Stetson Journal of Advocacy and the Law

The first online law review designed to be read online

5 Stetson J. Advoc. & L. 1 (2018)

Objections in Immigration Court: Dost Thou Protest Too Much or Too Little?

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I. Introduction

1. An objection is generally an expression or feeling of disapproval or opposition. In court, an objection is a reason for disagreeing with some introduction of evidence.[3] In most courts, the reasons and protocols for various objections are set forth in codified rules of evidence; however, the procedures in immigration courts are not so clearly defined since the Federal Rules of Evidence (F.R.E.) are not strictly applied in immigration courts. The rules of evidence applicable to criminal proceedings do not apply to removal hearings. Relevance and fundamental fairness are the only bars to

1 William Shakespeare, Gertrude to Hamlet, "The lady doth protest too much, methinks."

2 Dorothy A. Harbeck is the Eastern Regional Vice President of the National Association of Immigration Judges (NAIJ). The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of the NAIJ. This article is solely for educational purposes, and it does not serve to substitute for any expert, professional and/or legal representation and advice. Judge Harbeck is also an adjunct Professor of Law at Seton Hall University School of Law in trial skills.

3 BLACK'S LAW DICTIONARY (2D ED. 1910).

admissibility of evidence in deportation cases.[4] Immigration courts are creatures of statute. They were created under the Immigration & Nationality Act (INA) as part of the Department of Justice (DOJ), specifically the Executive Office for Immigration Review (EOIR). The EOIR has a Practice Manual as well as guidance memoranda.[5] The trials are before the bench (with no jury) and a Digital Audio Recording (DAR) is made of the proceedings. Lawyers conduct direct and cross examinations and sometimes — but not often enough — make objections. The F.R.E. can provide some guidance in immigration court practice, although immigration proceedings are not bound by the strict rules of evidence.[6] The relevant F.R.E. citation for each objection has been included. Objections to questions must first be made at the trial court level, because if the objection is not made there, an argument based on that objection cannot be asserted on appeal.[7] In immigration court, as in other courts, evidentiary objections must be made in a timely fashion, and the grounds must, therefore, be identified with particularity.[8]

2. The purpose of this article is to discuss verbal objections in immigration court removal/deportation proceedings. It is *not* an exhaustive and limiting list. It is merely a discussion of the main fourteen objections out of many potential objections that generally make the most sense in immigration court proceedings. This article does not include any objections based upon the potential mental capacity of a witness. The EOIR has extensive criteria for dealing with witnesses that exhibit such issues and that is well beyond the scope of this discussion.[9] Further, unlike many articles providing a "hip pocket" guide to objections at a trial court level, this article does not examine hearsay objections since hearsay is allowed in immigration court unless its use is fundamentally unfair.[10] The general rule with respect to evidence in

4 *Matter of Interiano-Rosa,* 25 I. & N. Dec. 264 (BIA 2010); *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503 (BIA 1980). See also Simon Azar-Farr, *A Synopsis of the Rules of Evidence in Immigration Removal Proceedings*, 19 BENDER'S IMMIGR. BULL. 3 (Jan. 2014).

5 The U.S. Department of Justice — Executive Office for Immigration Review (USDOJ-EOIR).

6 *Dallo v. INS*, 765 F. 2d 581 (6th Cir. 1985); *Longoria-Castaneda v. INS*, 548 F. 2d 233 (8th Cir. 1977); *Baliza v. INS*, 709 F. 2d 1231 (9th Cir. 1983); *Matter of Devera*, 16 I. & N. Dec. 266 (BIA 1977).

7 See *Matter of Edwards*, 20 I. & N. Dec. 191, 196–197 n.4 (BIA 1990) (objections not lodged before the immigration judge are not appropriately raised first on appeal).

8 Thus, a party who fails to raise a timely and specific objection to the admission of evidence generally does not preserve such an objection as a ground for appeal. *Matter of Lemhammad*, 20 I. & N. Dec. 316, 325 (BIA 1991); see also Fed. Rule of Evidence 103(a)(1). See *United States v. Adamson*, 665 F. 2d 649, 660 (5th Cir. 1982); *United States v. Arteaga-Limones*, 529 F. 2d 1183, 1198 (5th Cir. 1976). See also 8 C.F.R. § 1240.10(a)(4) (the immigration judge shall "advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her.").

