CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Opening Statements and Closing Arguments in Immigration Court[1]

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 This practice advisory is intended to assist lawyers and fully accredited representatives. Michelle Mendez, Director of the Defending Vulnerable Populations ("DVP") Program authored this practice advisory. Ms. Mendez would like to thank the following individuals for their review and thoughtful contributions: Victoria Neilson, Managing Attorney with CLINIC's DVP Program; Denise Noonan Slavin, retired Immigration Judge; and Tom Swett, Attorney. CLINIC would like to thank the State of Illinois Access to Justice: Communities Impacted by Immigration Project for its support.

I. Introduction

Opening statements and closing arguments can win cases for clients. However, Immigration Judges (IJs) increasingly deny respondents the opportunity to present an opening statement and a closing argument. Therefore, practitioners should be prepared to persuade an IJ to allow an opening statement and closing argument and to deliver a performance that is both concise and compelling.

This practice advisory offers guidance and tips on opening statements and closing arguments. Section II offers tips on how to request opening statements and closing arguments. Section III describes what the opening statement entails. Section IV explains the contents of a closing argument. Section V discusses the importance of storytelling to opening statements and closing arguments. Finally, section VI suggests practical tips for delivering an opening statement and closing argument.

II. Requesting an Opening Statement or a Closing Argument

Whatever the IJ's views on opening statements and closing arguments, practitioners should consider requesting the opportunity to offer an opening statement and, at the end of the individual hearing, should always request a closing argument.

Historically, opening statements in immigration court have been rare for various reasons. Some IJs may regard the opening statement as duplicative of the pre-hearing memorandum. More recently, some IJs may feel the pressure of the Department of Justice Executive Office for Immigration Review's (EOIR) performance metrics, which require IJs to complete 700 cases per year[2] and create an incentive for IJs to finish hearings quickly, including fast-forwarding to the testimony. Other IJs may disfavor opening statements because they have heard practitioners deliver unhelpful opening statements. If the IJ pushes back on an opening statement, the practitioner should ask for permission to respond and highlight the main benefit of an opening statement: to provide a summary of the most relevant facts in a complex case with a voluminous documentary evidence submission. If the practitioner knows that the IJ usually jumps from preliminary matters to direct examination, the practitioner could request an opening statement without calling it that. For example, "Your Honor, before respondent testifies, may I summarize the relevant facts of this case." Or, tempt the IJ by asking to address facts that have only become known since the submission of the application for relief, exhibits, and memorandum of law, if that is accurate. Whether or not to request the opportunity to offer an opening statement, given their rarity, is a strategic call. In making this decision, the practitioners should consider the particular IJ, the facts of the case, and if an opening statement will be beneficial in a particular case. The only downside to asking for the opportunity to present an opening statement is hearing "no" from the IJ.

[2] See EOIR Performance Plan, *Adjudicative Employees*, cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf.

Traditionally, IJs have generally welcomed closing arguments, but IJs have increasingly started denying practitioners this opportunity. IJs may feel pressured by EOIR's performance metrics, discussed above. Another explanation may be that IJs regard closing argument as unhelpful because the closing arguments they have heard simply recite the facts, lack persuasion, or suffer from other pitfalls. If the IJ pushes back on a closing argument, the practitioner should highlight the benefits of a closing statement: to address the concerns cited by the IJ during the individual hearing, clarify issues that may be unclear, explain how new case law applies to the case at bar, and explain facts and address arguments that arose during the hearing. Practitioners also may argue that DHS's refusal to stipulate to any element(s) of the case dictates the need for a closing argument during which the practitioner can address the element(s). In fact, the practitioner may argue that time is needed for the closing argument in order to address all the elements of relief that DHS challenges. The practitioner can then argue that due process requires the opportunity to present a closing argument: it is unfair to the respondent for DHS to contest all the elements of relief and not have a reasonable opportunity to address those arguments.

Furthermore, the practitioner can rely on reasonableness: if DHS had been more discriminate in its approach by focusing only on the issues worth contesting and if the IJ had encouraged DHS to narrow the issues, the hearing would have been shorter and there would have been ample time for closing arguments.[3]

If the practitioner knows that the IJ dislikes closing arguments, the practitioner may consider not calling it a closing argument. For example, "Your Honor, may I address two points in conclusion?" or "Your Honor, in closing, I would like to highlight three precedential decisions and how these relate to Mr. Nwaigbo's case." If the IJ does not allow a closing argument, ask for the opportunity to submit a closing in writing and request a filing deadline (also known as a "call-up date"). As with opening statements, the only downside to asking for the opportunity to present an oral or written closing argument is hearing "no" from the IJ. Furthermore, if the practitioner wishes to argue on appeal that the IJ prevented closing argument, the practitioner must request closing clearly on the record.[4]

While opening statements and closing arguments are not evidence that the respondent has a right to present,[5] they can ensure that the individual hearing remains focused on the relevant facts, legal issues, and law. When done correctly, opening statements and closing arguments may take more time during an individual hearing, but they will render the IJ's decision-making more efficient and accurate. Most importantly, they give the practitioner the first and last chance to persuade the IJ of the merits of the client's case.

