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A View from the Bench

So, You Want to Be a Litigator?

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Introduction

So, you want to be a litigator, a trial advocate, a courtroom legend? Who doesn't? However, lack of substance and style keeps many attorneys from realizing this dream.

Over the course of the last twenty years, I have observed or actively participated in literally hundreds of criminal and civil trials as a trial counsel, defense counsel, civil litigator, and military judge. Through these experiences, I have had the opportunity to observe and dissect the characteristics that make a successful litigator. Twelve characteristics seem to define successful litigators, and I have divided them into two general categories: substance and style.

Now, at first blush, one might conclude that "style" has no place in a discussion like this. I beg to differ. In art, style and substance are so intertwined as to be symbiotic. I believe trial advocacy is part art. There are substantive aspects that must be mastered: preparation, thoroughness, mastery of the facts, and organization. There are also some technical aspects that must be mastered: for example, rules of procedure and evidence. There are the stylistic aspects that give life to the legal work of art you produce: word choice, the ability to think on one's feet, calmness under pressure, presence, a deft touch, and the sense for properly picking one's battles. And there are some tasks that are part art, part science, like developing a theme and theory of the case, opening statements, voir dire, and witness examination. There is a lot of art in trial advocacy.

Certainly, as with all such ingredient lists for a topic with arguably nearly infinite ingredients, I do not contend that my list is exhaustive. Nor do I contend that someone else hasn't created a better list. Nevertheless, this is the list I have made. You decide what it is worth to you.

Substance

Preparation

Preparation is the key to the success. Preparation is the "backbone of trial advocacy."[1] Proper and thorough preparation casts out fear, instills confidence and enhances justice. What and how we prepare matters.

The key to effective preparation is planning. Backward planning has worked well in every major task I have undertaken. I even apply backward planning in my personal life—such as when it comes time to plan a PCS move. The concept is simple. One asks: What is the end state I hope to achieve? After identifying the desired end state, plan backward from the end state by working out the details and timing of each iterative step leading to that end. This backward planning concept is not new. The Army teaches it to its young leaders, and it was the subject of the seminal article on trial planning for advocates, "Trial Plan: From the Rear . . . March!"[2]

Whether you start from the rear, side, or front, planning is the key to proper preparation. A plan gives structure to your preparation. Without a plan, preparation can quickly become misguided, repetitive and counterproductive. For example, if you interview your key witness in a case five times but fail to interview the opposition's key witness even once, you are not fully prepared.

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[1] Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, ARMY LAW., Oct. 1997, at 4.

[2] Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21.

Even when the objective is clear and the steps to achieve it have been set out, preparation is hard work. Needless to say, the litigator must read and understand every document in the case file and talk to every witness or potential witness in the case. Inevitably, some witnesses will be more important than others. Identifying your theme and theory early will help you identify the more important witnesses and help you allocate your time more efficiently. Defense counsel must hold frank and frequent conversations with their clients, and trial counsel must communicate often with commanders and victims (if there are any). Regular communication not only places events in context, helping counsel identify what other issues should be investigated, it also keeps parties focused and informed so there are fewer surprises on the day of trial.

As a young defense counsel, I represented a client who was accused of burglary, attempted kidnapping, and assault with a deadly weapon. The wife of a deployed Soldier returned home late one evening to find an intruder in her on-post quarters. When she screamed, he grabbed her seven-year-old son and held a knife to the boy's throat. The woman was white, the perpetrator black. As the assailant made his way out the back door of the quarters and fled, a white neighbor, alarmed by the scream, saw the perpetrator run in the opposite direction and pass under a street light approximately fifty feet away. The eyewitness later gave statements and descriptions to investigators. The victim helped a sketch artist draw a composite sketch of the perpetrator. Several days later, my client, who was drunk and roaming around post late at night, was picked up by the MPs. When they took him to the MP station, someone noticed he looked like the sketch of the burglar. During a line-up, both women picked my client five out of six times. He was arrested and charged.

