

## ARTICLE: Advancing Advocacy

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### Text

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[\*35] The Necessity of Advancing Advocacy Skills Teaching trial advocacy is one of the most critical duties of a supervising attorney in the trial arena. Great advocacy does not just happen because excellent advocates are not spontaneously generated. Even advocates with finely honed trial advocacy skills will soon lose their edge and in time grow downright dull if training is neglected; hence the need for an experienced adviser to keep advocates at their best, even when they are not regularly in court. Given what is at stake when trial advocates employ their skills and how rapidly advocacy skills deteriorate when one is not on one's toes, the importance of skilled mentoring in this area is undeniable. To support this endeavor, I recently attended a workshop on teaching advocacy presented by the National Institute of Trial Advocacy (NITA).<sup>1</sup> The purpose of this article is to pass along what I learned from the course, plus some of my own experience, to assist readers in mentoring advocates within their zones of influence.<sup>2</sup>

For a training program to prove successful, a leader must examine his plan to ensure it supports his objectives. Is there a written training plan in place? This provides clear direction and strategic goals, as well as avoids the human tendency to let training devolve into story time or a discussion of everyone's weekend plans. Furthermore, if training is scheduled and time has been invested in a specific program, it is far less likely to fall victim to a current "crisis" that will push training to tomorrow or next week, only to have the cycle repeat itself. Without early planning and commitment, good intentions easily slip into unfulfilled wishes.

Prior scheduling also allows for maximum participation and affirms the importance of advocacy training. This is particularly true for the chief of justice who is responsible for trial counsel assigned to a separate brigade.<sup>3</sup> Units

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<sup>1</sup> The National Institute for Trial Advocacy (NITA) (website: <http://www.nita.org>) is a nonprofit organization based on Louisville, Colorado. With an average student to faculty ratio of 4 to 1 and an all-volunteer faculty of judges, law professors, and practicing attorneys, the NITA's multi-day "boot camps" train nearly 6000 attorneys each year.

<sup>2</sup> Though written well over a decade ago, two *Army Lawyer* articles are still well worth consulting on the supervisor's role in advocacy, as well as the many other responsibilities of a criminal law manager. Major David L. Hayden, Major Willis C. Hunter, & Major Donna L. Wilkins, *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 21; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15.

<sup>3</sup> While TJAG Policy Memorandum 08-1, dated 17 April 2008, makes this task easier by directing the brigade trial counsel (TC) to work in the Office of the Staff Judge Advocate while in garrison, their location is still a source of tension in some units.

have training calendars of their own and are much more agreeable to your plan if it is developed in advance, rather than thrown together *ad hoc* at the last minute. Accidents happen and productive instruction can still take place in the absence of a schedule, but failing to plan and instead relying on spontaneity is essentially a commitment not to educate in any purposeful way those you are accountable for supervising. <sup>4</sup>

As part of developing teaching goals, leaders should observe attorneys in court. Active interest in your counsels' actual ***skill*** levels permits you to tailor your instruction to their needs, while emphasizing that professional growth is a priority. <sup>5</sup> Committing the time to sit through trial, even if simultaneously working on something else such as reviewing a record of trial, also provides an opportunity for meaningful input about how the attorney may improve. An assessment based solely on an adjudged sentence will lack real substance beyond "good result." Even the best result may not correlate to counsel's performance in the courtroom. Additionally, observing where counsel need improvement can inform a more relevant training program.

### **The NITA Teaching Methodology**

The NITA teaches a four-part review for ***advocacy*** trainers. The review occurs after a student has completed a required demonstration, e.g., an opening statement or direct exam. The first step is to clearly identify one issue through the use of a "headline," a simple statement, such as "I want to talk to you about using leading questions on cross." This **[\*36]** focuses the group and the instructor on a specific point. Even when more than one issue needs addressing, sticking to one teachable point per person, in the group setting, keeps the information to be absorbed at a manageable level and prevents anyone from feeling singled out. <sup>6</sup> While certainly there is no magic language, starting off with, "I want to talk to you about using open-ended questions," will effectively focus the group and the instructor about a specific point. Avoiding negative and vague comments, such as "you did it wrong," will keep students receptive to what the instructor has to say and not place them on the defensive and closed off to constructive criticism that may follow.