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[3] If the IJ has shown a propensity in the past or during the hearing to ask the DHS attorney for an explanation of the law without giving the practitioners the same opportunity, it is crucial for the practitioner to preserve the record through closing argument by highlighting that it is unfair to the respondent for DHS to interpret the law for the IJ without giving respondent's representative the same opportunity.

[4] *See* Jorge Manrique-Ayala Julia Ruiz-Hernandez, AXX XX8 156/AXX XX8 157, 2004 WL 2943505 (BIA November 15, 2004) (unpublished) (dismissing argument that the respondents were prevented from presenting a closing argument because the record did not reflect that the respondents had requested closing argument).

[5] *See* INA § 240(b)(4)(B).

III. Content of an Opening Statements in Immigration Court

The opening statement is the opportunity to tell the IJ the respondent's story in a persuasive way, to set the stage or give a framework for the testimony and evidence that the practitioner will present, and to establish credibility with the IJ. An opening statement, when executed properly, may assist the IJ in understanding the relevant facts and navigating the respondent's complex story. During the opening, the practitioner can frame issues and introduce facts directly without risking any confusion that may arise from the translation of the testimony or interruptions of testimony from the IJ or DHS objections. To achieve these goals during an opening statement, practitioners should present only the facts they will demonstrate or prove during the individual hearing through the documentary evidence and testimony. The practitioner should not discuss or promise facts that will not be proven during the hearing as doing so can destroy both the case and the practitioner's credibility with the court.

Opening statements lay out the facts of the case for the IJ, but practitioners are prohibited from arguing the law in the opening statement; legal arguments are reserved for closings.[6] At the opening statement stage, practitioners will have submitted documentary evidence, but not the testimonial evidence. As such, the evidentiary record is incomplete. If the evidentiary record is still incomplete, arguing will be premature and the practitioner risks losing credibility with the IJ. Furthermore, if the practitioner attempts to argue during the opening statement, not only is this improper and should draw a DHS objection, but the IJ may also recognize the practitioner as a novice litigator who does not know the difference between the purpose of opening statements and closing arguments. Practitioners should thus reserve arguing for the closing argument, at which point the practitioners have established the evidentiary record.

Practitioners can avoid arguing mainly by not drawing legal conclusions. A conclusion is a judgment based on reasoning. A legal conclusion is a legal judgment based on reasoning derived from citing and applying the law to the facts. Compare the following two sentences as an illustration of the difference between statements that contain legal conclusions and facts:

- Mr. Villa will prove that he has suffered severe past persecution on account of his political opinion.
- MS-13 beat up Mr. Villa after political rallies and at the political party office. The beating nearly left Mr. Villa blind in his left eye.

The first sentence would not be appropriate for an opening because it contains the legal conclusion that the respondent "suffered past persecution." Likewise, it is best to avoid subjective adjectives like "severe" in an opening statement and instead limit the opening to facts that the practitioner can prove. Even if the adjective only relates to facts, if the IJ does not agree with the practitioner's characterization of the facts, the practitioner may lose credibility with the IJ.

[6] See United States Courts, *Differences Between Opening Statements & Closing Arguments*, uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/differences.

The second sentence contains only facts: the facts that establish when and where MS-13 beat Mr. Villa and the injuries Mr. Villa sustained. Understanding the difference between conclusions and facts will be crucial to remaining within the factual scope of the opening statement. Further, the second sentence includes only facts that can be proven through documentary evidence and testimony.

Even though the opening statement cannot be argument, it can and should be persuasive. First, an opening statement can be compelling based on how the practitioner organizes the facts and how the practitioner describes the facts. Sometimes chronological organization will be most persuasive, but not always, and the practitioner should test various organizational structures to find the most persuasive option. Second, the practitioner should humanize the respondent. For example, on the most basic level, refer to the respondent throughout the case by using a title— "Mr." or "Ms." — and his/her surname, unless the respondent is a child, in which case the first name is appropriate. Finally, the practitioner should incorporate in the opening statement the theme that the practitioner plans to argue in closing.

Whatever the facts are, it is important to not embellish them or discuss facts that will not be established either through the documentary or testimonial evidence or both. What does embellishing look like? Taking the above example, the practitioner should state only that "the beating nearly left Mr. Villa blind" if there is medical evidence to support this factual conclusion. If Mr. Villa had actually only suffered a black eye or a cut around his eye, the IJ will likely find that the injury was not as severe as the opening suggested thus undermining the respondent's case instead of advancing it. By embellishing, the practitioner loses credibility with the IJ and hinders their chance of success. Instead, the practitioner should use the opening statement to help set the scene for the IJ of the forthcoming testimony. Only through client preparation will practitioners know if the opening statement contains facts they will be able to deliver during the individual hearing.

Avoiding subjective adjectives and adverbs will ensure practitioners stick to the facts without arguing or embellishing. For example, instead of saying "significant injuries" one could say, "cuts and broken bones" Or instead of saying "the threats were terrifying and were made by a vicious gang known for violence," one could say, "The gang said they would make her disappear. MS-13 is known to kidnap and kill victims who resist their wishes."

Finally, as a general rule, keep the content of the opening statement to three minutes or fewer.