At our first interview before his pre-trial confinement hearing he told me, "Sir, I did not do it. I was at Primary Leadership Development Course (PLDC) that night taking a land navigation test." As it turns out, he was roaming around post because he had flunked out of PLDC and was being sent home. I found the PLDC class, and I interviewed the instructors and all thirty students. They all corroborated his story. The place where he was taking the test was miles away from the site of the crime. I then interviewed the women. The first one gave a great description of the knife held against her son's throat. She could even describe the trademark embossed on the blade. The second one said she really never saw the assailant's face up close. They both said they were raised in small Midwestern towns where very few, if any, black people lived.

I went to the Government and laid it all out. They refused to consider dropping the charges. The Government had not talked to all these people; the Government was too busy. And, they had the line-up and the sketch. I tried to convince them to talk to the PLDC witnesses and tried to explain the cross-racial identification issue. They refused to listen, so we went to trial. My client was acquitted.

The lessons from this case should be apparent. Had I not talked to my client early and carefully listened to his side of the story, I might have missed the opportunity to talk to his PLDC classmates because they would have graduated and returned to their various duty stations. Had I not made the effort to travel to the site and to talk to each PLDC Soldier individually, I would not have learned that his alibi was ironclad. Had I simply been satisfied with the alibi, I would not have explored the reason the two eyewitnesses, with no reason to lie about my client, could have mistaken him for the perpetrator. Additionally, I would not have learned of their backgrounds. I would not have researched the issue of mistaken eyewitness identification and cross-racial identification. I would not have discovered the experts needed to explain identification problems to the trier-of-fact. I, too, was very busy. There were only two defense counsel at this installation. I could easily have justified spending less time preparing for this trial. However, that would have been a disaster for my client.

Preparation means thorough inquiry into every aspect of the case—turning over rocks, talking to people, research and learning. Then, put it all together in a logical persuasive way, and have a flexible plan for presentation.

Thoroughness

Closely related to preparation, indeed, a vital component of preparation, is thoroughness. Thoroughness extends to every aspect of litigation, both before and during trial. Thus, it warrants its own consideration.

An important aspect of thoroughness is attention to detail. When a party files a motion listing the name of a witness or an accused from another case, it evidences a lack of attention to detail. When the charge sheet is replete with errors and omissions, the thoroughness of the entire process becomes suspect. Lack of attention to detail concerning these items calls into question what other details the attorney may have ignored.

On the other hand, when counsel have everything "wired tight," they gain confidence and credibility. This confidence operates in two ways: The litigator has more confidence in himself, and the judge has more confidence in the litigator. The

credibility gained extends to other aspects of the case and to other cases as well. As a highly esteemed, former military judge put it, "The bottom line is that attention to detail should be the trial advocate's obsession. If counsel let down their guard, something will go wrong. Counsel who are not convinced of this point should peruse any of the [sixty-seven] volumes of the *Military Justice Reporters*."[3]

A second aspect of thoroughness is thoroughness of thought. It is more than simply knowing the law and facts of the case or having a consistent theme.[4] An advocate's thought process should include considering the broader consequences, rather than just the immediate effect, of a contemplated action. The advocate should try to anticipate the opponent's reactions and the second- and third-order effects of the action. For example, suppose that a trial counsel has a statement in which an accused admits to engaging in sexual intercourse with a victim but also claims the victim's behavior indicated she wanted to engage in sex. Predictably, consent will be an issue at trial, and the defense will rely on mistake of fact as to consent to defend the accused. The Government is left with a dilemma. The trial counsel could move to admit the accused's statement under Military Rule of Evidence 801(d)(2) and use the accused's own words admitting he had sex with the victim to convict the accused. Introducing the accused's statement, however, would also help establish the mistake of fact defense and allow the panel to hear the defense's side of the story without requiring the accused to testify. The panel would be instructed on mistake of fact because of the evidence provided by the Government, and the likelihood of the accused testifying would be dramatically reduced.

Alternatively, the accused would be more likely to testify if the statement were not admitted. It's unlikely the mistake of fact would be raised by other evidence. If the accused were to testify, he would likely recount his version of events differently at trial than he did in his statement. At this point, trial counsel could cross-examine the accused with the statement. Impeaching a witness (especially an accused) with his own words is very powerful. Trial counsel may also convince the judge to instruct on prior inconsistent statements—a potentially damaging instruction for the accused. This scenario assumes the Government could prove all the elements without using the statement, but the main point is clear: Thoroughness means thinking about actions, reactions, and second-order effects.