Identifying the issue with a headline is followed by step two, the "playback," where the leader reads back verbatim three examples highlighting the issue identified in the headline. This requires some rapid transcribing by the instructor, but is the key to an effective playback. Reading back three examples in the speaker's own words prevents junior counsel from defensive rationalization. It is not unusual for the person being critiqued to think, "I did not do that, or if I did, it was only once."

Following the playback is the "prescription" NITA's step three. The leader explains how to solve the problem. In some cases, this is best done by example since some things are easier to show than describe. Modeling by the leader demonstrates that the principle being taught works in practice. The instructor must not critique junior counsel on a topic for which he has no solution, as this will greatly undermine the credibility of the senior attorney.

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Providing a training plan to the brigade that accounts for their TC's training may help to improve this dynamic. If not, it may be necessary to procure orders from the division commander to acquire the needed control. If things have to go this far, a training plan can help to justify and retain such control.

<sup>4</sup> As an Army leader, you have an inherent obligation to mentor your subordinates. Additionally, as a supervising Judge Advocate, you have an ethical obligation under Army Regulation 27-26, which specifically mandates that "[a] supervisory Army lawyer is responsible for making appropriate efforts to ensure that the subordinate lawyer is properly trained and is competent to perform the duties to which the subordinate lawyer is assigned." U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 5.1(d) (1 May 1992).

<sup>5</sup> This does not mean the chief of justice and senior defense counsel should sit right behind their trial attorneys and pass notes or whisper to them about the next question to ask. This practice is distracting, undermines counsel's credibility before the tribunal, and saps his confidence.

<sup>6</sup> Only as students develop should the instructors consider addressing more than one critique point per training session. The exception to this is if the instructor observes a violation of the ethical rules, such as the use of improper argument or a misstatement of the facts or law. Such a violation should always be brought to the students' attention and corrected immediately, no matter the topic of the day.

The final step of the critique is to explain the "rationale" for the needed change and why the proposed prescription is the best solution. This helps the students understand the reason for the prescription and identify related issues in the future. They will want to make the change when they realize the logic extends beyond "because I said so."

When reviewing counsel's presentations in a group setting, keep the group learning concept in mind. Make constructive points to benefit the group and do not focus solely on the shortcomings of an individual. Provide lessons that multiple members of the group can apply in future cases. Recognize that different students are at different levels, and vary your critiques accordingly, so that whoever just went can grasp the point being made. The instructor should make eye contact with the entire group throughout the critique, but particularly during the prescription and rationale steps, so the entire group understands it is a lesson for all of them. Just as an attorney making argument should avoid the using the word "I" during argument--"I think this" or "I believe that" --so too should the instructor during prescription and rationale, because it implies the solutions are just one person's opinion and not actually the correct way to do things. Instructors must also understand that while group training provides a shared learning experience where everyone learns from others' successes or missteps, student comments can quickly derail the schedule, and may be counterproductive.

In addition to teaching to the group, other practices can maximize the teaching value to the individual participants. The instructor should create an environment that excludes all distractions. He must keep the group to a manageable size, so that each attorney has a chance to participate. He may need to subdivide the group or limit the material assigned to each counsel. Typically, a five to seven minute block provides the participant enough time to develop a flow and let everyone see what needs to improve. When each participant is limited to five to seven minutes, each critique should take two to three minutes, to keep the instruction moving.

Before a student takes his turn, the instructor can use questions to focus his attention on important teaching points. Thus, if the exercise is direct examination, the instructor can ask, "What points will the witness make that you will argue in your closing?", "Are you planning to get any answers you know you will not use later?", and "Why are you asking those questions, then?"<sup>7</sup> The use of humor can help keep the attention of counsel, as can implementing an "all-object" rule where everyone is responsible for objecting so that no one "tunes out" during someone else's turn in the rotation.<sup>8</sup>

It is important to be respectful of all participants and create an environment without distractions. While respectful, the feedback should be forthright and not sugarcoated. An occasional positive critique of an exemplary performance can emphasize the value of something done well, but the most productive comments will focus on improving, not maintaining the status quo. While the form of the critique is important, it is the substance that matters most. Before the students begin, ask them questions about their upcoming cases that will focus them on the end goal, such as, "What points do you want the panel to come away with when you cross the victim in *Smith*?"

If other instructors are participating, they must understand what is expected of them. If the leader is using [\*37] the four-step NITA method, they need to understand it. They must appreciate the importance of not contradicting other instructors in front of the students. They must come prepared so that training time can be dedicated to training.<sup>9</sup>

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<sup>7</sup> Asking the questions prior to a student's in-training performance eliminates the controversial feel to the questions, since they are directed toward what trainees are about to do as opposed to what they have already done.

