation for Foreign Public Document[106] and for Canadian documents.[107] For non-signatories, the

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[103] 8 CFR § 1287.6(a).

[104] *See, e.g.*, Miguel Angel Reyes, AXXX XX1 626, 2018 WL 1872011, at *1-2 (BIA Jan. 26, 2018) (unpublished) (remanding where I-213 improperly "certified" by DHS OCC trial attorney); Rogelio Robles Hernandez, AXXX XX2 383, 2009 WL 2218073, at *1–3 (BIA July 10, 2009) (unpublished) (upholding termination and concluding that IJ had properly excluded an unauthenticated Form I-213). *But see* Pablo Alberto Jones Urena, AXXX-XX0-263, 2018 WL 6618240, at *1 (BIA Oct. 15, 2018) (unpublished) (regarding objection to unauthenticated I-213, stating that IJ "may allow even unreliable evidence to be submitted and determine what weight, if any, to give to the unauthenticated or uncertified documents"; chain of custody issues "generally go to the evidentiary weight assigned to a document, rather than its admissibility").

[105] *Iran v. INS*, 656 F.2d 469, 473 (9th Cir. 1981). *But see, e.g.*, *Matter of Gonzalez*, 16 I&N Dec. 44, 46-47 (BIA 1976) ("Even without identification by the maker, the [Form I-130] application and accompanying documents are admissible, for there is identity of name with the name of the respondent. . . .").

[106] *Compare* 8 CFR § 1287.6(b) *with* 8 CFR § 1287.6(c). For further discussion of these regulations and other authentication considerations in asylum cases, see Virgil Wiebe, *Maybe You Should, Yes You Must, No You Can't: Shifting Standards and Practices for Assuring Document Reliability in Asylum and Withholding of Removal Cases*, 06-11 IMMIGR. BRIEFINGS 1 (Nov. 2006).

[107] 8 CFR § 1287.6(d) ("In any proceedings under this chapter, an official record or entry therein, issued by a Canadian governmental entity within the geographical boundaries of Canada, when admissible for any purpose, shall be

regulations provide that the official foreign record "shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized."[108] The attested copy "may but need not be certified by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position."[109] The officer's official position and signature "may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates."[110] The attested copy with any additional foreign certificates must then "be certified by an officer in the Foreign Service of the United States, stationed in the foreign country where the record is kept."[111] The foreign service officer is to certify "the genuineness of the signature and the official position either of (i) the attesting officer; or (ii) any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation."[112]

For signatory countries, the regulations provide that the certified copy be accompanied by "a certificate in the form dictated by the Convention," which must be signed by "a foreign officer so authorized by the signatory country," and must certify the authenticity of the signature, the capacity in which the signer acted, and "where appropriate, the identity of the seal or stamp which the document bears."[113] Public documents from signatory countries do not need foreign service officer certification. These include "[d]ocuments emanating from an authority or an official connected with the courts of tribunals of the state, including those emanating from a public prosecutor, a clerk of a court or a process server," "[a]dministrative documents," "[n]otarial acts," and "[o]fficial certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures."[114]

Proof of Convictions

The INA provides that a specific list of documents (or certified copies of them) "shall constitute proof of a criminal conviction."[115] The list includes the official record of judgment and conviction, an official record of plea, verdict, and sentence, a docket entry from court records, and certain other official documents. The corresponding regulation states that such records must also comply with the authentication requirements found at 8 CFR § 287.6(a)—that is, they must be "evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or

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evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy.")

[108] 8 CFR § 1287.6(b)(1).

[109] *Id.*

[110] *Id.*

[111] 8 CFR § 1287.6(b)(2).

[112] *Id.*

[113] 8 CFR § 1287.6(c)(1).

[114] 8 CFR § 1287.6(c)(3).

[115] INA § 240(c)(3)(B); *see also* INA § 240(c)(3)(C) (discussing electronic records).

by an authorized deputy," or attested in writing by an immigration officer to be a true and correct copy of the original.[116] For an electronic record to be used as proof of a criminal conviction, it must be certified by a state official as an official record and certified in writing by a DHS official as having been received electronically from the state.[117] In addition to the list found in the statute, the corresponding regulation has a catch-all provision allowing for "[a]ny other evidence that reasonably indicates the existence of a criminal conviction" to be admissible as proof of the conviction.[118]

The BIA has held that the list of documents found in the statute and regulations is not mandatory or exclusive; rather, the listed documents are "safe harbors," meaning that such documents must be admitted, but IJs may admit documents "authenticated in other ways if they are found to be reliable."[119] This test goes back to the standard for admissibility generally—"whether [the] respondent has had due process; or to be specific here, whether the criminal records correctly reflect the facts."[120] Courts have relied on the regulation's catch-all provision to allow other types of evidence not found on the list to be used to prove the existence of a criminal conviction.[121] While the means of authentication can be flexible, there must be some authentication, and the IJ must find it to be probative and reliable.[122] If a criminal record is not certified or otherwise compliant with the statute and/or regulations and the noncitizen is charged with criminal grounds of deportability, practitioners should argue that DHS has not met its burden of proof and move to terminate.[123]