IV. Content of a Closing Argument in Immigration Court

As the descriptions suggest, closing argument is the time to argue. Closing argument is the last opportunity to convince the IJ that the respondent qualifies for and merits relief. Closing argument also provides the practitioner the opportunity to clarify or confirm the testimony if there were interpretation errors or confusing aspects of the testimony that arise from objections or complicated

factual testimony. Closing argument requires balancing facts, legal conclusions that the IJ can reasonably draw from the facts, evidentiary record citations, and legal references.

A. Organizing a Closing Argument

Strategic organization encompasses a few components: primacy and recency, a roadmap, and knowing what arguments to highlight. Organization based on principles of primacy and recency makes for a persuasive opening statement and closing argument. Primacy and recency principles of learning suggest that humans remember best information heard first and last while forgetting more quickly the words heard during the middle. Adhering to principles of primary and recency means not defaulting to chronology, which is usually the easiest, but not the most intentional or persuasive method of organization. For example, the facts relevant to immigration relief are often somewhere in the middle of the chronological story, but by burying those facts in the middle, the IJ will likely focus less on those facts. Practitioners should instead reserve the middle of the argument for countering the DHS positions, which require discussing the bad or weak facts in the case. As such, practitioners should start and end with words, phrases, and facts that the practitioner wants the IJ to remember.

This approach provides a simple starting point for organizing a strategic closing argument:

- Theme sentence
- Roadmap of the argument
- Argument
- Deal with weaknesses or DHS's best argument
- Finish by repeating a clear and compelling theme that includes "the ask" to the IJ

i. Open with a clear and compelling theme sentence

A theme is an underlying message, idea, or belief about the case theory that the practitioner weaves through the narrative from start to finish. To devise a theme, develop short, fact-based statements as to why the respondent should win relief. The best themes will incorporate Aristotle's three pillars of persuasion:[7] 1) Logos, which is an appeal to logic and common sense,[8] 2) Pathos, which is an appeal

[7] Krista C. McCormack, ETHOS, PATHOS, AND LOGOS: THE BENEFITS OF ARISTOTELIAN RHETORIC IN THE COURTROOM, 7 Wash. U. Jur. Rev. 131(2014), openscholarship.wustl.edu/law_jurisprudence/vol7/iss1/9.

[8] For an example of Logos, watch NAACP Legal Defense Fund President Sherrilyn Ifill's interview with "60 Minutes" on the meaning and roots of white people calling the police on Black people, youtube.com/watch?v=1RGt3SX55Go.

to emotion,[9] and 3) Ethos, which appeals to ethics, morals and character.[10] Here are two sample themes:

- Families belong together, but some families must remain together to avoid harm.[11]
- Gay youth in El Salvador either suppress their identity or die.[12]

Starting with a thematic statement will grab the IJ's attention and suggests that this is a unique case among, for example, the thousands of gang-based asylum cases from El Salvador. To illustrate this point, compare these two sentences, which are the first sentences of two different closing arguments:

- Mr. Villa seeks asylum, and, in the alternative, withholding of removal because he is a member of a family-based particular social group.
- The family is the first essential cell of human society, but in El Salvador, family is also essential to how and why MS-13 chooses its targets; that is exactly how and why MS-13 chose to target Mr. Villa.

The first statement is general, formulaic, and devoid of a theme. However, the second statement contains a clear theme that is tailored to Mr. Villa's case, making it more compelling. The IJ is more likely to have an emotional response to the second statement and therefore more likely to remember it.

ii. Roadmap of the argument

During the first minute of the closing argument, the practitioner should provide the IJ with a "roadmap" of the arguments. This is true in all cases, but especially in immigration court. Roadmaps are helpful because the IJ will know what to expect and, by knowing what to expect, will feel more comfortable and will follow the argument more easily. The road map is vital in immigration court because the IJ generally renders a full oral decision immediately at the end of the case. This means that in many circumstances the IJ is preparing that decision as they are listening to the closing

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[9] For an example of Pathos, consider this excerpt from Dr. Martin Luther King's "I Have a Dream" speech: "I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow jail cells. And some of you have come from areas where your quest—quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality. You have been the veterans of creative suffering. Continue to work with the faith that unearned suffering is redemptive. Go back to Mississippi, go back to Alabama, go back to South Carolina, go back to Georgia, go back to Louisiana, go back to the slums and ghettos of our northern cities, knowing that somehow this situation can and will be changed," archives.gov/files/press/exhibits/dream-speech.pdf.

[10] For an example of Ethos, watch Bryan Stevenson's TED Talk, "We Need to Talk About an Injustice," and listen to the words he uses to build trust between him and his audience on the topic of criminal justice reform, ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice?language=en.

[11] The Appendix contains a sample closing argument and thematic statement for this theme.

[12] A sample of a thematic statement of this theme could be the following: "In the United States, we teach kids to be strong through the adage, 'sticks and stones may break my bones, but words will never hurt me,' but for gay youth in El Salvador, words like 'marica' do hurt and often lead to deadly physical violence."

argument, and they need to know where in the decision they may want or need to add notes from the closing argument. Generally, the IJ will also be more willing to listen closely knowing that the time investment is clear and that the practitioner will be highlighting three or fewer points.