9 *Matter of M-J-K*, 26 I. & N. Dec. 773 (BIA 2016).

10 *Matter of Grijalva*, 19 I. & N. Dec. 713 (BIA 1988). See also *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9th Cir. 2003); *Guerrero-Perez v. INS*, 242 F.3d 727, 729 n.2 (7th Cir. 2001).

immigration proceedings is that admissibility is favored, as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law.[11]

3. Since I was inspired to write this guide by the line from Shakespeare's Hamlet where Queen Gertrude comments that a character in a play protests too much, I discuss each of the fourteen objections as though they were part of Shakespeare's next best known medium, the fourteen line sonnet.[12] A Shakespearean sonnet has three four-line quatrains and then a two line "volta," or twist, at the end. I have divided up three general groups of objections and saved the best two for the end.

II. The First Quatrain — Questions that Elicit an Organic Response

Argumentative

4. DISCUSSION: This is not an objection to opposing counsel making a good point. It should be used when the questioning attorney is not asking a question and is instead making an argument of law or application of law that should be argued in summation. It is only valid when the witness is not being asked a question that he or she can properly answer.

5. F.R.E. Reference: Argumentative (611(a))

6. RESPONSE: "Your Honor, I am testing the testimony of this witness."[13]

11 *Baliza v. INS*, 709 F. 2d 1231 (9th Cir. 1983); *Matter of Toro*, 17 I. & N. Dec. 340 (BIA 1980); *Tashnizi v. INS*, 585 F. 2d 781 (5th Cir. 1978); *Trias-Hernandez v. INS*, 528 F. 2d 366 (9th Cir. 1975); *Marlowe v. INS*, 457 F. 2d 1314 (9th Cir. 1972); *Matter of Lam*, 14 I. & N. Dec. 168 (BIA 1972).

12 Linda Gregerson, *The Sonnet: Poetic Form*.

13 The concept of suggesting a lawyer's response to a judge after the judge has ruled on the objection was suggested to this author by the work of Leonard Bucklin from his *Building Trial Notebooks* series (James Publishing). Mr. Bucklin is a Felllow of the International Academy of Trial Lawyers, which attempts to identify the top 500 trial lawyers in the U.S. He served as a Director of the Academy from 1990 to 1996. He is also a member of the Million-Dollar Advocate's Forum, which is limited to plaintiffs' attorneys who have won million or multi-million dollar verdicts, awards, and settlements. On the other side of the table, Mr. Bucklin has been placed in Best's Directory of Recommended Insurance Attorneys as a result of superior defense work and reasonable fees for over 35 insurers. His training materials have been used by the New Jersey Institute of Continuing Legal Education in basic skills classes.

Form

7. DISCUSSION: An objection that the "form" is improper is a generalization; it is a sort of "catch-all" when the sense is that there is something wrong with a question. The objection is generally dealt with by a direction to counsel to rephrase. The best objections to "form" should state the specific issue.

8. RESPONSE: "Your Honor, may counsel be requested to inform the court in what specific way is the form of my question insufficient, so that I can remedy any problem?" (Then, when informed, restate the question to eliminate the bad form.)

Compound Question/Double Question

9. DISCUSSION: The question is really two questions posed as one. This objection should only be used when the question is misleading and the answer could be misconstrued by the jury.

10. F.R.E. Reference: Compound (611(a))

11. RESPONSE: Separate the question into the two parts.

Confusing/Vague/Ambiguous

12. DISCUSSION: Confusing/vague/misleading/ambiguous are all words that convey the objection that the question is not posed in a clear and precise manner so that the witness knows with certainty what information is being sought.

13. RESPONSE: "Your Honor, I can restate that question."

Counsel is Testifying/Misstates Evidence/Misquotes Witness/Improper Characterization of Evidence

14. DISCUSSION: Basically, in immigration court, this is when a lawyer is leading his or her own witness on direct or deliberately misstating facts on cross. The immigration judge has inherent power to administer the trial so that it is fair. The value of making this objection is to both wake up the witness to pay attention and not mindlessly answer the question, and also to call the attention of the immigration judge to the fact that the earlier testimony was different.