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[116] 8 CFR § 1003.41(b).
[117] INA § 240(c)(3)(C); 8 CFR § 1003.41(c).
[118] 8 CFR § 1003.41(d).
[119] *Matter of Velasquez,* 25 I&N Dec. 680, 684 (BIA 2012); *see Sinotes-Cruz v. Gonzales,* 468 F.3d 1190, 1196 (9th Cir. 2006).
[120] *Matter of Gutnick,* 13 I&N Dec. 412, 416 (BIA 1969).
[121] *See, e.g., Fraser v. Lynch,* 795 F.3d 859, 863-64 (8th Cir. 2015) (considering pardon and police records, coupled with documents falling within 8 CFR § 1003.41(a)); *Padilla-Martinez v. Holder,* 770 F.3d 825, 832-33 (9th Cir. 2014); *Barradas v. Holder,* 582 F.3d 754, 762-63 (7th Cir. 2009) (criminal complaint); *Sinotes-Cruz v. Gonzales,* 468 F.3d 1190, 1196-97 (9th Cir. 2006) (allowing faxed documents that did not comply with the requirements for electronically received records where they contained two INS stamps, "give every indication of being official Arizona court records," and where respondent had not objected); *Rosales-Pineda v. Gonzales,* 452 F.3d 627, 631-32 (7th Cir. 2006) (relying on FBI rap sheet to establish that the respondent was ineligible for discretionary relief); *Francis v. Gonzales,* 442 F.3d 131, 144 (2d Cir. 2006) (concluding that Jamaican police report were admissible under the regulation but were "unlikely to constitute clear, convincing, and unequivocal evidence that Francis was convicted of those crimes"); Jorge Daniel Montes-Cervantes, AXXX XX6 192, 2016 WL 3924026, at *2 (BIA June 9, 2016) (unpublished) (concluding that "certification by the DHS officer that the judgment entry was obtained from PACER was sufficient to authenticate the conviction records").
[122] *See Velasquez,* 25 I&N Dec. at 684 (conviction record was not admissible because "it is not authenticated *at all*" (emphasis in original)).
[123] *See, e.g.*, Juan Jose Perez, A075 356 235 (BIA Jan. 17, 2020) (unpublished), https://www.scribd.com/document/447697927/Juan-Jose-Perez-A075-356-235-BIA-Jan-17-2020?secret_password=bw8U8qv9aNdPjVkAwX01 (remanding where IJ admitted non-certified copies of conviction records and the record was "unclear regarding the method of authentication deemed adequate by the Immigration Judge to support entry of these records into evidence"); Angelito Castillo Notarte, A070 466 715 (BIA May 11, 2012) (unpublished), http://www.scribd.com/doc/210301949/Angelito-Castillo-Notarte-A070-466-715-BIA-May-11-

Authentication of Other Documents

There are no specific immigration regulations governing authentication of other documents. While an immigration court may allow into evidence even authenticated documents such as an unsworn letter,[124] the level of authentication will go to the weight the IJ gives the evidence. In offering such documents into evidence, practitioners should ensure that there is a foundation for showing that the evidence "is what the proponent claims it is," and remember that the Federal Rules provide a non-exhaustive list of ways this can be done, including through testimony.[125]

Objecting and Responding

Authentication of official records - Courts have recognized that asylum seekers may not always be able to obtain authenticated documents.[126] When presenting official records that do not comply with the regulatory authentication requirements, practitioners should think creatively about how they can establish that the document is what it purports to be, such as providing testimony about how the document was obtained and its source, or having an expert testify about the document's authenticity.[127] Similarly, practitioners should make appropriate objections if DHS OCC seeks to introduce documents that have not been adequately authenticated, including criminal convictions or official records that do not comply with the regulatory requirements.[128]

Authentication of documents generally - Practitioners should make efforts to authenticate all documents submitted to ensure that they are given full evidentiary weight.[129] There are no hard and

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2012 (remanding for IJ to consider whether fax from court related to marijuana conviction was properly authenticated under *Velasquez*).

[124] *See, e.g., Gebreeyesus v. Gonzales,* 482 F.3d 952, 955 (7th Cir. 2007) (noting that asylum seeker's brother's unsworn letters could be considered despite the fact that they were not authenticated, distinguishing requirements for official records).

[125] Fed. R. Evid. 901.

[126] *See, e.g., Gui Cun Liu v. Ashcroft,* 372 F.3d 529, 532 (3d Cir. 2004) ("[A]sylum applicants can not always reasonably be expected to have an authenticated document from an alleged persecutor." (internal citation omitted); *accord Cao He Lin v. U.S. Dep't of Justice,* 428 F.3d 391, 404 (2d Cir. 2005).

[127] *See, e.g., Fei Yan Zhu v. U.S. Att'y Gen.,* 744 F.3d 268, 273-74 (3d Cir. 2014) (describing alternative ways a party could authenticate an official foreign record).