This raises the third and final aspect of thoroughness: anticipation. A quality litigator thinks through issues, anticipates the opposition's moves and is prepared with a counter-move. A good litigator anticipates objections to his evidence and prepares a response, including favorable case law. A good litigator puts himself in the opposition's shoes and tries to imagine what the opposition will do. A good litigator uses the imagined approach to plan a response, shore up weaknesses in the case and plan rebuttal evidence. Certainly, no one can anticipate everything that will happen in a trial; however, ninety-nine percent of issues can be anticipated if thoroughly thought through in advance. Anticipation not only affects preparation, but also reduces the need to "think on your feet."[5]

The following example illustrates this point. An accused intends to plead guilty to several offenses committed in a deployed environment. A punitive discharge seems certain based on the facts. The defense has requested several sentencing witnesses from the accused's noncommissioned officer chain of command, who fought with him in combat. Based upon your telephone interviews with these sentencing witnesses, you expect they will tell the court the accused was a good Soldier, fought hard, and often risked life and limb. However, you do not review Rule for Courts-Martial 1001 very closely during your preparation, and you do not immediately remember the case of *United States v. Griggs*.[6] Consequently, you fail to anticipate that these witnesses might recommend that the accused be retained in the service. Because you failed to read *Griggs* and failed to prepare to rebut this evidence, you do not discover or present the opinion of the company commander and first sergeant, who, despite the accused's good service in combat, believe he has no future in the Army. One might anticipate the results.

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[3] Cuculic, *supra* note 1, at 9.

[4] Subsequent sections will address these topics in more depth.

[5] The ability to think on one's feet is an important characteristic of a good litigator, which is covered later in this article. However, the less frequently the skill is required, the better, in this author's opinion.

[6] United States v. Griggs, 61 M.J. 402 (C.A.A.F. 2005).

Mastery of the Facts

Cases are decided on the facts. All trials are really about getting at the true facts, not someone's myopic or biased view of what happened. This sounds simple enough, but we all know that in practice it is not. To the master of the facts goes—if not always the victory—at least a sound night's sleep before trial.

A litigator simply must know the facts of his case better than anyone else. That imperative is so fundamental that panel members are told it is so in the preliminary instructions.[7] Mastery of the facts is one of the products of thorough preparation.

As part of thorough preparation, the good litigator will have read every document, interviewed every witness, examined all the evidence, and visited the scene of the crime. Most of the time, these tasks must be done more than once. "The goal of the [litigator] is to know everything about the case so that if a witness states something that is incomplete or incorrect, counsel knows exactly where contradictory information is located and can find it in an instant."[8] However, simply reading, looking, and talking are not enough. Knowing the facts is more than that.

To master the facts a litigator must know them thoroughly and be able to marshal them to the best advantage. For example, a chronological recitation of the facts may not always be the most effective way to present them. Only a master of the facts will recognize the subtle strategy that might make withholding some fact for later presentation more dramatic and devastating to the opposition.

My previous example of the case involving attempted kidnapping, aggravated assault, and burglary offers additional insights. In that case, the mother—the eyewitness—was able to describe the knife in great detail. When I interviewed her, she told me she could not only identify the trademark embossed on the blade, she also knew how many serrations there were on the top of the blade, what the grip was made of, and the length of the blade. I also knew that the knife had been held to her son's throat for only a few seconds. Once I read the literature on mistaken eyewitness identification, I realized the mother, in that situation, would not have taken her eyes off the knife. Certainly, I could have asked her about this during cross-examination. That would have been convenient and easy. However, I decided my client deserved more. Instead, I recalled the witness immediately after my mistaken identity expert had testified. I asked her about the knife and the amount of time the perpetrator had held the knife to her son's throat. When juxtaposed immediately after the expert's testimony, such evidence, even though taken on direct rather than cross, was far more effective. I would not have been able to make that tactical determination had I not mastered the facts.

Mastery of the Law

No one can know all the law; it is simply impossible. However, one can master the law of a particular case. Of course, this requires legal research and reading . . . and more.