In immigration court, it is often logical for the closing argument roadmap to track the elements of the relief sought. For example, in an asylum case, the roadmap could include the three part-test for the cognizability of the particular social group or in a non-LPR cancellation case, the roadmap could focus on exceptional and extremely unusual hardship and discretion. Here is an example of a roadmap for a non-LPR cancellation closing:

- "Given the DHS stipulations, Your Honor, the only issues in Ms. Martinez's non-LPR cancellation of removal case are whether Julie and Michael will face exceptional and extremely unusual hardship if Ms. Martinez must return to Guatemala, and whether Ms. Martinez deserves non-LPR cancellation as a matter of discretion."

On the other hand, if only one element is at issue and the practitioner wishes to discuss several points of that element, those points would become the roadmap:

- "Has Ms. Martinez shown that Julie and Michael will face exceptional and extremely unusual hardship without her? Yes, Julie's mental health needs, Julie's learning disability, and Michael's emotional health prove this. First, Julie's mental health needs … Second, Julie's learning disability … Third, Michael's emotional health …"

iii. Respondent's argument

Practitioners should always highlight or prioritize the best arguments. The best arguments are the ones that, if believed by the IJ, would result in the relief requested. Drafting the brief in support of the application for relief, interviewing and preparing witnesses, gathering documentary evidence, researching the law and the country conditions, and other case preparation, will guide practitioners on what merits attention during closing argument. However, the most relevant closing argument will respond to the issues and concerns voiced by the IJ during the individual hearing. If the IJ has not expressed any specific concerns during the individual hearing, it may be appropriate to simply ask the IJ if there are any specific issues, or topics on which the IJ would like additional clarification. If the IJ identifies a question or concern, the practitioner should start with the issue raised by the IJ and proceed to argue that the respondent should prevail because the facts established address the issue raised by the IJ in favor of the relief requested.

Ultimately, practitioners should avoid a closing that seems "canned." A closing argument based solely on the declaration is a "canned closing." The canned closing prevents an advocate from incorporating the witness testimony, IJ concerns and rulings, and DHS objections into the closing in a fluid manner. Otherwise, the practitioner will miss the last opportunity to address the issues that the practitioner knows are important to the IJ and that could be the difference between an approved or

denied application. Failing to address the issues that arose during the hearing could signal to the IJ that no testimony or arguments of merit arose during the individual hearing that were not already in the file. Furthermore, basing the closing argument solely on what happened before the individual hearing gives the IJ cause to reject future closings from the practitioner because a canned closing does not offer any arguments that are crucial for the IJ to render a decision. If the practitioner cannot recognize that a canned closing argument wastes the IJ's time in the case at bar, why should the IJ believe that the practitioner will recognize this distinction in the future?

One way to prepare for a "living" closing argument rather than a closing argument that does not incorporate any new issues that arise during the individual hearing is to create an outline on multiple pieces of paper devoting one page for each issue. This will allow the practitioner the space to write in any good testimony or anything else from the individual hearing that merits discussion during the closing argument. Another approach is to use different colored index cards for each component of the argument and reserve space on the front of the card or use the back of the index card for additions from the individual hearings.[13]

iv. Dealing with weaknesses or the DHS's best argument(s)

After starting strong with a theme sentence, roadmap, and the best arguments, it is time to deal with the weakness or DHS's best argument(s). Because of the truncated nature of a closing argument in immigration court, practitioners should not spend the majority of the time on this aspect of the closing. As guidance, if the closing argument is limited to approximately five minutes, spend approximately one minute on a weakness of the case or countering DHS's argument(s). Use facts to explain why DHS is wrong. For example, if DHS argued that the respondent is not credible, conclude that the record as a whole proves that the respondent is credible. Explain why DHS is wrong via the facts: the respondent admitted to being nervous and having loss of memory, the respondent is a trauma survivor and suffers from post-traumatic stress disorder the respondent testified about an event that took place many years ago, the interpreter admitted to making a mistake in the interpretation, or DHS mischaracterized the respondent's testimony. Furthermore, if DHS lacks indicia of credibility in presenting the government's case, this is the opportunity to highlight their credibility issue, which could include lacking the case file, admitting to not being familiar with the case, and citing or misinterpreting the law. The practitioner should do this in such a way as to address the errors caused by these failings, not as a personal attack on DHS counsel. A personal attack on opposing counsel is unprofessional and could backfire on the practitioner.

v. Finish by repeating a clear and compelling theme that includes "the ask" to the IJ

The closing argument should end with the practitioner repeating the theme while telling the IJ the desired ruling in the case or the "ask." Ending with a thematic "ask" that places the IJ in the vindicator

[13] If planning to use the back of the index card, practice the mechanics of turning over the index card during practice rounds of closing argument so that during the actual closing argument this movement feels routine and fluid.

role, discussed below in section V, sets up a more memorable ending. To illustrate this point, compare these two sentences, which are the last sentences of two different closing arguments:

- Mr. Villa has met his burden of proof and therefore merits asylum as a matter of law and discretion.
- The credible testimony and documentary evidence prove that MS-13 will find and kill Mr. Villa because of his family if Your Honor denies him asylum, but if Your Honor grants Mr. Villa asylum he will continue to live freely, openly and safely in the United States with his 14-year old son.