<sup>8</sup> While one counsel can be tasked as "opposing counsel" and given responsibility for making objections, with an "all-object" rule, more individuals can work on spotting objectionable matter and *concisely* stating their objections to the judge. An "all-object" rule also generates more objections, providing counsel on their feet more chances to respond succinctly to objections and move on, without losing focus.

<sup>9</sup> For example, if the courtroom is unavailable for your *advocacy* training, prepare another location as similar as possible to give the entire exercise a more realistic feel. This avoids wasting valuable training time on interior decorating and will allow the instructor to provide feedback on the attorney's movement within the courtroom, such as how they interact with the witness and panel. Additionally, exhibits, diagrams, and maps should be available for counsel to practice with, as should PowerPoint

While "war stories" can occasionally be helpful, generally they are a distraction and seldom fit the skill-specific nature of the NITA method.

As the students become more proficient and begin to master the skills, encourage them to attempt novel ideas. Emphasize that a training session is the ideal place to try something new. The only downside to greatly improved counsel is the increased difficulty of finding something meaningful to critique. Hopefully, that is a problem a leader will relish as his or her junior counsel's advocacy skills improve.

### **Self-Reflection with Video Review**

The use of video review can add a whole new dimension to the methods discussed above. Such review is best done in private by a different instructor while the rest of the group continues training.<sup>10</sup> It focuses on the junior counsel's physical actions. If the student is feeling discouraged from the review in the main room, the instructor should encourage him about what he did well before proceeding with the video review. After all, the goal is to improve the student's advocacy, not cause him to loathe it and request a transfer to claims. If the student is still in denial about a particular problem highlighted in the headline and detailed in three examples, the video review provides irrefutable proof of the critique's accuracy. Video review gives students a chance to benefit from self discovery, internalizing lessons they would have been reluctant to receive if delivered by someone else. Also, some issues--such as problems with tone, pacing, or body movement--can be difficult and embarrassing to repeat in playback before a group, these are better left unmentioned during the main session and addressed during the video review.

An effective video review differs from a successful live critique. An obvious difference is the private setting offered by video review. The attention is focused on the individual rather than making points for the benefit of the group at large. The individual can explain his objectives and share insights from the group instruction.<sup>11</sup> If time allows, the student can redo a portion of his performance to reinforce the lesson taught. This chance should not take priority over other students who may be waiting outside the video review room. To keep the program on schedule, it is necessary to talk over the recording. As tempting as it may be to repeatedly pause the tape to address valid points, this unfairly takes time from other students. The resulting backlog keeps students out of the main classroom and unable to learn from the points made there for the benefit of the group.

A variation of a video review is to turn off the sound to isolate particular mannerisms or observe the student's overall movement.<sup>12</sup> Alternatively, the instructor could cover the screen to center the attention on the audio portion. Ensure that the room setup allows the student an unobstructed view of the screen, particularly if the performance is being watched on a laptop computer that inhibits watching from an angle. As the student is about to leave, give him one thing to work on for next time, be it pacing, gestures, eye contact, overreliance on notes, or demeanor--particularly when opposing counsel objects or the judge asks a question.

### **Use of Drills in Advocacy**

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presentations incorporated into arguments, if these are allowed by the local judge. If the judge has yet to embrace this technology, flip charts, enlarged elements worksheets, or blown up copies of the instructions are a workable alternative.

<sup>10</sup> If two instructors in the main room with a third conducting the video review does not work because your only instructors are "me, myself, and I," or if you have only a few counsel, consider running the main room by yourself and tasking a student with starting and stopping the camera. Then do individualized video sessions later in the day or whenever fits your schedules. If there are only a couple of counsel, consider adding a second headline, playback, prescription, and rationale so they still have multiple points to take away from the session.

<sup>11</sup> Due to the importance of privacy for this section, it is better to perform the video review in a separate office with the door closed. This maintains privacy as the next student arrives for his video review session, so that the current student can self-critique in private or ask a question that might be uncomfortable to ask in front of others.

<sup>12</sup> This lesson will be greatly magnified if carried out in "fast forward" mode, which will exaggerate or emphasize movements.

To introduce some variety, one possible variation in the training program is advocacy drills. These can not only reenergize the group, but allow the instructor to focus on a specific pre-determined lesson, as opposed to whatever issues pop up as the students rotate through opening, direct, or closing exercises.