[128] *See, e.g., Matter of Exantus & Pierre,* 16 I&N Dec. 382, 383 (BIA 1977) (concluding that affidavits allegedly signed by the respondents were improperly admitted, where government failed to authenticate them in any manner); Jose de Jesus Alvarez Gudino, A095 748 846 (BIA June 26, 2013) (unpublished), http://www.scribd.com/doc/152499667/Jose-de-Jesus-Alvarez-Gudino-A095-748-846-BIA-June-26-2013 (remanding for IJ to consider whether FBI rap sheet which was introduced to prove alienage was properly authenticated).

[129] The respondent has the burden of proof in applications for relief in removal proceedings and must provide corroborating evidence if the IJ requires it, unless the respondent can show that they cannot reasonably obtain the evidence. INA §§ 240(c)(4)(B); 208(b)(1)(B)(ii). This is one reason why it is important to demonstrate efforts to authenticate evidence in some manner. *Cf. Balachova v. Mukasey,* 547 F.3d 374, 382 (2d Cir. 2008) (concluding that IJ erred in finding that respondent did not meet his burden of proof based in part on fact that he failed to authenticate medical records, where neither the IJ nor DHS OCC asked him why he did not obtain an authenticated document and "it

fast rules about how authentication must take place, but the Federal Rules provide non-binding guidance.

J. Administrative Notice

Federal Rule of Evidence 201 allows courts to take judicial notice of adjudicative facts that are "not subject to reasonable dispute" because they are generally known or can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Upon request, "a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed."[130] The immigration regulations allow the BIA to take administrative notice "of commonly known facts such as current events or the contents of official documents."[131] There is no corresponding regulation for the authority of IJs to take administrative notice, but the BIA has recognized that IJs also have this authority.[132]

The BIA has taken administrative notice of facts such as the following:

- Change in government[133]
- State Department reports and reports from other governments[134]
- An amendment to federal law[135]
- State law[136]
- The respondent's record of conviction or evidence that a conviction is vacated[137]

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is not at all clear that fourteen years after the fact, a Russian hospital would issue an authenticated copy of a medical record").

[130] Fed. R. Evid. 201(e).

[131] 8 CFR § 1003.1(d)(3)(iv).

[132] *Matter of R-R-*, 20 I&N Dec. 547, 551 n.5 (BIA 1992) ("It is well established that administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts."); *Matter of Chen,* 20 I&N Dec. 16, 18 (BIA 1989) ("[T]he immigration judge or this Board may take administrative notice of changed circumstances in appropriate cases, such as where the government from which the threat of persecution arises has been removed from power."); *see also Vasha v. Gonzales,* 410 F.3d 863, 874 n.5 (6th Cir. 2005) (recognizing that both BIA and IJ can take administrative notice of commonly known facts and citing cases in other circuits recognizing the same).

[133] *See, e.g., Rivera-Cruz v. INS*, 948 F.2d 962, 966 (5th Cir. 1991) ("The Board is entitled to take administrative notice of a change of government."); *Wojcik v. INS*, 951 F.2d 172, 173 (8th Cir. 1991); *Janusiak v. INS*, 947 F.2d 46, 48 (3d Cir. 1991); *Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991); *Kubon v. INS*, 913 F.2d 386, 388 (7th Cir. 1990); *Matter of R-R-*, 20 I&N Dec. 547, 551 (BIA 1992); *Matter of B-*, 21 I&N Dec. 66, 71-72 (BIA 1995).

[134] *See, e.g., Matter of S-E-G-*, 24 I&N Dec. 579, 587 n.4 (BIA 2008) (State Department human rights reports for El Salvador); *Matter of C-C-*, 23 I&N Dec. 899, 902 n.3 (BIA 2006) (reports from United Kingdom and Canada); *see also Matter of S-K-*, 23 I&N Dec. 936, 950 n.16 (BIA 2006) (report by U.S. Commission on International Religious Freedom).

[135] *Matter of G-D-*, 22 I&N Dec. 1132, 1144 (BIA 1999) (Lautenberg Amendment).

[136] *Matter of Cuellar-Gomez,* 25 I&N Dec. 850, 865 n.15 (BIA 2012); *Matter of Grijalva,* 19 I&N Dec. 713, 714 n.1 (BIA 1988).

[137] *Matter of Tavdidishvili,* 27 I&N Dec. 142, 142 n.1 (BIA 2017) (record of conviction);
Cutberto Hernandez-Rubio, AXX XX8 975, 2004 WL 2374854, at *1 (BIA Aug. 26, 2004) (unpublished) (vacatur of conviction "authenticated in compliance with 8 CFR § 1287.6(a)").