Ideally, the practitioner will offer a persuasive "ask" rather than stating it in a matter of fact manner that does not distinguish the respondent from other litigants asking for the same type of relief from removal. At a minimum, the practitioner should use the client's name as opposed to referring to "Respondent" or the generic "my client."

B. Argument Technique

Arguments consist of conclusions, backed up with the facts in the record that prove the legal conclusion. Similar to an opening statement, understanding the difference between conclusions and facts will be crucial to presenting a cogent argument. In fact, retired IJs often share that practitioners tend to provide an opening statement during closing argument by being too fact-based and failing to weave the facts into the law.

One way for practitioners to ensure they weave together facts and law is by using "because" to link a conclusion to a fact in a sentence. Here is an example:

- There is no doubt that Mr. Villa will be persecuted if returned to El Salvador because, if Mr. Villa returns to El Salvador, he would continue to work in politics and MS-13 has killed two other anti-gang political activists since Mr. Villa fled El Salvador.

The first clause, "there is no doubt that Mr. Villa will be persecuted if returned to El Salvador," is a legal conclusion. The second clause, "Mr. Villa would continue to work in politics and MS-13 has killed two other anti-gang political activists since Mr. Villa fled El Salvador" contains facts that would have been proven through the testimony and documentary evidence in the trial. The practitioner should be able to state each argument in a single, simple, declarative sentence, like so:

- Mr. Villa is entitled to asylum under Y law based on X facts.

One method to ensure the practitioner weaves together facts and conclusions is to diagram the closing argument on paper. Write the closing argument and go through each sentence assigning every sentence or sentence clause either "C" for conclusion or "F" for fact. If the diagram denotes

few or no "Cs," this will indicate that the practitioner has drafted an opening statement rather than a closing argument. On the other hand, if the argument is primarily comprised of "Cs" the practitioner should be sure to add sufficient facts to prove the conclusions. The practitioner should revise the draft intentionally adding the conclusions that the IJ must hear and the facts that prove the conclusions. Ideally, the practitioner will include more than one fact to support each conclusion. Once the diagram reflects a mix of facts and conclusions, the practitioner will have achieved an argument.

Additionally, consider arguing by using rhetorical questions and answering the questions raised. Here is an example:

- If a person fleeing state-sanctioned torture can demonstrate that a return to their country of origin would result in more torture, shouldn't that person benefit from the Convention against Torture? Yes, and in this case, Mr. Villa has demonstrated that both the government and the paramilitary organizations to which the government turns a blind eye, targeted and will continue to target Mr. Villa if he is forced to return to El Salvador.

C. Citing to the Documentary Evidence

When highlighting facts, practitioners should cite to the documentary record but do so sparingly. Citing to the documentary record after every fact is not necessary, especially if the practitioner included a detailed and well-organized exhibit list. Furthermore, citing to the documentary record too often will detract from story-telling persuasion.

However, there are approaches to citing to the documentary record persuasive. If the record contains an especially persuasive exhibit, the practitioner can hold it up during the closing argument to draw attention to it. For example:

- As expert Dr. Smith states in his psychological evaluation, marked as Respondent's Exhibit 2, Tab M, Mr. Villa....

If the practitioner has included many documentary exhibits in support of a legal element, the practitioner can highlight the voluminous evidence during the closing argument. For example:

- The Salvadoran government is unable and unwilling to protect Mr. Villa from the MS-13. The report from expert Ms. Thomas and [specific #] of reports from human rights organizations and news reports marked as Respondent's Exhibit 2, Tab T through EE, prove the government's unwillingness and inability to protect the respondent.

D. Citing to the Law

In addition to citing to specific evidence, the practitioner can and should cite to the law governing the relief requested in the closing argument. However, knowing how much case law to incorporate into the closing argument can be tricky. Generally, practitioners should limit the case law references to those few cases that will most likely control the outcome in the case before the IJ. Citing too many cases may detract from the story-telling aspect of the argument, discussed below, and may frustrate the IJ. IJs who are new to the bench but have a strong immigration law background or have been on the bench for years will not appreciate a recitation of the evolution of asylum case law. Instead, practitioners should focus case law references to recent Board of Immigration Appeals, attorney general, U.S. Court of Appeals, or U.S. Supreme Court precedent and how those cases relate to the case at bar. Alternatively, if the BIA has issued only a few longstanding precedential decisions on the legal issue, the practitioner could analogize to or distinguish from the facts of those cases. For example, there are four BIA cases on the exceptional and extremely unusual hardship standard for non-LPR cancellation of removal, *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), and *Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020). However, do not provide the citation for the case in the argument, but be prepared to give it if the IJ asks. Of course, as discussed above, if the IJ brings up a new precedential decision during the individual hearing, the practitioner should address during closing argument how that case supports or is distinguishable from the respondent's claim for relief.