15. RESPONSE: "Your Honor, it is not a misstatement, and certainly the court and jury have heard the evidence." If the issue is counsel testifying, then, depending on the type of question, the best response is to revert back to non-leading who, what, where, when, how and why questions.

Narrative

16. DISCUSSION: This type of objection in immigration court is really only useful with expert witnesses. The point being that the immigration judge *wants* to hear from the respondent in a general narrative form, since so much of the respondent's case will depend upon whether the immigration judge finds him or her credible. However, objecting to a long narrative by an expert witness has the advantage of preventing an expert witness or other verbally gifted witness from captivating the attention of the immigration judge.

17. RESPONSE: "Your Honor, this simply asks for a short description of the expert's methodology."

III. The Second Quatrain — Questions Based on What Has Happened in Court

Assumes Facts Not in Evidence

18. DISCUSSION: Facts which are not in evidence cannot be used as the basis of a question, unless the immigration judge allows the question "subject to later connecting up." Generally, in the interest of good administration and usage of time, the immigration judge may allow the missing facts to be brought in later.

19. RESPONSE: "Your Honor, we will have those facts later in the case, but this witness is here now and it is the best use of time to ask that question now."

Beyond The Scope of Direct/Cross/Redirect Examination

20. DISCUSSION: The testimony sought was not covered by the opposing counsel while questioning the witness and is not relevant to any of the previous issues covered. In the testimony of an expert, the scope of what is within the direct examination is not limited to the exact items the expert talked about. Because the expert is an expert in an entire field and is there to explain items in the field of endeavor,

the scope of direct is usually understood to be everything in the expert's field of knowledge that bears on the case in issue.

21. F.R.E. Reference: Beyond Scope (of Direct, Cross) (1002).

22. RESPONSE: "Your Honor, this is within the scope of the direct examination (cross-examination) because [explain]."

Speculative

23. DISCUSSION: The witness does not have first-hand knowledge of the fact about which he or she is testifying. Greater freedom is allowed with expert witnesses, but still the expert is limited by Rule 702 strictures. Expert witnesses are allowed in immigration court proceedings.[14]

24. F.R.E. Reference: Speculation (602; 701)

25. RESPONSE: "Your Honor, this is an expert giving an expert opinion within the scope of her expertise."

Foundation/Lack of Personal Knowledge

26. DISCUSSION: The predicate evidence has not been entered that would make this evidence admissible. This is a good objection to make when the evidence about to come in is objectionable in some way. The objecting attorney must identify what is necessary to correct the lack of foundation for the deponent to answer.[15] If the witness is a layperson, the usual foundation objection is a lack of showing that the witness has personal knowledge of the facts which the question seeks. If the witness is an expert, the usual foundation objection is a lack of showing that the expert is qualified to give the opinion sought. A (non-expert) witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness

14 *Matter of D-R-*, 25 I. & N. Dec. 445 (BIA 2011). An expert witness is broadly defined as one who is qualified as an expert by knowledge, skill, experience, training, or education and who has specialized knowledge that will assist the immigration judge to understand the evidence or to determine a fact in issue. The "spirit of Daubert" is applicable in immigration court. See *Pasha v. Gonzales*, 433 F. 3d 530 (7th Cir. 2005) (discussing the rubric of expert testimony and referencing the seminal expert report case under the Federal Rules of Evidence, *Daubert v. Merrill Pharmaceuticals*, 509 U.S. 579 (1993)). The immigration judge has the discretion to exclude expert testimony. *Matter of V-K-*, 24 I. & N. Dec. 500, fn. 2 (BIA 2008); *Akinfolarin v. Gonzales*, 423 F. 3d 39, 43 (1st Cir. 2005).

15 *United States v. Michaels*, 726 F. 2d 1307, 1314 (8th Cir. 1984).

has personal knowledge of the matter. Evidence to prove personal knowledge may, but not must, consist of the testimony of the witness. With some qualifications, experts can testify to facts they used in their process of building an opinion, even if they do not have personal knowledge of the facts supporting the opinion.