- Case status of immigration application from USCIS website[138]
- The Department of State Visa Bulletin for a given month[139]
- The fact that DHS rescinded the DACA program[140]
- The day of the week a particular date fell on and federal holidays[141]
- Monetary rates of conversion to the U.S. dollar at a particular time[142]

The BIA has found administrative notice improper in circumstances including the following:

- "T]he fact that the Service does not always institute exclusion proceedings against Mexican aliens apprehended . . . close to the border"[143]
- Two convictions of the respondent that had not been found to exist by the IJ, reasoning that this factual determination should have been left to the IJ[144]
- Court record showing vacatur of conviction that was not certified under 8 CFR § 1287.6(a)[145]
- Foreign law[146]

There is a circuit court split about whether a respondent must be provided with notice and an opportunity to be heard before the BIA rules against the respondent relying on an administratively noticed fact. The Second, Ninth, and Tenth Circuits have held that due process requires the BIA to provide the respondent with notice and an opportunity to respond before using an administratively noticed fact to deny asylum.[147] The Fifth, Seventh, and D.C. Circuits have held that such notice and opportunity to respond is not required before entering a final order of removal, because the motion to reopen process suffices to satisfy due process.[148]

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[138] Joaquin Gustavo Dominguez Marin, AXXX XX2 344, 2016 WL 6392700, at *1 (BIA Aug. 29, 2016) (unpublished) (USCIS acknowledgment of applicant request to withdraw DACA application); Israel Mejia Lopez, AXXX XX3 029, 2014 WL 6883023, at *1 (BIA Nov. 6, 2014) (unpublished) (DACA denial decision).

[139] Robert Nicpon, AXXX XX6 831, 2014 WL 3817740, at *1 n.1 (BIA June 6, 2014) (unpublished).

[140] Carlos Abraham Alvarez Quezada, AXXX XX0 967, 2018 WL 2761470, at *3 n.1 (BIA Mar. 13, 2018) (unpublished).

[141] Zbigniew Nawrot Iwona Nawrot, AXXX XX3 591, 2016 WL 6392681, at *1 (BIA Aug. 31, 2016) (unpublished).

[142] *Matter of S-K-*, 23 I&N Dec. 936, 945 n.13 (BIA 2006).

[143] *Matter of Estrada-Betancourt*, 12 I&N Dec. 191, 198 (BIA 1967).

[144] Juan Salazar-Rodriguez, AXX XX3 720, 2006 WL 3088932, at *2 (BIA Sept. 13, 2006) (unpublished).

[145] Juan Carlos Moreno-Tinoco, AXX XX0 133, 2006 WL 1558721, at *2 (BIA Apr. 27, 2006) (unpublished) (also reasoning that remand was necessary so that IJ could determine whether conviction was vitiated for immigration purposes).

[146] *Matter of G-Q-*, 7 I&N Dec. 195, 200 (BIA 1956) ("Evidence of the laws of Mexico and their interpretation are readily available to the Service and should be entered into the record in a proper manner.").

[147] *See Burger v. Gonzales*, 498 F.3d 131, 134-36 (2d Cir. 2007); *Getachew v. INS*, 25 F.3d 841, 845-46 (9th Cir. 1994); *De la Llana-Castellon v. INS*, 16 F.3d 1093, 1099-1100 (10th Cir. 1994).

[148] *See Gutierrez-Rogue v. INS*, 954 F.2d 769, 772-73 (D.C. Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 967-69 (5th Cir. 1991); *Kaczmarczyk v. INS*, 933 F.2d 588, 595-97 (7th Cir. 1991).

Challenges to an IJ or the BIA taking administrative notice

If an IJ indicates at a hearing that they intend to take administrative notice of something, practitioners should request the opportunity to review a copy of whatever the IJ intends to rely on and to then make any appropriate objections or present evidence to rebut it. Practitioners could challenge an IJ or BIA's use of administratively noticed facts by arguing, for example, that the materials relied on were not "commonly known facts," that the facts are actually in dispute pointing to their own expert or report, or that the source relied upon is of questionable reliability.

Practitioners should never rely on the IJ or BIA's authority to administratively notice a fact and should always introduce into the record all evidence needed to sustain the client's burden of proof. While the BIA and IJ may take administrative notice, they are not required to do so.[149]

When the IJ or the BIA relies on administratively noticed facts to enter an adverse decision, practitioners should challenge the lack of notice and opportunity to respond to the evidence before a decision was reached. Practitioners could argue that such practice violates the statutory right to a "reasonable opportunity to examine the evidence against the [noncitizen]"[150] as well as due process principles of notice and an opportunity to be heard. Practitioners should be familiar with precedent in their particular jurisdiction regarding this issue.

For further information on this subject, practitioners may wish to review IJ training materials discussing evidentiary standards including administrative notice, which were obtained by immigration attorney Matthew Hoppock through a Freedom of Information Act request.[151]

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[149] *See Yang Zhao-Cheng v. Holder*, 721 F.3d 25, 28 (1st Cir. 2013) ("[A]lthough the BIA is empowered to take administrative notice of 'commonly known facts such as current events or the contents of official documents,' it is not compelled to do so." (internal citations omitted)); *see also, e.g.*, Jose Omar Mejia-Palacios, AXXX XX9 552, 2018 WL 3416259, at *3 (BIA May 17, 2018) (unpublished) (noting that IJ need not take administrative notice of increase in gang violence in Honduras since it is the respondent's burden to submit sufficient evidence supporting a motion to reopen).

