

APPENDIX 8H

PRACTICE POINTERS ON DIRECT AND CROSS-EXAMINATION OF THE ASYLUM APPLICANT

As you prepare for your asylum hearing, it is helpful to outline your direct examination and anticipated cross-examination. Review the questions over and over with the asylum applicant during your interviews and, later, in a mock hearing. The following are useful tips to employ when preparing your direct examination and in anticipating the U.S. Department of Homeland Security (DHS) attorney's cross-examination.

Starting

Begin your direct examination with simple questions that are easy for the applicant to answer and that will give the applicant time to become accustomed to testifying in court. It is highly beneficial and recommended that you make an opening statement to the immigration judge. If you do not, you may want to ask the applicant a question at the beginning of the hearing that allows the applicant to provide an overview of the case.

Concluding

End both your direct and re-direct with the strongest aspects of the applicant's claim.

Weak Points

Often it is helpful to address the weak points of the applicant's claim in your direct examination. If weak points are revealed only during cross-examination, the immigration judge may believe the applicant is evasive or dishonest.

Voluntary Departure

Ask voluntary departure questions at the beginning of the hearing, never at the end. Remember, it's better to end with the strongest points regarding the applicant's claim.

Cross-Examination

In asking the applicant anticipated cross-examination questions, always include questions that contain mistakes regarding the applicant's previous testimony. Advise the applicant of the importance of correcting such errors. Also, during the mock hearing, it is useful for the applicant to practice correcting these errors.

Emotional and Physical Harm

Ask questions not only about the events surrounding the applicant's claim, but also about the emotional and physical state of the applicant before, during, and after such events. It is important for the immigration judge to understand the trauma an individual may experience from witnessing such an event or its aftermath.

Positive and Negative Discretionary Factors

Asylum is a discretionary form of relief. An individual who meets the definition of refugee may be denied asylum at the discretion of the immigration judge. Generally, only the most egregious adverse factors should result in an asylum denial. It is imperative that positive discretionary factors, such as the presence of family members lawfully in the United States; letters from employers, co-

workers, houses of worship, volunteer work, teachers, and neighbors; grades from school or classes the applicant and the applicant's children are attending.

Objections

Advise the applicant that the DHS attorney may ask questions that are improper or irrelevant. Instruct the applicant that if an objection is made, the applicant should not answer the question until the matter is resolved by the immigration judge. If the applicant does not speak English, explain prior to the hearing that there may be untranslated discussions regarding questions, documents, or witnesses, and that these discussions are a normal part of the hearing.

Organization

In most cases, the best way to organize questions is chronologically. There may be cases, however, where a different order is preferable, especially if applicant fears more than one persecutor. For example, if the applicant fears both the government and a nongovernmental actor, it may be best to organize questions chronologically, but separately, regarding each persecutor that the applicant fears.

Follow-Up Questions

An applicant may forget to mention a fact or detail of his or her claim while testifying. Make sure to ask non-leading follow-up questions during the direct and re-direct examination to elicit this information from the applicant. Practice this beforehand! It's hard not to be leading when your client has left out a small, but vital piece of information.

Comprehension

Applicants sometimes have difficulty understanding the immigration judge or DHS trial attorney because of their manner of speaking or the vocabulary they use. Advise the applicant that he or she should never answer a question that he or she does not understand. The applicant can ask that a question be repeated or rephrased. If an interpreter is being used, instruct the applicant to inform the immigration judge if he or she has difficulty understanding the interpreter.

DIRECT EXAMINATION OF THE APPLICANT

The Beginning—Simple Questions

Simple questions at the start of your direct examination will put the applicant at ease and allow him or her to become accustomed to answering questions in court. If an interpreter is used, these questions will allow the applicant to become accustomed to the accent and speech patterns of the interpreter, as well.

- Please state your full name.
- Where were you born?
- Are you a citizen of _____?
- How old are you?
- When were you born?
- Are you married?
- Where does your spouse live?
- How many children do you have?
- How old are they?
- Where do your children live?