V. The Importance of Story Telling during Opening Statements and Closing Arguments

Every respondent in immigration court has a compelling story. It is hard to believe that anyone who left behind their home, loved ones, and all that is familiar would not have a naturally compelling story. Yet, in immigration court closing arguments, practitioners often forget the importance of the client's story choosing, instead, to repeat the statute and case law dryly, perhaps thinking that a story is more appropriate for a jury trial. Omitting storytelling in a closing argument automatically puts the respondent at a disadvantage because the law is likely a boring discussion for the IJ while a story is memorable and emotional. During openings, practitioners may find it hard to tell a story because of the restriction on arguing. However, opening statements are an excellent opportunity to tell a story because these are fact driven.

Stories are easy to remember, in part because many stories share a common theme of having a victim, a villain, and a vindicator. This character structure also applies in immigration court proceedings even if the roles are not always attributable to a particular person. In an asylum and related relief case, the victim is the respondent, the villain is the persecutor and the government of the home country, and the vindicator is the IJ. However, in a non-LPR cancellation of removal case, the roles are not as simple. The victims would be the qualifying relative(s) and the respondent, the villain could be the U.S. immigration system or the thing and person that pushed the respondent out of the

country of origin over ten years ago, and the vindicator is the IJ. In an LPR cancellation of removal case, the respondent could be both the villain and the victim if there are criminal issues for which the respondent must take responsibility and from which the respondent needs to show rehabilitation. While the victim and villain role may change depending on the facts and relief sought, the IJ is always the vindicator. Even those IJs who rarely grant relief should see themselves in this vindicator role. Telling the respondent's story by providing context and identifying the "injustice" that the IJ can and should fix though a grant of relief will lead the IJ to the vindicator role.

Having a theme facilitates storytelling. Every compelling story has a clear and compelling theme that should prompt a visual in the mind of the audience. Even though individual hearings are bench trials that lack the theatrics common to jury trials, IJs will appreciate a story with a theme rather than a formulaic approach that simply regurgitates elements in the statute. Moreover, consider that IJs hear thousands of the same types of cases unlike state court and Article III judges who hear many types of civil and criminal cases. For this reason, it is even more imperative for immigration practitioners to tell stories with a theme and make this particular client's case memorable to the IJ.

VI. Practical Tips for Delivering Both Opening Statements and Closing Arguments

The best opening statements and closing arguments will deliver the client's story in a compelling manner. In addition to having an argument that is substantively persuasive, the practitioner can use other techniques to make the argument compelling such as the following:

- **Make eye contact with the IJ**. Reading from a pre-prepared opening statement or closing argument does not compel the IJ to listen. Moreover, reading from these conveys to the IJ two negative messages: 1) that the closing argument does not incorporate any of the insight and concerns expressed by the IJ during the individual hearing, and 2) that the practitioner did not make the effort to gain a command of the relevant facts or the law.
- **Use your voice.**[14]
    - **Volume:** If the IJ cannot hear the opening statement or closing argument, it is not worth offering either. Therefore, the practitioner's voice volume should be loud enough for the IJ to hear and to make the record while still being deferential and not shouting. However, practitioners will also want to highlight certain words by becoming louder when stating those words.
    - **Pitch:** Practitioners should mix up different vocal ranges: low, middle, and high. Such a combination of ranges is much more interesting to the listener than a voice that remains at one range. In immigration court, practitioners may use different pitches to enhance the storytelling approach. For example, when repeating quotes from the

[14] Practitioners who have difficulty using voice may benefit from an acting or improv class. Alternatively, practitioners may consult videos on voice usage available for free on YouTube. One example is "Vocal Branding: How Your Voice Shapes Your Communication Image" by Wendy LeBorgne, available at youtube.com/watch?v=p_ylzGfHKOs.

documentary evidence or testimony, adapt the voice range to fit the person who delivered the quote.

- **Enunciation:** Practitioners should take care to enunciate clearly and not mumble. If the IJ cannot understand the opening statement or closing argument, it is also not worth offering either. If the hearing transcript is unclear, this will be detrimental on appeal.
- **Tempo:** One reason practitioners will want to adopt a quick tempo is the desire to say a lot in a small amount of time. However, it is better to be selective and say less with a slower tempo. By clearly enunciating, the practitioner will invariably slow down. Pausing for dramatic effect will also slow the tempo. Another way to use tempo is to highlight the facts of persecution in an asylum case. A fast tempo when delivering these facts will help the IJ feel the danger that the respondent endured. For example, "MS-13 looked for Mr. Villa at his home, searched for him at the campaign office, and cornered him in the street … [slow tempo here to describe the beating].
- **Emphasis:** Practitioners may highlight a specific word by placing emphasis or inflecting a word or words over other words in the sentence.[15] For example, take this quote from President Trump, "But in the end Mexico is paying for the wall."[16] Emphasizing "Mexico" in this sentence relays the importance of Mexico—not another country, not the United States—paying for the wall. Emphasizing "paying" in this sentence relays the importance of Mexico paying for the wall as opposed to, say, building the wall. Emphasizing "is" in this sentence suggests a desire to convince an incredulous audience that Mexico is definitely paying for the wall.