[150] INA § 240(b)(4)(B).

[151] Hoppock Law Firm, FOIA Results: Immigration Judges' Conference Materials for 2018 (Aug. 21, 2018), https://www.hoppocklawfirm.com/foia-results-immigration-judges-conference-materials-for-2018/ (see resources entitled "Evidentiary Challenges in Immigration Court" and especially "Immigration Law: Evidentiary Challenges for Appellate Adjudication in the Digital Age 2018"). For further discussion about administrative notice in immigration proceedings, see Robyn Brown & Vivian Carballo, *Beyond the Record: Administrative Notice and the Opportunity to Respond*, 9 IMMIGR. L. ADVISOR 1 (Sept. 2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/10/02/vol9no8.pdf?fbclid=IwAR19XXMvlE_m1eInStHNE1NxhanUZvd44bvQHuhWyg8pgJBfLNPfZJdhjSM.

IV. Procedural and Filing Rules

A. Generally

The Immigration Court Practice Manual (ICPM) provides guidance to practitioners about practice in immigration courts, including the proper methods for filing documents.[152] The ICPM's requirements are binding on the parties appearing before the court unless an IJ directs otherwise in a particular case.[153] The ICPM covers the following subjects, among others:

- Foreign language document translation, including the requirement that documents be "accompanied by a certified English language translation" that includes a signed certification stating "that the translator is competent to translate the language of the document, and that the translation is true and accurate to the best of the translator's abilities"[154]
- Criminal conviction documents including encouraging the use of criminal history charts[155]
- Document size, tabs, pagination, indices, and binding[156]
- Witness lists[157]
- Signature requirements for documents[158]
- Photocopies versus originals[159]
- Photographs[160]
- Service on the opposing party[161]
- Rules for going off the record during hearings[162]
- Filing deadlines[163]

Practice Tips

Practitioners should carefully review the ICPM and relevant regulations and EOIR memoranda and follow them in all filings. Practitioners should be prepared to advocate for the IJ to follow procedures

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[152] EOIR, Immigration Court Practice Manual (last updated Feb. 20, 2020), https://www.justice.gov/file/1250706/download [hereinafter "ICPM"].
[153] ICPM ch. 1.1(b).
[154] *Id.* ch. 3.3(a); *see also* 8 CFR § 1003.33.
[155] ICPM ch. 3.3(f).
[156] *Id.* ch. 3.3(c); *see also* 8 CFR § 1003.32.
[157] ICPM ch. 3.3(g).
[158] *Id.* ch. 3.3(b).
[159] *Id.* ch. 3.3(d).
[160] *Id.* ch. 3.3(d)(iv).
[161] *Id.* ch. 3.2; *see also* 8 CFR § 1003.32(a).
[162] ICPM ch. 4.10(a), *see* INA 240(b)(4)(C) (requiring that a "complete record" of testimony and evidence be kept); 8 CFR § 1240.9 (stating that hearing must be "recorded verbatim except for statements made off the record with the permission of the immigration judge"); EOIR, Operating Policies and Procedures Memorandum 03-06: Procedures for Going Off-Record During Proceedings (Oct. 10, 2003), https://www.justice.gov/sites/default/files/eoir/legacy/2003/10/15/03-06.pdf.
[163] ICPM ch. 3.1(b).

to protect their clients' interests, such as the requirement that if an IJ goes off the record during a hearing he or she must summarize the off-record discussion on the record and allow the parties to supplement the summary.[164]

B. Impeachment and Rebuttal Evidence

The ICPM establishes a general filing deadline in non-detained cases of 15 days before the upcoming hearing; however if the IJ sets specific deadlines in a case any IJ-imposed deadline would govern.[165] If a party fails to file documents by the imposed deadline, "the opportunity to file that . . . document shall be deemed waived."[166] The ICPM provides an exception to the general 15-day filing deadline for "exhibits or witnesses offered solely to rebut and/or impeach."[167] According to Black's Law Dictionary, impeachment evidence is "[e]vidence used to undermine a witness's credibility,"[168] and rebuttal evidence is evidence "offered to disprove or contradict the evidence presented by an opposing party."[169]

Practice Tips

Practitioners should object to DHS's untimely submission of evidence. If DHS has the burden of proof, practitioners should move to terminate for failure to meet the burden of proof.

