

The Art of Trial Advocacy

Preparing the Mind, Body, and Voice

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Introduction

A common attribute that top professionals share is their ability to prepare themselves to perform at an optimal level. For example, the athlete thoroughly stretches and warms-up his body prior to the competition; the singer carefully warms-up her voice through the full vocal range before the concert; and the actor painstakingly memorizes his lines prior to the opening curtain call. Many lawyers, however, fail to attain this level of preparation prior to a trial. Throughout a trial, a lawyer is required to use his mind, body, and voice. In order to successfully present his client's case, an advocate should prepare and warm-up these faculties prior to trial. While many advocacy articles focus on courtroom techniques, this article focuses on ways a trial lawyer can prepare for optimal performance before he ever enters the courtroom.¹

The Challenge

One commentator recently reported that a larger percentage of people have a greater fear of speaking in public than of their own physical death.² The fear of speaking in public can cause the body to go into an instinctual fight or flight reaction.³ When undergoing this reaction, the body directs all its energy into sur-

viving, including holding its breath and becoming tense and rigid.⁴ This reaction is antithetical to the advocate who is trying to project a calm and confident image in the courtroom. The solution is to take the nervous energy of "stage fright" and transform and channel it into "stage presence."⁵

Case Preparation

People fear public speaking, in large part, because they fear the unknown.⁶ Therefore, the more an advocate familiarizes himself with the case and the courtroom environment, the more confident he will be at trial. Through a diligent and thorough case investigation, the advocate can intimately familiarize himself with the case. This process involves reading the law-enforcement file several times and paying attention to the details including any inconsistencies.⁷ Additionally, the advocate should carefully interview all relevant witnesses at least once and all key witnesses at least twice.⁸ Advocates should ask all witnesses, "Is there anything else you can tell me that would be helpful to my investigation?" and "Are there any other people I should talk to as part of my investigation?" An advocate will know that his interviews are complete when he is not learning new information from the witnesses and he has interviewed all the people that the witnesses have suggested.⁹

It is also important to examine the physical evidence. The advocate should not rely solely on the law-enforcement investigation file to correctly describe the physical evidence. There may be characteristics of a piece of physical evidence that are either missing or are mischaracterized in the report, but that are very helpful to the advocate's case. The only way to discover this information is to personally and carefully examine the physical evidence. For the same reasons, it is essential for the

1. See JOSHUA KARTON, COMMUNICATION TECHNIQUES FOR PERSUASIVE ADVOCACY (2000) (on file with author) (serving as a source for many of the suggestions in this article). Joshua Karton taught this material at the 6th Advanced Advocacy Training Course at The Judge Advocate's Legal Center and School, U.S. Army, Charlottesville, Virginia on 31 May 2003. He is the President of the Santa Monica, California firm of Communication Arts for the Professional. He is a specialist in teaching litigators how to apply the personal communication skills and the techniques of theatre, film, and television to the art of advocacy. He currently teaches at the School of Theatre, the University of Southern California, the Loyola Law School, and the California Western School of Law.

2. *Id.*

3. *Id.* at 13.

4. *Id.*

5. *Id.*

6. *Id.*

7. Major Timothy MacDonnell, *It Is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 67.

8. See *id.* at 65; Major Edie Moran, *Prevention of Juror Ennui—Demonstrative Evidence in the Courtroom*, ARMY LAW., June 1998, at 24.

9. See generally Lieutenant Colonel Henley, *Horse-shedding the Evidence—Twenty Do's and Don'ts of Witness Preparation*, ARMY LAW., Feb. 1998, at 38.

trial advocate to visit the crime scene. When visiting the crime scene, an advocate should go during the same time of day that the crime occurred and have someone accompany him to help reenact the crime. This will help the advocate better analyze the evidence and will highlight any inconsistencies with the case file and the witness's statements.¹⁰