- **Incorporate Transitions.** Transitions or verbal signposts signal to the IJ distinct points and help the IJ incorporate what is being argued into legal findings that will facilitate the written decision. In other words, present the argument so that if the IJ wrote it down verbatim, the argument would reflect a record that requires that the IJ issue a decision granting the relief requested. Here are some examples:
  - "The United States must provide Mr. Villa safe haven for three reasons. First, …. Second, …. Third, …."
  - "Alternatively, Respondent qualifies for CAT, cancellation, etc."
  - "While DHS argues X, Respondent has demonstrated through credible evidence Y."
- **Use Active Voice.** Active voice means that the practitioner is telling a story in which the subject performs the action through a "subject + verb + object" sentence structure.

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[15] An example of this from popular culture is the lineup scene from the movie "The Usual Suspects" when the police ask all five characters to say the same line and each character says the same line a bit differently. Kevin Pollack and Gabriel Byrne are fairly monotone, Stephen Baldwin emphasizes "give" (along with others not appropriate for this resource), which is the first word in the statement, Benicio del Toro emphasizes the word "keys" on his first try, and Kevin Spacey emphasizes "me." Furthermore, the same sentence may relay a different message to the listener depending on the emphasized word. Lineup Scene from "The Usual Suspects", available at youtube.com/watch?v=tDfZ5HmA6fs.

[16] President Trump in Nashville, CSPAN, May 30, 2018 5:53am-7:00am EDT, archive.org/details/CSPAN_20180530_095300_President_Trump_in_Nashville/start/1620/end/1680.

Meanwhile, passive voice has a subject that is acted on by the verb, a conjugated form of to be, and, often, a preposition. Compare these two examples:

  - Past Tense: In El Salvador, Mr. Villa was beaten multiple times by MS-13 to the point of almost losing his eyesight.
  - Active Voice: MS-13 beat Mr. Villa multiple times, each time punching Mr. Villa's face and injuring his left eye to the point of blindness.

In asylum cases, using active voice forces the persecutor to become the subject, which allows the IJ to visualize better the persecutor harming the respondent. Active voice also requires fewer words leading to more a more concise and compelling statement. Furthermore, present tense forces practitioners to use colorful and vivid words that cause the listener to think in mental picture, which are more persuasive.

- **Ask to stand, if beneficial.** In immigration court, practitioners usually sit at a table rather than stand. While some practitioners will derive power from sitting, others will feel more powerful standing. If the practitioner feels better able to deliver a compelling opening statement or closing argument standing, the practitioner should ask for permission to stand. The IJ's main concern will likely be the microphone on the table capturing the opening or closing for the record. Practitioners should be prepared to address this concern by stating how they will ensure that the microphone captures the opening or closing: speaking loudly and clearly into the microphone, using a podium and placing the microphone on the podium, elevating the microphone by placing it on books, or women wearing high heels could remove the shoe and stand barefoot behind counsel's table.
- **Use intentional hand gestures.** Whether standing or sitting, practitioners should use hand gestures selectively and intentionally for impact. For example, practitioners may choose to underscore a point, signal a transition, represent a number using fingers,[17] or, mimic a gesture made by a persecutor in an asylum case. Placing the forearms and hands on the table provides a neutral starting point from which the practitioner can easily bend at the elbow and lift up the forearm and hand. If standing, clasping the hands in front of the body and bending the arms to create a 90-degree angle at the elbow provides a neutral position. This position also allows for hand gestures to frame the practitioner's face, where the IJ should already be looking. Practitioners should refrain from wildly gesticulating without a purpose as this will likely distract or annoy the IJ.
- **Sit up straight.** As children, parents loved reminding us to sit up straight. Unsurprisingly, our parents were right. Erect posture signals confidence and respect for the audience. Erect posture also allows us to breathe more easily and deeply, which translates into better voice use. There are two ways to achieve erect posture. Either sit as far back in the chair as possible and pull the chair forward under the table or sit closer to the edge of the seat and push the chair back, away from the table. Which position feels best takes practice and depends on the practitioner's height. It may be sage to take time before the hearing to become familiar with the chairs in the courtroom.

[17] The "roadmap" statement provides an opportunity to use this hand gesture.

- **Practice.** Practice for the "cold," "focused," and "hot" bench scenarios. There are generally three types of oral argument scenarios in immigration court:
    - "Cold bench": when an IJ gives no instruction or direction and the practitioner must decide what to argue based on the oral testimony, the IJ's questions during the hearing, if any, and the DHS cross examination,
    - "Specific issues bench": when an IJ instructs the practitioner to focus on the issue(s) that are of concern and only on those issues, or
    - "Hot bench": when an IJ interrupts the practitioner with questions throughout the closing similar to an appellate oral argument.

  Although a "cold bench" seems to be the most common scenario, the practitioner should practice all three types of scenario to ensure that they are comfortable with whatever structure the IJ chooses. Speaking with other local practitioners about the IJs style is also helpful. While the practitioner can practice the "cold bench" closing alone or in front of the mirror, the "specific issue bench" and "hot bench" will require colleague assistance. Ideally, a colleague will devise questions without the practitioner's input so that the practitioner can practice the quick thinking required for a "hot bench" scenario. By practicing all three scenarios, the practitioner will be ready for whatever scenario the IJ employs. By being ready for any closing argument scenario, the practitioner will be able to engage the IJ in the process and perhaps the IJ will be more willing to offer the opportunity for closing argument to other practitioners.

