The Art of Trial Advocacy

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This month, *The Army Lawyer* introduces a regular column on the art of trial advocacy. It will feature perspectives from the faculty of The Judge Advocate General's School, United States Army (TJAGSA), and others on military trial advocacy. The faculty welcomes submissions from practitioners, as well as samples from records of trial; send all submissions to the Criminal Law Department, TJAGSA.

Training Manual Released

Sprinting to the field this month is *The Advocacy Trainer*, *A Manual for Supervisors*. This manual provides numerous training scenarios that supervisors, both chiefs of justice (COJs) and senior defense counsel (SDCs), can use to conduct training on virtually any aspect of criminal trial advocacy. *The Advocacy Trainer* enables any COJ or SDC, regardless of experience, inclination, or office size, to train counsel. Instead of having to plan the training, they now only need to execute it. *The Advocacy Trainer* should go a long way toward stoking and maintaining a corps of trained, ready, and enthusiastic trial advocates.

Regional defense counsel and staff judge advocates received copies of the manual at the WorldWide CLE. All COJs and SDCs who have not yet received a copy can contact the Criminal Law Department, TJAGSA.

Trial Notebook

Before addressing discrete aspects of military trial practice, this column will address organization for trial. Every counsel in every trial, whether a guilty plea or a complex contest, should have a trial notebook. A notebook is simply a method of organizing counsel's resources—proof, witness exams, arguments—for the case at hand. It is not so critical that counsel follow this method but that they have *some* method for keeping track of documents and recording their thoughts. Such a system gives counsel easy access to what they need and mastery (and the important *appearance* of mastery) of the case during trial. Equally important, it gives peace of mind and frees counsel to listen to witnesses and concentrate on the case, because they are not worrying or scurrying—for example, trying to remember where they placed a document or where the Article 32 testimony is.

Trial notebooks should have sections for each of the following areas.

Allied Papers and Foundational Documents

- Convening orders and amendments
- Charge sheet
- Flyer
- Findings Worksheet
- Judge-alone request
- · Offers to Plead Guilty
- Sentencing Worksheet

Foundational Documents/Consultation

- Discovery
- •Other reports of investigation

Planning Documents

- Proof Analysis Sheet
- Chronology

Non-Evidentiary Court Documents

- Script
- Panel schematic
- Exhibit lists with columns for offered/admitted/comments (one list for counsel and one for opposing counsel)
- Witness List

Motions

- Copies of motions (one for counsel, one for opposing counsel, and one for the court)
- Supporting case law

Voir Dire

- Members' questionnaires, data forms, personnel records
- •Questions to ask
- Form for recording responses (another copy of panel schematic)

Witness Exams

Direct exams of all witnesses

•Notes for likley cross of opponent's witnesses

Witness statements

- Original copies of any statements that might be introduced into evidence
- Separate folder or divider for each witness
- •Photocopies of all statements that counsel may mark up, highlight, and use for preparation and witness exams during trial (including impeachment and prior consistent statements)
- •Copies (again copy for counsel and copy for possible introduction) of Article 32 transcripts

Documentary Evidence

- All documents which counsel know from the outset that they plan to introduce
- Foundation necessary to admit evidence

Arguments

- •Opening Statement
- Closing
- Rebuttal

Whatever form of notes counsel uses to prepare and to deliver opening statements and closing arguments should be included in this section. Counsel can use the trial notebook throughout trial preparation and trial. As thoughts occur to counsel that might be useful in argument, counsel should scratch them on a piece of paper and toss them into the arguments folder, sort them, and assemble them for argument.

Sentencing

Generally, the above sections—witnesses, documents, argument—separately set out documents, evidence, and other materials that can be used for the sentencing phase of the case. There is a possibility of redundancy in this section with documents or witnesses, but it keeps counsel from having to sift through documents from the merits phase of the trial to use as sentencing material during that phase of the trial.

Conclusion

Though the term used is *trial* notebook, it should begin taking shape well before trial; perhaps it is better termed a trial *organizer*. It is peculiar to each advocate and must be shaped according to individual counsel's needs and shortcomings, as well as those of the case.

The physical form of the notebook is even more personal. Many counsel use commercially produced oversized binders; some prefer pockets (thereby not punching holes in documents); others use 3-ring binders. Some use accordion files or even manila folders. In a complicated or lengthy trial, it may be appropriate to bring a file drawer or cabinet into court. All of this illustrates the need for planning. The trial notebook should evolve as the case is prepared. Document control, witness examination, and argument planning are ongoing concerns. Having somewhere to place things and thoughts (when an insight regarding an argument or witness exam strikes, scratch it out and place it in the appropriate folder) keeps the trial preparation process orderly and free of distracting stress, and thus makes counsel more organized and compelling in court.