If the instructor has seen counsel rush through the details to get to their final point, only to produce an anticlimactic result because there was no build-up to the climax, perhaps an Elongation Drill is in order. In this drill, the instructor performs a simple act, such as putting on a beret, and then each member of the group makes a single statement to describe the act. The temptation is for the first one to say, "You put on your beret," and the second to ask, "What else is there?" At this point, remind them the objective is to describe what happened along the way and to **[\*38]** not rush to the end. Start them with, "You were seated in a chair--behind your desk--you slid the chair back--you stood up--your left arm began moving--the fingers on your left hand extended--they made contact with the handle to your upper left desk drawer--the fingers closed around the handle--you pulled your arm back, opening the drawer--you released the handle--you raised your hand over the drawer--you again extended your fingers--they came into contact with the beret--your fingers closed around the beret . . ." Hopefully the group has the idea and continues with the details of the beret rising to your head and being placed there after the rank is centered over the left eye. Now that they have the idea, perform another simple action. By using an uncomplicated action, this drill highlights how they can draw even more details out of something more complex that is in dispute.

Along with the Elongation Drill, another effective toll is the Looping Drill. The point of a Looping Drill is to emphasize certain words, images, or concepts. This is done by "looping" portions of a witness's previous answer into the next question. While this should not be done constantly because it will lose its effect, it is a great tool to emphasize important testimony. The drill is performed with the facilitator playing the role of the witness. The first participant asks a question, and after the "witness" answers the question, the next participant asks a follow-up question incorporating a portion of the previous answer.

Q: What did you do this morning when you woke up?

A: I brushed my teeth.

Q: *After you brushed your teeth*, what else did you do to get ready for the day?

Another drill is a variant of the game Twenty Questions. Instead of asking only "yes-no" questions to identify a person, place, or thing, participants ask questions beginning with "who," "what," "when," "where," "why," or "how" to encourage open-ended questions on direct (they are not allowed to ask the "ultimate" question of "who is he?" or "what is it?"). Alternatively, the instructor can provide a few brief facts, such as "Something happened to me yesterday at noon. What was it?" Students then use the same basic open-ended questions, prefaced with interrogatory words, and under the same limitation, to fill in the details. Call it the "W" Drill.

To demonstrate how individuals remember things by breaking information down into smaller parts, have the students try a Chunking Drill. Instruct the group to recite the Pledge of Allegiance together. Presumably, none of them had ever recited it with anyone else in the training group, yet each paused at the same spots because they learned it in "chunks" to make it easier to remember. This demonstrates how a pause can break a large volume of information into manageable pieces for the listener.

Another effective drill involves students saying the phrase, "I never told you I loved you." The idea is to see how many different meanings they can obtain from the same phrase by placing the emphasis on different words or pausing at different points to illustrate the importance of proper emphasis when asking questions. To get students thinking about incorporating gestures in their work, use the same sentence and see how many gestures they can work into it. For a different gesture drill, have counsel play charades, with one attorney "telling" the facts of a case in pantomime format. Follow up by asking the "panel" about the case for which they just "heard" the "opening" and see how that meshes with what counsel attempted to convey.

If counsel are not listening to their witnesses' answers because they are reading their notes for the remaining questions, incorporate the Tennis Ball Drill into your training. Participants play the role of the witness and questioner. Each participant can only talk when holding the tennis ball. After asking a question, the attorney tosses the ball to the witness, who answers the question and tosses the ball back to the attorney, who asks another

question before returning the ball. If the witness sees the attorney looking down at his notes while the witness has the ball, the witness should immediately throw the ball at the distracted counsel. (Remember, it is the Tennis Ball Drill, not the Baseball Drill--unconscious counsel do not retain information.) The lesson being, if the counsel is not paying attention to the witness, the witness has the ability to inflict "pain" on the questioner. This focuses the attorney's attention where it should be, squarely on the witness. If questioners need to consult their notes, they need to learn to do it when they have the ball, i.e., when the witness has finished speaking.