In situations where the respondent has the burden such as related to an application for relief, DHS may decline to file any evidence in a case by the filing deadline but then seek to introduce derogatory evidence on the day of the hearing, asserting that it is being offered for rebuttal or impeachment purposes. Where possible, practitioners should argue that the evidence is not truly impeachment or rebuttal evidence and that DHS has not provided adequate reasons to support a late filing.[170] For example, practitioners should object if DHS offers a prior inconsistent statement as impeachment evidence but there has not been any witness testimony to impeach, or if DHS has not gone through the required step of giving the witness the chance to explain or deny the prior

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[164] See sources noted in note 162, *supra*.
[165] ICPM ch 3.1(b); 8 CFR 1003.31(c) ("The Immigration Judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any.").
[166] *Id.*
[167] ICPM ch 3.1(b)(ii)(A).
[168] BLACK'S LAW DICTIONARY (11th Ed. 2019) (Evidence, Impeachment evidence); see Fed. R. Evid. 607-610 (discussing evidence rules related to impeachment of witnesses); *Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013) (noting that impeachment evidence attacks a witness's credibility and that "[w]here there is no act of 'telling,' there is no need to determine the credibility of the witness"; holding that, in asylum termination hearing context, DHS could not meet its burden solely through impeachment evidence where there is "no substantive evidence and thus nothing to impeach").
[169] BLACK'S LAW DICTIONARY (11th Ed. 2019) (Evidence, Rebuttal evidence).
[170] *See, e.g.*, Ingrid Paxtor, AXXX XX8 753, 2010 WL 4972449 (BIA Nov. 16, 2010) (unpublished) (upholding IJ exclusion of Form I-213 for failing to show good cause for the late filing despite IJ's clear setting of deadline and fact that DHS had the I-213 in its possession well before the deadline).

inconsistent statement.[171] Similarly, if DHS offers evidence purporting to rebut evidence the respondent filed pursuant to the 15-day filing deadline (rather than evidence offered to rebut testimony or evidence that arises at the hearing), practitioners should argue that such evidence is untimely unless DHS complied with the 10-day deadline for responses to such filings.[172] If the IJ allows the evidence despite its tardiness, practitioners should seek a continuance to allow sufficient time to review the evidence.[173] Reviewing the evidence is necessary so that appropriate objections can be made and also in order for the respondent to be able to meaningfully respond to the evidence or offer rebuttal evidence. If the IJ denies a continuance, the practitioner should ask for a recess to review the document with the client before proceeding. If the IJ does not provide adequate time to review the document and allows it into evidence, practitioners should ensure that the record is clear regarding the objection and how the IJ's denial of a continuance prejudices the respondent's ability to present his or her case.[174]

If a practitioner must submit evidence beyond the court's deadline, the evidence should be accompanied by a motion to accept the untimely filing that explains the reasons for the untimely filing and establishes good cause for the lateness.[175] Parties are "strongly encouraged" to submit

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[171] *See* Fed. R. Evid. 613(b).

[172] *See* ICPM ch. 3.1(b)(ii)(A) ("Responses to filings that were submitted in advance of an individual calendar hearing must be filed within ten (10) days after the original filing with the Immigration Court.").

[173] *See, e.g.*, *Bondarenko v. Holder*, 733 F.3d 899, 906 (9th Cir. 2013) (concluding that petitioner's due process rights were violated when the IJ refused to grant him a continuance to investigate a forensic report introduced by DHS at the hearing); *Cinapian v. Holder*, 567 F.3d 1067, 1076-77 (9th Cir. 2009) ("When the government fails to notify Petitioners in advance of the hearing of evidence and also does not take reasonable steps to make the preparer of that evidence available for cross-examination at the hearing, the proper course is for the IJ either to grant a continuance or to refuse to admit the evidence."); *cf.* Seon Yun, AXXX XX6 378, 2016 WL 4976724, at *1 (BIA July 22, 2016) (unpublished) (concluding that the respondent had waived the issue by failing to request a continuance to review DHS's untimely submitted documents). To minimize the possibility of surprise impeachment evidence, practitioners should seek to obtain such evidence well before the hearing, such as by filing Freedom of Information Act requests, FBI background checks, obtaining criminal records including police reports, and asking DHS OCC for documents (or asking the IJ to order DHS OCC to produce documents). *See Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010); American Immigration Council Legal Action Center, Practice Advisory, Dent v. Holder *and Strategies for Obtaining Documents from the Government During Removal Proceedings* (June 12, 2012), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf.

[174] *See* INA § 240(b)(4)(B); 8 CFR § 1240.10(a)(4); *Hincapie v. U.S. Att'y Gen.*, 604 F. App'x 882, 8885 (11th Cir. 2015) (unpublished) (concluding that the respondent could not show prejudice as required to assert due process violation because she "has not demonstrated how having prior access to the statement" that DHS submitted at the hearing "would have changed the outcome of her proceedings"); *cf.* Guillermo Trevino-Cavazos, AXX XX6 735, 2004 WL 2375049, at *2 (BIA Sept. 21, 2004) (unpublished) (respondent alleged that DHS unfairly surprised him by offering presentence investigation report and he was not given sufficient time to review it and rehabilitate his testimony, but "he has not explained on appeal how he could have been rehabilitated on redirect examination or how the filing of a written response by his counsel would have served any purpose other than to delay the proceedings").