At the beginning of each case, a good litigator will brush up on the law pertinent to the case. Even though this may be the thousandth drug use case she has tried, she will open the *Manual for Courts-Martial* and read Article 112a again. She will read about potential defenses. She will review the *Crimes and Defenses Deskbook*[9] and read the case law cited. Then she will Shepardize the case law cited. She will make copies of case precedents that address vital points she anticipates may become issues at trial. The good litigator will also do a proof analysis work sheet, even if she is a defense counsel. She will analyze what evidence can be used to prove each element. She will anticipate potential objections to that evidence, research the law, and prepare to make or answer objections based on the law. The good litigator will have read all the instructions that may be raised. She will prepare a list of instructions she wants or does not want given and will craft rational arguments to support her position. She will consider tailored instructions or instructions not included in Department of Army, Pamphlet 27-9,[10] and will have drafted them, with supporting legal precedents, for presentation to the judge and opposing counsel at the

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[7] The judge's preliminary instructions to members, as outlined in the *Military Judges' Benchbook*, include the following: "[C]ounsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what might to us appear to be an obvious question because they are aware that this particular witness has no knowledge on the subject." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5 (1 Apr. 2001) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[8] Cuculic, *supra* note 1, at 4.

[9] CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 337, CRIMES AND DEFENSES DESKBOOK (Apr. 2009).

[10] BENCHBOOK, *supra* note 7.

appropriate time. Finally, the good litigator will discuss the law of the case with peers and superiors. Defense counsel can do this without disclosing client confidentialities. Invariably, someone out there has tried a case like yours or has read or heard about particular legal issues relevant to your case. And, even if they have not, they may offer insights simply because they look at the matter from a slightly different angle.

Organization

Organization is critical at every stage of litigation. A litigator who is not organized prior to trial will miss important items, will waste time completing tasks twice and will find trial preparation wearisome and frustrating. A litigator who is not organized during the presentation of the case will forget to ask important questions, will fail to have documents needed to impeach at his fingertips, and will leave the panel and the judge with an impression that does not inspire confidence.

Organization is important to presentation. Organization in presentation comes through breaking down a trial to its various parts—voir dire, opening statements, presentation of evidence, and so forth. The organized litigator will keep a tab in his trial notebook or a separate file folder for each part of the trial and for each witness.[11] Those tabs or folders should contain all the documents relevant to that part of the trial or to that witness. For example, the voir dire folder should include the court-martial convening order(s), the counsel's approved voir dire questions, a copy of the standard questions the judge will ask, and an enlarged seating chart so that counsel can make notes under the name of the panel member he wants to recall for individual voir dire or challenge for cause or peremptorily.[12]

When a litigator is organized it shows and makes a positive impression at trial. Imagine the impression a litigator makes when, asked if she has any questions for the opposition's star witness, she pulls out an organized file folder and rises to conduct a scathing cross examination. Furthermore, organization can make a litigator feel more confident, less nervous, and more in control. One cannot anticipate every bump and curve during the course of a trial; however, one can anticipate that there will be bumps and curves. Being organized makes negotiating the bumps and curves easier and makes it less likely that any particular bump or curve will crash the entire case.

Have a Theme

The importance of having a theme cannot be overstated. The theme gives direction and meaning to the litigator's presentation and lets the fact finder know where the litigator is taking them. As he builds his case brick by brick, the fact finder can see how the evidence relates to the theme. In fact, the most effective litigators are able to involve the audience as actual participants in building the case's inevitable conclusion that the theme represents.

The theme, then, is properly defined as the conclusion the litigator wants to reach once the presentation of the case is complete. The theme must come first, and every other part of the trial should be designed to support it. The theme should be introduced in voir dire but should be completely developed in opening statement. It serves no purpose to have a theme but save it for closing argument.

The litigator provides a theme so that the panel can make sense of the evidence as it is presented.[13] The theme helps make sense of the facts, and as evidence is introduced that supports the theme, panel members begin to accept the theme. The closing argument then becomes an exercise in confirmation of the theme and serves as a reminder of how the evidence supports the counsel's conclusions. Panel members are smart and experienced, and if they are not provided a sound theme,

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[11] I prefer the file folder method. This allows me to keep my table clear of all but a couple parts of the trial at a time. It also allows me to access documents without having holes punched in the sides (remember, the record of trial will have two holes at the top, just like the file folder) and without constantly opening and closing the metal rings of the three-ring binder. The form, however, is adaptable to individual preference. Use what works best for you.