To promote concise, specific questions, try the Picture Drawing Drill. Ask one or two volunteers to leave the room. When they leave, draw a simple picture on butcher block paper, show it to everyone remaining in the room, and turn the picture over. Then have the students return, ask questions about the drawing you made (as few as possible), and attempt to replicate it. This is good practice for dealing with the unhelpful witness, who leaves out vital details unless the questions "pin him down." A variation of this game is to divide the group into teams of two. Pass out the same picture to one member of each team, and then have the other member ask questions, and draw what is being described. The teammate with the picture may not volunteer information, but can only answer questions; the teammate doing the drawing cannot show his picture to the other teammate; and the questions cannot include the "ultimate" question--"please describe the whole picture." After five or ten minutes, compare the pictures to determine which team had the best communication. Find out what they did differently from the team with the worst likeness and see what lessons the group can "draw" from the experience. This adaptation of the original drill concentrates on developing a shared perspective with the witness rather than incisiveness in questioning.

**[\*39]** If the goal is to focus counsel's arguments, especially in coming up with concise themes and identifying essential facts, try the Telegram Drill. Each counsel gets ten words to describe a case he is currently assigned. Alternatively, have the group work collectively on the same case. If all participants are not familiar with one fact pattern, use a common story such as "Goldilocks and the Three Bears" as the basis for the drill. The group then needs to come up with ten words framing the case to prosecute or defend Goldilocks. For example, Goldilocks' defense team may come up with: helpless child, lost wilderness, famished, storm, sought shelter, arrested--release. The prosecution team has their own perspective: truant teen invaded home, theft, violated privacy, societal threat--confine.

A drill to work on the basics is to have the group form a circle with the facilitator throwing out topics, such as laying a foundation for a particular piece of evidence, impeaching a witness, or refreshing recollection. The first member of the group says the first step to whatever the facilitator started with and then the person next to them says the second step, and so on with those that are unable to remember removed from the circle until the next round. The last one remaining in the circle wins.

Other drills can help counsel engage the panel. If an attorney speaks a foreign language, have him deliver his opening to the group in that language. After a few minutes, stop him and see what the group understands from his body language, tone, and gestures. If the group did not get an appreciation for what was conveyed, have the speaker start over with greater emphasis on the nonverbal language.

When eye contact is a problem, have the group form a notional panel. As counsel is delivering an opening or closing, "panel members" should raise their hands if the speaker is making eye contact with them. This is a good way to see if the speaker's attention to his listeners flows naturally from one to another, lingers uncomfortably in one place, or is missing altogether. If counsel is having trouble getting hands to rise because of a lack of eye contact, take a more direct approach. During counsel's presentation, the speaker must hold the hand of the person he is making eye contact with and cannot release one hand until he has another in his grasp. After he seems to have developed a flow, allow him to release hand contact while continuing the performance and the eye contact. If the eye contact starts to deteriorate, have the speaker reengage the hand contact until it seems less forced.

For the group to understand what they find engaging at a personal level, have two or three individuals start giving opening statements at the same time to the group. After a couple of minutes, stop the speakers and have them immediately start telling the group about their worst airline experiences, best high school memories, favorite Saturday activities, or any other one topic the facilitator chooses that anyone can speak about extemporaneously. After a few minutes of these stories, have them pick back up with their openings wherever they left off before the

interruption. Again, after a few minutes have passed, interject with a new topic such as what they would do if they won all-expensepaid vacations, only to take it back to the original opening again after a few minutes. After ten minutes or so of the simultaneous openings and stories stop the speakers and ask the group who listened to which speaker and for how long. Ask what caused the observers to listen to one particular person. Ask what caused them to stop focusing on one speaker and begin listening to another. What caught the audience members' attention so that they were not distracted by the other ongoing presentations? Did the speakers change tone when they stopped talking about someone else's problems in the opening or closing and began speaking about something personal? Quickly poll the group about who received eye contact and how much from each speaker. Ask the speakers how they felt. For those who were able to maintain focus, how were they able to do that with the competing voice or voices? Would that help in maintaining one's focus despite repeated objections or a difficult witness attempting to redirect the testimony?

### **Conclusion**

Just like **advocacy** itself, this article is more art than science. It offers suggestions on ways to train. Use what is effective and change or ignore what does not work for you or your group. The important thing is that you plan it and do it. It has been my experience, as a practicing and supervising attorney, that the hardest thing about training is making it happen. As the Chinese proverb says, "The more you sweat in peace, the less you bleed in war."<sup>13</sup> Make sure your counsel are prepared the next time they enter the courtroom to avoid a bloodbath.

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<sup>13</sup> Chinese proverb, *quoted in* ROBERT DEBS HEINL, JR., *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 330 (Naval Inst. Press 1966).