[175] ICPM ch. 3.1(d)(iii).

documentary evidence with the motion, such as an affidavit or declaration under penalty of perjury that includes the facts showing good cause.[176]

V. Practice Tips for Making and Responding to Objections in Immigration Court

During witness examination at an individual hearing, practitioners should object to unfair or improper questioning of their client and other witnesses by the DHS OCC attorney or the IJ. Practitioners should also be prepared to respond to objections to their own questions made by the DHS OCC attorney during direct or re-direct examination of a witness or cross examination of a DHS witness. Below are some practical tips for making and responding to objections in immigration court.

A. Making Objections

- Practitioners should carefully review all DHS OCC documentary evidence and make appropriate objections at the beginning of the hearing before it is admitted into evidence. Practitioners could also file written objections ahead of the hearing.[177]
- Before making an objection, practitioners should consider whether there is a legal basis for the objection and whether it is strategically beneficial to make the objection. Sometimes a question is objectionable but the practitioner may conclude, based on hearing preparation with the witness, that the witness's answer will advance the case. On the contrary, practitioners should object any time it is appropriate and helpful to the client, regardless of the anticipated likelihood that the objection will be successful. It is necessary to object to preserve the record for appeal.
- When making an objection to a DHS OCC question, practitioners should do so timely (before the witness answers). If the witness is testifying through an interpreter, this may give the practitioner a little more time to object before the witness answers.
- Practitioners should ensure that the IJ rules on the objection, on the record, to preserve the issue for appellate review. If the IJ does not give a clear ruling, practitioners should respectfully request a ruling.
- Practitioners should be ready to state the basis for the objection. If an objection is overruled, practitioners could argue that for the same reasons that the objection was made, the elicited evidence should be afforded minimal weight. Practitioners could also make weight arguments during closing argument. If the IJ does not allow closing, practitioners may request the opportunity to submit a written closing.[178]
- Practitioners should remember that it is also possible—and sometimes necessary—to object to IJ questioning, particularly if it is hostile. While IJs have the authority to question witnesses, this

[176] *Id.*

[177] *See* ICPM ch. 3.1(b)(ii)(A) ("Objections to evidence may be made at any time, including at the hearing.").

[178] *See* 8 CFR § 1240.9 ("In his or her discretion, the immigration judge may exclude from the record any arguments . . . but in such event the person affected may submit a brief.").

does not mean that the IJ may do so in a hostile manner.[179] Objections on the record will preserve the issue for appeal.

- Practitioners should review the evidence rules ahead of the hearing, and bring an objection cheat sheet for reference during the hearing. When in doubt, practitioners should make the objection to preserve the issue for appeal, relying on the fundamental fairness framework.

B. Responding to Objections

- Practitioners should prepare for possible DHS OCC objections to documentary evidence or witness testimony. In particular, practitioners should have a theory of relevance for all evidence submitted and testimony elicited and be prepared to lay an evidentiary foundation if there are objections based on lack of personal knowledge. This highlights the importance of engaging continuously in case assessment.
- To avoid DHS objections for leading questions, practitioners should ask non-leading, open ended questions on direct and re-direct examination.
- In response to a DHS OCC objection, practitioners have several options, which will depend on the nature of the objection. These options include defending the question or evidence (particularly where the objection relates to the substance of the question or testimony) or rephrasing the question (particularly in situations where the objection relates to the form of the question or the failure to lay sufficient foundation).
- If the IJ sustains a DHS OCC objection, practitioners should consider other ways to get the evidence in, such as by asking a different question or getting the evidence in through another source or witness.
- When the IJ sustains an objection and the practitioner is not able to get the evidence in by asking a different question or through another witness, he or she should make an offer of proof to preserve the issue for appeal. An offer of proof tells the court what the evidence would have been, had it been allowed in.[180] For example, the practitioner might say – "Your Honor, I would like to make an offer of proof. If the IJ had not sustained the objection, the witness would have testified that she was 23 years old when she left Honduras." An offer of proof helps show prejudice on appeal, which is necessary for winning on an evidentiary issue.

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[179] *See* EOIR, Ethics and Professionalism Guide for Immigration Judges § IX, https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf ("An Immigration Judge should be patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers, and others with whom the Immigration Judge deals in his or her official capacity, and should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice."); *id.* Note (cautioning IJs to "avoid behavior, including inappropriate demeanor, which may be perceived as biased" such as "threatening, intimidating, or hostile acts"); *see also Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015) ("Conduct by an Immigration Judge that can be perceived as bullying or hostile is never appropriate. . . .").

[180] *See* Fed. R. Evid. 103(a)(2); 8 CFR § 1240.9 (stating that proffers are part of the record).

VI. Conclusion

Even though evidence rules are relaxed in immigration court proceedings, practitioners must be familiar with the Federal Rules of Evidence and other relevant authority discussed herein and should argue that IJ should follow these standards to ensure reliability and fundamental fairness. Practitioners who employ evidentiary tools to a client's advantage help to protect the client's rights to due process in removal proceedings and preserve the best record for appeal. These skills are all the more important in an era where IJs are under pressure to complete hearings quickly and follow politicized directives.