[12] Another format for trial notebooks can be found in *The Art of Trial Advocacy*, ARMY LAW., Oct., 1997, at 40. This format has conceptual tabs like "allied papers and foundational documents," "non-evidentiary court documents," and "planning documents" in which are found documents pertaining to that broad topic regardless of the part of the trial to which they pertain. This organization may work better for you. From this author's perspective, it is easier to find what you need in the heat of battle if you do not have to think about where a certain document might be located. This might result in more tabs or folders, but I think it serves better in the heat of battle.

[13] Cuculic, *supra* note 1, at 10.

they will choose one for themselves.[14] Having a framework helps them understand and process evidence, and if they are forced to provide their own theme because counsel has failed to provide one—or because the theme does not make sense—counsel will be more likely to lose the case.

To develop a theme, the litigator should ask, "What is it I want the panel to believe?" Not just that the accused is guilty or not guilty but why that is so. What is the reason, the hook? Often the theme reflects the accused's motive (he murdered her for the insurance money or because she was cheating on him with his best friend). Sometimes the theme is closely tied to an element of the offense or a defense (she did not consent and no reasonable person would have thought she consented under the circumstances). Take out the word "not," and substitute the word "any" for the word "no," and, in most cases, you have a defense theme.

Develop a sound theme at the beginning of your trial preparation, while writing your closing argument,[15] and refer to it early and often. The theme should dictate preparation, guide direct and cross-examination, steer the evidence one seeks to introduce, and even influence the timing of the introduction. The theme should inform voir dire and be the keystone of the opening statement. Cross-examination, if done, should be theme focused. In short, everything the litigator does at trial should support that theme. During trial preparation, if the litigator finds the theme is difficult to support, he should find a new theme.

Style

Pick Your Battles

The inclination of most new litigators, and unfortunately some old ones, is to fight every move, objection, motion, request or suggestion by the opposing party. For example, if, the defense asks that an accused's mother be allowed to sit in the gallery during a partial guilty plea, even though she will be a witness in the sentencing phase of the trial, the Government could say "yes" and lose nothing. However, many trial counsel will stubbornly say "no," or worse yet, will respond, "The Government has no problem with that your honor, as long as all our witnesses are also allowed to sit in during the trial." What is lost by allowing the mother to watch her son's trial? Usually, nothing. More importantly, what is lost when the Government refuses the request? The goodwill of the opposing lawyers. Consequently, when the Government raises an issue that requires some concession by the defense, the defense will probably refuse. The Government may also lose the goodwill of the judge because its actions may be viewed as petty, unreasonable, and unprofessional.

Picking the appropriate battles also makes the litigator more effective because he can spend less time on insignificant collateral issues. For example, in a drug case where an accused faces decades of punishment for selling drugs in the barracks, the defense advises trial counsel of possible restriction tantamount to confinement for a three-day period during which the accused was under restriction prior to pre-trial confinement. The facts are admittedly not clear and may or may not warrant credit under the law. However, arguing the motion will require days of preparation and hours on the record—time the trial counsel could better use concentrating on the elements of the offenses or figuring out how to convince the panel to believe his immunized witness. Three days is a small price to pay to avoid the distraction. Now, that is not to say that, in some cases, three days is not worth the fight. The point is, fight the battle after reasoned consideration, not because of machismo or obstructionism. The true litigator actually enhances his toughness by being reasonable and professional and not fighting every battle just because he can or because he thinks it is expected.

Picking one's battles applies throughout the litigation process, including on evidentiary matters. For example, why do some counsel object to defense-offered documentary evidence during sentencing just to force the defense to request that the rules be relaxed even though the trial counsel has no need for the rules to be relaxed to admit his own evidence? This is unwise. It wastes time and unnecessarily requires witnesses to testify, to the detriment of their own professional endeavors. Of course, some battles are worth fighting. If, for example, there is an Article 15 that the Government cannot authenticate and the defense refuses to stipulate to the authenticity of, then, by all means, the battle should be fought and no quarter given.