27. F.R.E. Reference: Rule 602, 703; Lack of Foundation (602; 901(a))

28. RESPONSE: [Establish by preliminary questions that the person has actual personal knowledge.]

IV. The Third Quatrain — Imagery: Questions Based On Rules

Best Evidence Rule

29. "OBJECTION: Your Honor, this is not the best evidence. The original document is the best evidence."

30. DISCUSSION: This objection can be used when the evidence being solicited is not the best source of the information.[16] It usually occurs when a witness is being asked a question about a document that is available to be entered into evidence. The document should be entered as proof of its contents. There are three aspects to the "Best Evidence Rule." The first aspect is the one most often invoked: ordinarily a non-expert witness is not allowed to describe what is in a document without the document itself being introduced into evidence. Put the document into evidence first, and then have the lay witness talk about what is in it. The second aspect is requiring the original document to be introduced into evidence instead of a copy — if the original is available. Requiring the original document (the best evidence) to be available for examination insures that nothing has been altered in any way. The original document is not always available, especially in cases where a respondent may be fleeing persecution/prosecution. The third aspect is a summary of voluminous documents. The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available

16 In the *Matter of M-*, 5 I. & N. Dec. 484 (BIA 1953) (failure to produce reports of Communist Party activity made by the Government witness to the police department is not a violation of the best evidence rule where the sole issue is whether the respondent was a Communist Party member. Such reports did not create Communist Party membership but reflected the witness's report of such membership; they were not used by the witness or the Government in the hearing; and there was no showing that they were relevant for the purpose of impeachment).

for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

31. F.R.E. Reference: Rules 1002, 1003, 1006.

32. RESPONSE: Dependent on the aspect of the Best Evidence rule involved in the objection: [Offer the document into evidence] ["Your Honor, this is admissible as a copy under Evidence Rule 1003"] ["Your Honor, this is a summary admissible under Evidence Rule 1006"].

Opinion

33. DISCUSSION: An improper lay (non-expert) opinion is when a witness is giving testimony that does not require an expertise, but is still an opinion that does not assist the jury in its understanding of the case. In regard to an expert, this objection is made to the competence of the expert due to the inability of the expert to pass the voir dire requirements for experts. If the witness is not testifying as an expert, the witness' 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, (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 expert knowledge.

34. F.R.E. Reference: Rule 701, 702.

35. RESPONSE to Objection Regarding Expert: "Your Honor, the witness is an expert and entitled to draw a conclusion."

Privileged Communication

36. DISCUSSION: A privilege is a right of an individual not to testify.

37. Some general privileges are:

- Attorney-Client[17]

17 See generally IMMIGRATION COURT PRACTICE MANUAL, Chapter 2, Sec. 2.3(d); *Matter of Velazquez*, 19 I. & N. Dec. 384 (BIA 1986); *Matter of Athanasopoulos*, 13 I. & N. Dec. 827 (BIA 1971) (finding that attorney-client privilege was lost when the representative was in pursuit of a fraudulent claim); see also Ann Naffier, *Attorney-Client Privilege for Non-Lawyers? A Study of Board of Immigration Appeals-Accredited Representatives, Prilege, and Confidentially*, 59 Drake L. Rev. 584 (2011).

- Attorney Work Product
- Husband-Wife[18]
- Mental Health Records[19]
- Physician-Patient
- Psychotherapist-Patient

38. RESPONSE: "Your Honor, the matter is not privileged because. . . ."

Public Policy

39. DISCUSSION: The objection regarding public policy does not consist of an optional right of an individual not to testify. The objection based on public policy refers to a non-optional class of evidence that cannot be introduced, no matter that the person who holds the evidence wants to testify. Subjects forbidden by state and federal law are wide:

- *Medical Expense Payments*. Evidence of the payment of medical expenses to show liability for negligence leading to the medical expenses is inadmissible.
- *Medical Review Records*. Most states forbid discoverability or admissibility of the records of a medical review committee of a hospital. It is a legislative policy decision to promote the ability of a hospital to discover medical malpractice above that of the injured person to discover the malpractice.
- *Parole Evidence Rule*. The "parole evidence rule" has long been a rule of law in the English speaking world. In the absence of fraud or mutual mistake, oral statements are not admissible to modify, vary, or contradict the plain terms of a valid written contract between two parties.
- *Witness is Attorney*. Ethical rules prohibit a lawyer from serving simultaneously as a witness and an advocate. Generally, a party's lawyer who attempts to testify is subject to having to choose between being a witness or continuing as a lawyer in a case.