Thorny Issues

Address the thornier issues in the case near the beginning of the direct examination, if possible. As noted above, it is better to save the stronger portions of the claim for later. Thorny issues that may arise in asylum claims include:

- Manner of entry into the United States (*e.g.*, use of false documents, the use of documents fraudulently obtained, or illegal entry);
- Eligibility for voluntary departure;
- Criminal convictions (in addition to questions regarding crimes and sentences, ask the applicant about his or her efforts toward rehabilitation and feelings of remorse for past actions);
- Reasons for remaining in or returning to the country of claimed persecution;
- Lack of corroborating evidence. Note: if the applicant lacks proof of his or her identity, membership in a political party, or other aspect of his or her claim, the applicant must explain why he or she has been unable to obtain such evidence or why it would be unreasonable to attempt to obtain it.

The Middle—The Heart of the Claim

To begin this part of the direct examination, ask the applicant, “Why did you come to the United States?” or “Why did you leave your home country?” The applicant should begin with a brief summary of his or her claim, such as: *I came to the United States because I feared that I would be killed by the government because I am a member of _____, a religious minority, and I was an outspoken opponent of the government.* Then the applicant should be asked questions that elicit a chronological account of the harm he or she suffered and/or why he or she has a well-founded fear of persecution.

- Details matter! Ask probing questions so that the applicant provides as much detail as possible. Make sure, however, that you also ask these questions prior to the hearing so that you are not surprised in court by the applicant’s responses.
- Be creative! Applicants who have difficulty remembering dates could establish approximate dates by providing details regarding the season, political events, religious celebrations, or even the ages of their children.
- Listen! Make sure that you, the interpreter, the DHS attorney, or the immigration judge do not inadvertently cut off the applicant’s testimony. Always ask whether the applicant has any further comments if an interruption takes place.

The End—The Lasting Impression

End your direct examination with a summary of the strongest points of the applicant’s claim. Sometimes this may be done by asking questions such as:

- Why did you leave your home country?
- Who or what did you leave behind?
- Have you been affected physically and emotionally by what has happened to you in your home country?
- In what way?

Applicants who have experienced or witnessed traumatic events may continue to experience emotional, as well as physical effects. If so, such applicants should also be referred for treatment. *See ap-*

pendix 6H for a list of treatment centers. It is also important to ask the applicant at or near the end of the direct examination:

- What do you think will happen to you if you are returned to your home country?
- Why?

Humanize your client. Let the immigration judge know what a responsible, respectable, honorable person she is. Does she help out in her neighborhood, church, school, or community? Is she a good mother? What activities does she do with her children? Is she attending classes? What are her future plans if she remains here? The DHS attorney might object that such questions are not relevant, but they are. They are relevant to whether the applicant merits asylum as a matter of discretion and most judges not only allow them, but are very interested in and swayed by the responses.

CROSS-EXAMINATION OF THE APPLICANT

In an effort to determine whether the applicant is eligible for or deserving of asylum or withholding of removal, the DHS attorney may ask the applicant questions regarding:

Family Members Who Have Remained in the Applicant's Home Country

If the applicant has family members who live in his or her home country, the applicant should indicate how the applicant's situation is different than that of his or her family members (if this is so) or provide information regarding why his or her family members have remained and the problems or difficulties, if any, they are experiencing.

Failure to Report Crimes or Abuses to the Police or Other Governmental Authority

If the applicant suffered harm in his or her home country, but failed to report it to the police, he or she will need to explain why. Was the applicant afraid of the authorities or would such a report have been futile or dangerous? These are areas that need to be explored when questioning the applicant prior to the hearing and addressed during direct examination.

Economic Reasons for Coming to the United States

The applicant may have chosen the United States as a country of refuge for a variety of reasons. The applicant may have friends or family members in the United States, or a desire to further his or her education, or he or she may have chosen the United States because of the freedoms enjoyed by its residents. It is also well known that many immigrants come to the United States to work. The applicant may have chosen the United States for any one or all of these reasons. If the applicant also came here believing that he or she would be able to find a job, in addition to fleeing the harm he or she experienced, the applicant should be truthful and acknowledge this. In answering, however, the applicant should reiterate the primary motive for leaving his or her home country.

Lack of Political Activity

Even though the applicant may not have been politically active in his or her home country, the applicant may still be eligible for asylum based on a political opinion imputed to him or her, or because of his or her race, religion, nationality, or membership in a particular social group. When the applicant is questioned about a lack of political activity, he or she should reiterate the basis for the asylum claim.