Rehearsal

Once an advocate has eliminated the mystery of a case through his pretrial investigation, his next step is to reduce the fear of the courtroom by practicing his case presentation. The courtroom is the most effective place for rehearsal. The key parts of a case that an advocate should rehearse in the courtroom include voir dire, opening statement, and closing argument.¹¹ The advocate should also rehearse direct testimony of key witnesses in the courtroom.¹² This preparation is indispensable for child witnesses and victims of violent crimes because they are most likely to have an adverse reaction when having to confront their assailant in the intimidating environment of open court.¹³ Additionally, advocates should always develop contingency plans for using remote testimony with child witnesses.¹⁴ When rehearsing direct examination, the advocate should select a location in the courtroom that directs the panel's focus to the witness.¹⁵ To do so, the advocate should place himself in a position where he is outside of the direct view of the panel while they are looking toward the witness.¹⁶ While the witnesses practice testifying, it is helpful to have a fellow attorney or paralegal sit in the panel box to assist the witness to learn how to talk directly to the panel members. This will also allow the advocate to gain valuable feedback on the effectiveness of the testimony from their mock panel member.¹⁷

The trial lawyer should also practice handling the physical evidence in the case. This is especially true if the evidence may involve mechanical operation during the case, such as a pistol or rifle. The trial lawyer must be able to *clear* a weapon smoothly before handing it to a witness. If the advocate has trouble handling the weapon in front of a panel, he can quickly lose credibility as both a lawyer and a soldier. This advice holds true for demonstrative evidence also, especially diagrams. Before the lawyer uses a diagram in court, he should rehearse its use with any necessary witnesses before trial.¹⁸ Doing this will not only help ensure a smooth presentation in front of the members, but will reduce the chance that a witness will forget key portions of their testimony. Rehearsing with the diagram in the courtroom allows the advocate to find a location for the diagram that will maximize its impact, while still ensuring all court personnel are able to view it.¹⁹

When rehearsing with physical evidence and diagrams, as well as the other evidence he plans to introduce, the advocate should practice laying the necessary evidentiary foundations. This will increase the lawyer's confidence and avoid the awkward moments in front of a panel following a sustained objection to a piece of evidence based on lack of foundation. Even if the advocate feels he has memorized the necessary foundational questions, he should create a foundational checklist for each type of evidence.²⁰

The advocate should also prepare objections to the opposing counsel's anticipated evidence. This preparation includes outlining his objection arguments, with references to the applicable law. The advocate should attempt to anticipate the opposing counsel's objections to his evidence and prepare well-reasoned responses. Finally, he should maintain a list of legal references close at hand, with copies available to provide to the military judge and opposing counsel upon request.²¹

10. See MacDonnell, *supra* note 7, at 67.

11. See generally Moran, *supra* note 8, at 24.

12. See *id.*

13. Major Christina Ekman, *Preparing the Young Child-Victim for Trial*, ARMY LAW., June 2002, at 42.

14. See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 914A (2002); see also United States v. McCollum, 58 M.J. 323 (2003).

15. THOMAS A. MAUET, TRIAL TECHNIQUES 88 (4th ed. 1996).

16. *Id.*

17. See generally MacDonnell, *supra* note 7, at 67.

18. Moran, *supra* note 8, at 23.

19. MAUET, *supra* note 15, at 139.

20. See DAVID A. SCHLUETER, STEPHEN A. SALTZBURG, LEE D. SCHINASI & EDWARD J. IMWINKELRIED, MILITARY EVIDENTIARY FOUNDATIONS (2000) (containing an excellent resource on evidentiary foundations); CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 18TH CRIMINAL LAW ADVOCACY COURSE DESKBOOK, tab O (Sept. 2002), available at <http://www.jagcnet.army.mil/TJAGLCS> (last visited 22 October 2003) (explaining the evidentiary foundational elements).

21. Major Norman Allen, *Making and Responding to Objections*, ARMY LAW., July 1999, at 38.

The Day Before Trial

In addition to thoroughly preparing the case, the advocate must prepare his mind, body, and voice for the demands of a trial.²² An advocate must maintain mental sharpness and alertness to process information during the trial. To achieve optimum productivity, the advocate should get a full night's sleep before trial and not be tempted into staying up all night. An advocate's inability to remain alert during trial will often negate the advantages gained through case preparation. Tips for those who have trouble falling asleep include the following: (1) maintaining a regular bedtime routine; (2) reading a relaxing book before bed; and (3) regularly exercising.²³ If an advocate has trouble falling asleep because he cannot stop thinking about the remaining tasks he needs to accomplish, he should keep a notepad and pen next to the bed and write down his ideas as they come to him.