VII. Conclusion

Although removal proceedings are bench trials in administrative tribunals, immigration practitioners should not take for granted opening statements and closing arguments. Practitioners should consider an opening statement and prepare a closing argument in each case because these are essential advocacy tools. Opening statements and closing arguments when prepared well and delivered artfully may persuade the IJ to grant immigration relief. Even if a practitioner ultimately does not ultimately deliver an opening statement or closing argument in a case, the process of preparing for these forces the practitioner to master the case facts, documentary record, relevant case law, and legal theory. Mastering these aspects of the case will nurture a zealous and confident advocate, and respondents facing removal proceedings deserve competent, zealous, and confident legal representation.

Appendix

This sample opening statement and closing argument are for the same non-LPR cancellation of removal fact pattern.

Opening

When the Frederick County police arrested the respondent, Ms. Martinez, for practicing her driving in her church's parking lot, the police turned her over to ICE through the 287(g) program. That moment changed the lives of her two U.S. citizen children, Julie and Michael, forever.

- Julie developed an unshakable fear of police officers. Every time she saw a police officer or police car she sobbed and asked, "Mama, is the police going to take you again?"
- Doctors subsequently diagnosed Julie with adjustment disorder with anxiety and her school determined she had a learning disability that required an Individualized Educational Plan for Julie to ensure she received specialized instruction and services.
- Michael asked non-stop why his mother had abandoned them. He clutched her every night that she tucked him in to sleep asking if she would still be there in the morning.
- Both Julie and Michael are extremely attached to Ms. Martinez knowing that their future as a family remained in jeopardy. That is, until today.

Today, Ms. Martinez is prepared to meet her burden of proof for non-LPR Cancellation of Removal by showing that she merits a favorable exercise of discretion and Julie and Michael will face exceptional and extremely unusual hardship (EEUH) if she returns to Guatemala.

Closing

Families belong together. But it is imperative that Ms. Martinez's family stay united. Julie's mental health and Michael's emotional health depend on it.

Given the DHS stipulations, your Honor, the only issues in Ms. Martinez's non-LPR cancellation of removal case are 1) whether Julie and Michael will face exceptional and extremely unusual hardship if Ms. Martinez is removed to Guatemala, and 2) discretion.

1. Based on documentary and testimonial evidence, there is no question that if the government deports Ms. Martinez to Guatemala, her children would suffer exceptional and extremely unusual hardship.

Without his mother, Michael will think that Ms. Martinez abandoned them a second time. Without his mother, Michael will become an at-risk youth who believes he made Ms. Martinez leave. Michael has already started to act out in school and teachers have successfully used school counseling to help Michael, but if Ms. Martinez vanishes suddenly again, the teachers know that counseling will not suffice to support Michael.

Without her mother, Julie cannot cope with her diagnosed adjustment disorder with anxiety. Without her mother, Julie cannot meet the numerous recommendations of the school's Individualized Educational Plan. Julie's teacher, Ms. Johnson, underscored the importance of Ms. Martinez's presence in Julie's life through a letter found at exhibit X, "In the past, we have worked with Ms. Martinez to meet Julie's goals. Going forward, Julie's learning disabilities require educational interventions, social skills work in school, individual, school counseling, cognitive behavioral therapy, and ongoing monitoring both medically and academically. Ms. Martinez's presence and assistance with these goals will be essential to Julie's well-being."

Without their mother, Julie will never overcome her anxiety and learning disabilities and Ms. Martinez's U.S. citizen son Michael will face a lifetime of abandonment trauma.

Compared to *Matter of Recinas*, the exceptional and extremely unusual hardship in this case is far greater because none of the qualifying relatives in *Recinas* had emotional trauma, diagnosed mental disorder, or a learning disability.

DHS argues that Ms. Martinez has not proven exceptional and extremely unusual hardship because her spouse will care for their children in Ms. Martinez's absence. However, DHS fails to consider the record through the cumulative analysis lens required by *Matter of Recinas*. DHS ignores that besides Julie's serious diagnoses,

- Julie and Michael are both extremely emotionally attached to Ms. Martinez, and
- that they are bonded more with their mother because she was the homemaker while their father worked long hours in construction. Mr. Martinez testified to this today noting, "Julie is a very fearful child. She needs care and patience from both of us, but when she is scared, she goes to my wife. When it comes to Michael, only my wife can discipline him."

2. Ms. Martinez deserves to remain in the United States with her family for three reasons.

- First, she has been actively involved in her church, including by leading Bible study and feeding the hungry at the church's weekly soup kitchen, as detailed in exhibits GG through MM.
- Second, she is praised as an upstanding and well-liked member of the community, as demonstrated by letters found at exhibits NN through RR.
- Third, she has no criminal history whatsoever since arriving in the United States 15 years ago.

Your Honor, this family has already undergone the pain of family separation, a pain that was unnecessary and preventable. Ms. Martinez has proven that she qualifies for and merits non-LPR cancellation of removal. Ms. Martinez requests that this court grant her non-LPR cancellation of removal relief so that her two U.S. citizen children can keep the caring and supportive family unit that Ms. and Mr. Martinez have built, Julie can continue to receive the services she needs, and the family never has to endure the pain of forced family separation again.

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

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

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