Failure to Mention an Event or Detail on the Asylum Application

When completing the asylum application, it is often useful to provide as many details as possible regarding the applicant's claim. Nevertheless, at the hearing, the applicant may (and almost always

does) mention a fact or detail not included in the application. In response to a question by the DHS attorney regarding why the applicant failed to mention it on his or her asylum application, the applicant should offer an explanation. Was the applicant previously uncomfortable in speaking about a particular aspect of his or her claim? Did the applicant tell you and you decided to leave it out of the application? Or did the applicant, in preparing for the hearing, begin to remember more aspects and details regarding a particular event?

Inconsistencies in the Applicant's Testimony or Between the Testimony and the Application

We all make mistakes, but such mistakes could be fatal (literally) if they involve a material fact in the applicant's claim. Under the REAL ID Act, even minor inconsistencies that do not go to the heart of the asylum applicant can be used to establish an applicant is not credible. Does the applicant have difficulty remembering? If so, the applicant should emphasize when answering questions that he or she has difficulty remembering and that the answers given are based on his or her recollection or are approximations. If the applicant makes a mistake when testifying on his or her application, the applicant should state this in his or her answer. Individuals who have experienced or witnessed traumatic events may have difficulty remembering. If applicant is experiencing memory problems, you may wish to refer him or her for treatment. *See* appendix 12B. Applicants should also be advised that if the DHS attorney misstates their previous testimony or their statement on the application, they should correct such mistakes in their response.

Country Conditions

The applicant should be made aware of the country condition information submitted in his or her case. He or she also usually has firsthand knowledge of conditions in his or her country. Sometimes, however, the DHS attorney will ask a question that the applicant is unable to answer. The applicant should be instructed not to guess, and, if he or she is asked to guess, an objection should be made.

Misstatements Made upon Entry

The applicant may have made misstatements to a U.S. Embassy official or an airport inspector or border patrol agent when he or she was apprehended. He or she may have made misrepresentations regarding his or her country of origin or reasons for coming to the United States. The applicant needs to explain why he or she made such statements. Occasionally, an applicant will claim that he or she did not make the misrepresentations that DHS claims were made. In such cases, it is important to request the opportunity to question the officer who reported that the applicant made such statements.

Failure to Apply for Asylum in Other Countries

Applicants may be questioned regarding whether they applied for asylum in any countries that they passed through en route to the United States. If the applicant did not apply in such countries, he or she will be asked why. Many applicants are unaware of asylum procedures in other countries or have fled their home countries with the intention of being reunited with friends and family members in the United States. The applicant should state his or her reasons for failing to apply in the countries he or she resided in or traveled through on the way to the United States.

Failure to Immediately Depart from the Country of Claimed Persecution

The applicant may have remained in his or her home country for several months or longer after he or she was harmed or threatened. It is important for the applicant to state when he or she decided to leave, the steps taken in arranging to leave, and the difficulties encountered in planning to leave.

Failure to Present Corroborating Evidence

The REAL ID Act imposes an even greater burden on the applicant to produce corroborating evidence in support of his or her claim. Often, it is unreasonable to expect the applicant to contact his or her home government, which has engaged in persecution, to corroborate the claim. Many times, individuals flee with little or nothing to prove their claim. The applicant should state any attempts made to locate corroborating evidence and, if no steps were taken, why it would be unreasonable to expect corroboration.

Manner of Entry

The applicant's manner of entry is almost always an issue in an asylum case. Did he or she enter legally on a valid passport? If so, DHS will argue either that the government is not really after the applicant because it would not have issued him or her a passport to leave the country or that the applicant committed fraud by telling a consular official overseas that he or she was coming to study or to visit as a tourist. Is the applicant better off in the eyes of DHS if he or she entered with a false passport and visa? Not really. DHS will argue that this is a person who lied to DHS inspectors at the airport to get into the United States and is probably lying now. What if the applicant resorted to using the services of a smuggler? DHS will ask detailed questions about the amount the applicant paid the smuggler and whether the smuggler informed him or her about what to say when seeking asylum. If the applicant is a victim of human traffickers, however, he or she may be eligible for a form of relief under the Victims of Trafficking and Violence Protection Act. *See* chapter 16.