The Day of Trial

On the morning of the trial, an advocate should allow plenty of extra time to get ready. This includes time to eat a nutritious breakfast. Additionally, it is a good idea for the trial lawyer to pack high-energy snacks in his briefcase to eat during the court recesses. Not only will this help to maintain his energy, but it may also be his only food if he has to work through lunch. Finally, the advocate must not forget to drink fluids throughout the trial in order to stay hydrated. Even mild dehydration can cause headaches, lethargy, and poor concentration.²⁴

Rising early in the morning not only allows the advocate time to get ready in a relaxed and unhurried manner, but it also allows him to get to the courtroom early. Arriving at the courtroom early is important, since it allows an advocate time to arrange his materials at his table, to review his voir dire and opening statement one last time, and to handle any last-minute issues with opposing counsel, witnesses, or the trial judge. One of the things that will quickly anger a trial judge, is a counsel who shows up late to trial while members are kept waiting in

the deliberation room. Ideally, an advocate should arrive in court forty-five minutes to one hour early.

After an advocate has prepared mentally for the trial, through both case preparation and rest, he needs to prepare his voice. An advocate cannot afford to wait until halfway through the first day of trial to utilize the full range and potential of his voice. Studies show that eighty percent of jurors decide how they will vote at the end of opening statements—it is paramount for an advocate to utilize the full persuasive ability of his voice from the moment he addresses the panel.²⁵ An advocate should focus on releasing tension from his body and warming-up his vocal cords to allow his voice to fully release itself.²⁶

While these techniques may seem unorthodox, some notable theater and television professionals have recommended the stretches and vocal exercises discussed in this article.²⁷ A couple of quick and easy stretches that will assist in releasing vocal-inhibiting tension from the body include the head-roll and the drop-down.²⁸ To perform the head-roll, allow the head to gently fall forward and then roll it slowly from side to side. Use deep exhalations of breath as the head rolls back and forth—the ear should touch the shoulder. To conduct the drop-down, first release the jaw and again letting the head gently fall forward, with the chin resting on the chest. The weight of the head then slowly leads the rest of the body all the way down—one vertebra at a time—until the body is folded in half with the head, arms and entire top of the body dangling down. The advocate should remain in this relaxed position and allow the breath to flow naturally as the tension is released from the body. This exercise should be repeated at least three times.²⁹

The final step involves warming-up the vocal cords. In order to warm-up the full range of the voice, the advocate should use both “articulators” and “resonators.”³⁰ Articulator drills include the following: (1) alternating between scrunching the face into a tiny fist and then opening the mouth widely with the tongue sticking out; (2) making “raspberry” sounds by blowing through the lips and tongue; and (3) repeating “tongue twister” phrases.³¹ Resonators are designed to warm-up the resonating cavities of the body. One method for doing this vocal

22. See KARTON, *supra* note 1, at 23.

23. National Sleep Foundation, *Top Ten Sleep Tips for Promoting a Healthy Lifestyle*, available at <http://www.sleepfoundation.org/sleeptips.cfm> (last visited 22 Oct. 2003).

24. Martha Brassil, B.A., D.Th.Dip., *How Dehydration Affects the Body*, at <http://www.cell-free.com/dehydration.htm> (last visited 22 Oct. 2003).

25. KARTON, *supra* note 1, at 15.

26. *Id.*

27. *Id.*

28. *Id.* at 26.

29. *Id.*

30. *Id.* at 28.

warm-up includes humming “MEE-MAY-MAH-MOE-MOO” with the sound resonating first from the nasal cavities, then flowing to the throat, and finally down to the chest.³² If this exercise seems too complex, the lawyer can reap vocal warm-up benefits by merely humming his favorite tune while alternating its delivery between his nasal passages, throat, and chest. Doing these vocal exercises will increase the range and placement of the voice. The good thing about this vocal drill is that an advocate can perform it in the car on the way to the courthouse if he is running short of time.

Conclusion

Although many of these preparatory steps may seem more appropriate for the stage actor rather than the courtroom advocate, the courtroom is in fact a stage. It is on this stage that the lawyer presents the drama of his client’s case or a victim’s story. Therefore, it benefits the lawyer to be prepared to deliver a compelling performance from the time he steps foot on the courtroom stage. Advocates can perform at optimal levels if they devote the necessary time and effort to case preparation before trial, and set aside time on the day of trial to prepare their minds, bodies, and voices.

31. *Id.*

32. *Id.*