

# The Art of Trial Advocacy

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## To Write or Not to Write?: That Should Not Be A Question<sup>1</sup>

One of the most frequently asked questions by experienced trial advocates is whether they should write their opening and closing statements and direct and cross examinations before they proceed to trial.

Counsel's first advocacy move,<sup>2</sup> after brainstorming about how to organize and present the case, should be drafting a closing argument.<sup>3</sup> Proceeding from there, counsel must write out the execution for the other phases of trial. This includes direct and cross-examinations and summaries of evidence, opening statements, and motions. Writing out the component parts of a case permits counsel to see a picture of the end product—a good trial notebook.<sup>4</sup> For most advocates, writing out the component parts of a case is the essential step in trial preparation that permits counsel to validate their general thoughts about the facts and law applicable to their case. If you have difficulty writing out your opening statement or direct examinations, that should be the first clue that your thinking may be flawed, or needs further refinement.

## Methods

Advocates often use many methods to write out the phases of a trial. The three most common writing methods include the (1) write everything, (2) outline, and (3) summarize methods.<sup>5</sup> Each method coincides with the advocate's level of experience. New advocates normally use the "write everything" method. Intermediate advocates use the "outline method." Experienced advocates tend to use the "summarize method," although many continue to use the other methods.

The "write everything" method consumes the most time, but is the most effective way to prepare for trial. For example, writ-

ing out every question for direct or cross-examination helps advocates construct short, specific, single fact questions. The pitfall with this method is that it might lead advocates to read excessively or rely too heavily on their notes at trial.

New advocates should use the "write everything" method. This is the least complicated method and produces a safety net should counsel become disoriented in the court-martial.

The second method of writing a case for advocacy success is to use an outline. This is almost as simple as writing everything. Instead of constructing a prose opening, an advocate organizes the general areas and key points that make an effective opening statement into outline form. The general areas and key points will prompt the advocate during the trial. Intermediate advocates often use this method. Not surprisingly, getting to this stage of advocacy usually involves starting with the "write everything" method.

The third way to write a case is the "summary" method. This method involves writing a few words and phrases that describe a theme or the objective that the advocate seeks to establish.<sup>6</sup> For example, before delivering a sentencing argument, the defense counsel might decide that there are three points that he wishes to emphasize about the accused. For example, the defense counsel might wish to emphasize the accused's "lack of a meaningful education," "bad family environment," and "good intention gone mistakenly awry." During the closing argument, an advocate uses the "summary" phrases as prompts that remind him to introduce the particular theme and form the argument. The "summary" method allows an advocate to easily insert additional prompts as the case proceeds.

The "summary" method often draws the most attention from new counsel because it appears to involve the least amount of work and time. In actuality, it probably involves the same

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1. Of course, the title is a rewording of the Hamlet "to be or not to be" speech. See WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1.
  2. There are many things that an advocate should do before taking care of the advocacy part of a case. For example, an advocate must read the case file, conduct preliminary investigation, and interview witnesses.
  3. See generally Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, *ARMY LAW.*, June 1998, at 21.
  4. Once a counsel prepares the trial notebook, a picture of the desired result of trial becomes clear. For example, the desired result may include effective representation for the government or the accused—which leads to either a guilty finding or on acquittal, or a superb sentence.
  5. There may be other methods of writing the phases of a trial. Some of these methods may work better than others depending upon the individual advocate and the specific issues of the case.
  6. This is different from the "outline" method because the subparts of the main point are not written. Rather, an advocate remembers the subparts and uses the words and phrases that are written to prompt and refresh his recollection of the points that he desires to make. In addition, an advocate writes the words and phrases as the trial proceeds or at the close of a particular stage of the trial rather than prior to trial.

amount of preparation time, coupled with the sage experience that is gained from many years of practice.

### *Don't Be Fooled*

To avoid a script-like delivery at trial, many experienced advocates never write presentations word for word. Rather, they create a mental picture of key points to present to the factfinder, or use the "summary" method after they have heard opposing counsel conduct the opening statement or direct examination. Don't be fooled. Experienced advocates who can stand and deliver a closing argument or conduct an effective direct or cross-examination with "little or no prep time" do not do so "off the cuff." They do so as a result of years of experience, and in most cases, after using each of the aforementioned writing methods. For inexperienced counsel, the "summary method" presents the highest risk of failure since there is no written backup plan if the advocate loses his train of thought.

### **Conclusion**

Regardless of the method that counsel choose, writing the phases of a case is the step that enables advocates to internalize how to execute the plan of attack at a court-martial. It permits counsel to place the planning on paper in concrete form; revise and refine the initial attack plan; and appropriately weave personality and ideas into the process. It also serves as the first link<sup>7</sup> for advocates to translate facts, law, and their theme into smooth verbal communication for the factfinder.

An effective advocate goes through a maturation process of writing everything, writing some things, and then perhaps writing less. Experience enables an advocate to choose which option best suits his case, personality, or talent level. The "write everything" method is the best way to ensure success in the courtroom. Adopting a strategy that includes some method of writing out the phases of a trial can only enhance an advocate's chance for success. Major Coe.

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7. The other important link in converting facts, objectives, and theme into a verbal communication is the rehearsal.