LIST OF COMMON OBJECTIONS[1]

National Institute for Trial Advocacy Immigration Programs

OBJECTIONS TO THE FORM OF THE QUESTION

1. **LEADING QUESTION** (611): question suggests its own answer
2. **COMPOUND QUESTION**: contains 2 separate inquiries
3. **VAGUE QUESTION**: incomprehensible, incomplete, or answer will be ambiguous
4. **ARGUMENTATIVE QUESTION**: asks the witness to accept the examiner's summary, inference, or conclusion rather than a fact
5. **NARRATIVES**: question calls for a narrative answer - answer does not allow opposing counsel to frame objections
6. **ASKED AND ANSWERED**: repeats the same question (611(a) cumulative)
7. **ASSUMING FACTS NOT IN EVIDENCE**: contains as a predicate a statement of fact not proven/included
8. **MISCHARACTERIZATION OF THE EVIDENCE:** presents the documentary evidence or prior testimony in an inaccurate manner

RESPONDING TO AN OBJECTION

1. NO ARGUMENT
Rephrase the question and move on

2. REQUESTING ARGUMENT
Politely let the judge know argument is necessary. Ask, "May I respond?"

3. OFFER OF PROOF (103)
Provide an offer of proof about what the witness would have testified about had the IJ allowed the witness to answer the question

SUBSTANTIVE OBJECTIONS

1. **HEARSAY** (801(c)): calls for a statement, other than made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Since hearsay is generally admissible in Immigration Court, object and argue within the fundamental fairness framework applicable in removal proceedings by noting that the evidence is not reliable, relevant, etc.
2. **RELEVANCE** (401 & 402): does not make any fact of consequence more or less probable
3. **UNFAIR PREJUDICE** (403): probative value is outweighed by the danger of unfair prejudice
4. **LACK OF PERSONAL KNOWLEDGE** (602): witnesses (other than experts) must testify from personal knowledge - sensory perception
5. **IMPROPER LAY OPINION** (701): lay witnesses can't testify as to opinions, conclusions or inferences
6. **SPECULATION**: can't be asked to speculate or guess, especially as to someone else's state of mind
7. **AUTHENTICITY** (901): proposed evidence must be authenticated before it may be admitted
8. **LACK OF FOUNDATION**: has not shown why the witness is qualified to answer the question, how s/he is familiar with the subject
9. **NON-RESPONSIVE ANSWER**: answer does not respond to the question
10. **PRIVILEGE** (501): excludes otherwise admissible evidence because of special relationship (attorney/client, doctor/patient, marital, clergy, etc.)

MAKING AN OBJECTION

1. **Listen**
2. **Be timely**
3. **Say "Objection" loud enough to be heard**
4. **State the grounds**
5. **Be calm, succinct, professional**
6. **Make sure you get a ruling**

[1] Excerpted and adapted from Lubet, **Modern Trial Advocacy** (4th Ed. 2009 NITA). *See, in particular*, Chapter 9.

RULE 401 — DEFINITION OF RELEVANT EVIDENCE

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 403 — EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence my be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 602 — LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

RULE 701 — OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

RULE 702 — TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

RULE 801 — HEARSAY DEFINED

(c) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay (1) Prior statement by witness; (2) Admission by party-opponent.

RULE 803 — (Some) HEARSAY EXCEPTIONS

(1) Present sense impression; (2) Excited utterance; (3) Then existing mental, emotional or physical condition; (4) Statements for medical diagnosis or treatment; (5) Recorded recollection; (6) Records of regularly conducted activity; (8) Public records and reports; (9) Records of vital statistics; (11) Records of religious organizations; (14) Records or documents affecting an interest in property; (15) Statements in documents affecting an interest in property; (16) Statements in ancient documents; (17) Market reports; (18) Learned treatises; (19) Reputation concerning personal or family history; (20) Reputation concerning boundaries or general history; (21) Reputation as to character; (22) Judgment of previous conviction; (23) Judgment as to personal, family or general history.

RULE 804 — HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(b) Hearsay exceptions: (1) Former testimony; (2) Statement under belief of impending death; (3) Statement against interest; (4) Statement of personal or family history.

RULE 1002 — REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

RULE 103 - Rulings on Evidence

(a) Preserving a Claim of Error

A party may claim error "if the ruling excludes evidence, [and] a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Examples:

"Your honor, if allowed to answer Q objected to, W would testify to X."

"Your Honor, the witness would testify that ... substantiating the facts that Mr. Drobny has not seen his father since he was two years old. The elderly condition of the grandmother who partially raised him and would have also testified as to the fact that while Mr. Drobny was employed he did contribute towards his support. When he lived with his mother while he was employed he paid room and board to his mother." *Drobny v. I.N.S.,* 947 F.2d 241 (7th Cir. 1991)

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 370 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 legal representatives; 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 appeal, 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 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."