

The Art of Trial Advocacy

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Lawyering Through Your Eyes

"The Next Question Must Be More Important"

You are sitting in a bar with a good friend. He looks at you and says, "So, tell me about the case you tried last week." As you launch into your latest acquittal with gusto, your friend immediately turns his head from you and begins to scan the bar, apparently looking for more interesting conversation. You cut your story short and eat another pretzel.

Perhaps a more familiar setting for the judge advocate is the "boss' signal." You walk in to discuss a case with the Staff Judge Advocate. He asks you a question, and, shortly into your answer, his eyes fall and lock on a document on his desk—a document you didn't give him. He reads it while you talk and grunts the occasional "mmm . . ." and "right." You shorten your case description and quickly exit, not wanting to waste any more of his time.

What is the message from this classic human behavior? The message is, "I'm not interested, it's time to move on" or "this conversation is over." What thoughts bolt through the speaker's mind? Perhaps it is reluctance to continue speaking or to expand on a thought or the story, incentive to cut short the description, resentment, anger, disgust, or a combination of these things.

Think back to your last trial and the signals you transmitted. After you asked a witness a question, did you look down at your notes, *during the answer*, to find your next question? You were probably listening, but you were also ensuring you had the next question in the chamber, ready to fire. Your attention and concentration were *divided* or *appeared* to be divided, which is equally destructive.

The consequence of this behavior, like the bar scene or the boss' office, is deadly. You have signaled to your witness that you are not interested in the question or the answer. The witness thinks, "he's looking at the next question, not at me; he must not be interested in this answer." As a result, the witness is inclined to shorten an answer because you look like you want to move on.

This nonverbal speech is also dangerously apparent to a panel. It, too, picks up signals. The members think, "he's looking to the next question, *this* question must not be that important. It's the *next* question that's important." When the advocate continues with similar behavior throughout an examination, it is hard to identify a single, apparently important question.

This behavior most often occurs in a relatively low threat arena, such as introducing a witness—a court-sanctioned bolstering opportunity which, more often than not, counsel squander by blazing through, eyes on the paper and the next "important question." Counsel must take this opportunity to personalize the witness and to engage him.

The Floor and Ceiling Have No Questions or Answers

Think back to a recent opening or closing. Can you remember the faces of the panel members? Can you remember connecting eye-to-eye with a member and delivering an important point to that member? Probably not. This is because we typically *scan* our listeners with our eyes. Even worse, we pace "thoughtfully," with our eyes scrutinizing the ceiling tiles or the crumbs on the floor. This most often occurs during opening statement and closing argument. We do not engage interested members *individually*. We simply roll over them like water over a dam or avoid them entirely by looking at the floor and ceiling.

The trial attorney must be constantly aware of not only what sound is coming out but also how that sound is dressed. Like the bar scene or the "talk" with the Staff Judge Advocate, are our courtroom eyes engaged in their own persuasive yet counter-productive conversation?

Solutions

Your eyes are simply another powerful tool to further your cause. When you rehearse an opening or closing, think through, calculate, and plan your "eye speech." You should concentrate on establishing eye contact with each member at some point in your delivery.

Ideally, you should engage each member a number of times as you talk. That is, you speak "individually" to that member and deliver a singular thought or point. Only then should you move to a new member, lock on, fire the next point, and move to the next target. To avoid a monotony and predictability, you should inject a random quality into this process and avoid singling out members by over-relying on those with whom you connect more easily.

Drills

Improving Eye Contact With Members

As highlighted extensively in *The Advocacy Trainer, A Manual for Supervisors (The Advocacy Trainer)*,¹ drilling is essential to every profession. The baseball player practices fielding and hitting. The basketball player practices the jump shot. The doctor practices on cadavers (and, in university hospitals, on living, breathing patients!). The trial advocate must also practice his art.

The somewhat unorthodox drill below will improve your eye contact with members—guaranteed.

Deliver a portion of your opening, closing, or sentencing argument during a training session. As you speak, establish eye contact with a “member” and then shake the member’s hand (yes, take the person’s hand in yours; you need not shake the hand, simply grip it) while you “deliver” a single thought or point to that person. Once the point is delivered, move randomly to another member, establish eye contact, shake her hand, and deliver the point. Continue this through your statement.²

You will find that a number of interesting things happen during this drill. First, you lock on the person, and she tends to lock onto you. Second, you have now invested that thought or point with that member, you have given her ownership of it, you have asked her to hold that thought for you throughout the case. An additional benefit of this technique is your inevitable “run on the bank.” Once you have invested an important point of fact or law with a particular member, you can later “cash in” and have her recall that fact while you are looking at her. Gripping the hand of the member also adjusts your pace (typically slowing it down), and it tends to enhance your emphasis on what is important.

After a few minutes, continue the argument without the handshake. Your natural inclination will be to continue “hand delivery” of thoughts, points, and concepts with individual members. When you find yourself backsliding to the scanning mode, picture the handshake in your mind and return to individual delivery.

Improving Eye Contact With the Witness

As a trial advocate, you must keep your eyes on the prize—your witness. During a practice direct examination, you should force yourself to keep your eyes on the witness *during* your question and *during* the answer. You must fight off the desire to look to your paper to upload the next question. You should find the question by either continuing to look at the witness or really listening to the witness so that the flow of your questions comes from the witness, in conjunction with your overall plan of attack. Try to move away from your step-by-step pretrial notes. Alternatively, if you feel compelled to follow your scripted examination, find the next question after the witness completes the answer. Simply pause and collect into your quiver the next two or three questions and begin again.

Trial advocates must practice this skill. *The Advocacy Trainer* contains many drills that force counsel to improve their eye contact.³

Counsel must remember that there are many interconnected skills in successful advocacy. Eye contact is a skill over which an advocate can easily exercise control. It also has an incalculable effect on his listeners. However unorthodox it may be, the drill above will help advocates to master the art of “lawyering through their eyes.”

The Advocacy Trainer, A Manual for Supervisors

The Advocacy Trainer marched into the hands of all Staff Judge Advocates (SJAs) during the SJA Worldwide CLE held at The Judge Advocate General’s School, United States Army (TJAGSA), during the week of 6-10 October 1997. For military justice supervisors who are not colocated with their SJAs, TJAGSA will mail copies by the end of October 1997. The Criminal Law Department welcomes input on *The Advocacy Trainer* and suggestions for future supplements. Those who have comments or suggestions can call (804) 972-6340 or e-mail advtrngm@otjag.army.mil.

1. CRIMINAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY (1997) [hereinafter THE ADVOCACY TRAINER].

2. This technique is a component of advocacy training conducted by the Naval Justice School, Newport, Rhode Island.

3. See THE ADVOCACY TRAINER, *supra* note 1, Tab B, Modules 1 and 2.