40. F.R.E. Reference: 409

41. RESPONSE: [Depends on the statute or rule involved.]

18 *Matter of Gonzalez*, 16 I. & N. Dec. 44 (BIA 1976); *Matter of B-*, 5 I. & N. Dec. 738 (BIA 1954).

19 *Matter of B-*, 5 I. & N. Dec. 738 (BIA 1954). (The testimony of a physician of the United States Public Health Service in a deportation hearing is competent and not privileged since he is performing a duty provided by applicable law and regulations and the ordinary relationship of physician and patient does not exist).

V. The Couplet — The Volta: The Takeaway, Most Important Objections

Leading on Direct Examination

42. DISCUSSION: The question on direct suggests an answer. This is (1) not an objection on cross, and (2) actually allowed in some circumstances. The important factor is not whether the question is leading, irrelevant, or without foundation, but rather whether the answer would assist the immigration judge in formulating his or her opinion. The special inquiry officer should weigh this objective along with his obligation to keep the record within bounds when ruling upon objections made by either counsel for the alien or the trial attorney.[20] The problem with a leading question is that the question itself suggests the answer that the examiner wants to have. A leading question often, but not always, can be answered with a "yes." To encourage witnesses telling facts in their own way, leading questions are not allowed on direct examination when an attorney is examining his/her own friendly or neutral witness. When an attorney has called a hostile witness (which may be someone other than the adverse party), leading questions are allowed in direct examination. Leading questions are always proper in cross-examinations.

43. F.R.E. Reference: Leading (611(c))

44. RESPONSE: "Your Honor, this question is only preliminary to move us quickly to the matters in issue." OR "Your Honor, the witness is a hostile witness." Depending on the type of question, the best response is often to revert back to non-leading who, what, where, when, how and why questions.[21]

Rule 403 (Undue Waste of Time or Undue Prejudice/Immaterial/Irrelevant/Repetitive/Asked and Answered/Cumulative/Surprise)

45. DISCUSSION: The argument is that the evidence being introduced is highly prejudicial to your client and this prejudice far outweighs the probative value. An objectionable piece of evidence is one that not only hurts your case but is also not sufficiently relevant to the merits of your opponent's case to be let in.

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20 *Matter of Joseph*, 13 I. & N. Dec. 70 (BIA 1968).

21 Dorothy Harbeck, *The Commonsense of Direct and Cross Examinations in Immigration Court*, 304 New Jersey Law. Mag. (2017) (NAIJ capacity); Dorothy Harbeck, *Terms so Plain and Firm as to Command Assent: Preparing and Conducting Optimal Direct Examination of the Respondent*, Fed. Law. 13 (Jan./Feb. 2017) (primary author, NAIJ capacity).

46. In immigration court, all relevant evidence should be admitted.[22] Determining "probative value" or "weight" is at the discretion of the immigration judge.[23] The amount of "unfair prejudicial effect" also is determined by the judge. The word "unfair" is the key. In determining whether to exclude evidence, immigration judges should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.

47. F.R.E. Reference: More Prejudicial Than Probative (401–403); Non-responsive (611a).

48. RESPONSE: "Your Honor, the exclusion of relevant evidence for unfairness is an extraordinary remedy. There is nothing unfair about this evidence."

49. Do not be afraid to object in immigration court. The Federal Rules of Evidence are not strictly followed; however, evidence must be relevant and fundamentally fair. If the evidence is not, no protest is too much.

22 *Matter of Edwards*, 20 I. & N. Dec. 191 (1990).

23 Admissibility is favored and the most pertinent question is what weight an immigration judge should accord a particular piece of evidence. *Matter of H-L-H & Z-Y-Z*, 25 I. & N. Dec. 209 (BIA 2010), 8 C.F.R. sect. 1003.41, 8 C.F.R. sect 1287.6(b).