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[14] *Id.*

[15] *See generally* Pohl, *supra* note 2.

Picking one's battles extends to questioning witnesses and making arguments. Too often litigators think they must cross-examine every witness, even witnesses who have nothing useful to offer. These cross-examinations usually result in bickering between counsel and the witness and groping by counsel for the always elusive Perry Mason moment. Misguided counsel actually seem to think they can get the first sergeant to change his opinion about Specialist Snuffy, who he previously characterized as a "great duty performer," by asking, "Isn't a Soldier a Soldier twenty-four hours per day?" A smart litigator can do better than that. And, if he can't, he should just say, "No questions, your honor." The point is, as I say in nearly every "Bridging-the-Gap" session, if you can argue the point without asking the question, don't ask the question. Picking one's battles—focusing or foregoing cross-examination—can make the cross-examination more effective. Cross-examination for the sake of cross-examination, which usually results in an argument with the witness, dilutes the power of meaningful examination that might actually be legitimate and effective.

The ability to know when and what to ask comes with preparation, experience and common sense. The good litigator will develop this skill by talking to more experienced counsel, watching other litigators in action, and having a theme-based reason for everything he does.

Have a Deft Touch

The adjective "deft" means "characterized by facility and skill." Its etymology is from Middle English meaning gentle.[16] A litigator must not only know how to play his cards, but when. This understanding comes from preparation and experience. The litigator must make the best out of what he has, but resist the temptation to overplay his hand. A simple example illustrates this point.

Suppose the accused allegedly committed child rape. The panel has found him guilty, and significant jail time is possible. In mitigation, the defense plans to show the accused was himself abused as a child. Of course, Government counsel must address this issue, but how and to what extent will be key decisions for the litigator. A full frontal assault might not be the correct approach. The litigator could argue that the accused deserves no mercy because he showed none; his offenses are so heinous that whatever happened to him is irrelevant. This approach might or might not be effective depending on the circumstances.

On the other hand, the litigator could acknowledge that the accused was abused and try to turn that fact against him. As a victim of abuse himself, he had to know how horribly his conduct would affect the victim in the case, and yet he chose to do it anyway. Be prepared to cross-examine any defense expert called to testify about the abuse the accused suffered as a child. This cross-examination may include questions derived from the medical literature on the subject, especially articles discussing the unlikelihood that treatment in such situations would be effective. Argue that, as sad as the accused's abuse may have been, the case before the court is about what the accused did to the child victim in the case, and the jail term ought to be designed to prevent him from abusing other children because he is dangerous and nothing will change that. With this approach, the deft litigator still persuades the members who would have voted for a lengthy period of confinement, but now he also is more likely to get the members who might be receptive to the argument, made by the defense, that the accused deserves mercy because he was abused as a child. Remember, members vote on sentences from lowest to highest, and when they reach the required majority then that is their sentence. So, in this scenario, the advocate must focus on persuading the members at the low end who might be unreceptive to the Government's argument for lengthy confinement if the accused's own abuse were simply dismissed rather than acknowledged and explained.

Deftness of touch can be learned. In fact, quality trial experience increases deftness. But, deftness must be pursued; it will not develop on its own. Pursuit means observing others at trial and analyzing how things were done and how they might have been done more effectively. It comes from learning and considering human tendencies and how to affect them. And, it comes from humble introspection about one's own performance.

Presence

When I was a young Reserve Officer Training Corps cadet, I was taught by a wise and experienced instructor, "When in charge, take charge." This is a good axiom. As a litigator, you want to be in charge. Of course, the judge and the opposition

[16] Merriam-Webster Online, http://www.merriam-webster.com/dictionary/deft (last visited Oct. 20, 2009).

will have something to say about that, but you can certainly be in charge when you have the floor. Part of being in charge is attitude. Part is confidence. Attitude and confidence are fed by preparation.

The presence to which I refer, however, does not include arrogance or haughtiness. I know it is tempting to strut around the courtroom because you are an attorney. That is certainly *a* presence. It is just not *the* presence.

The greatest staff judge advocate I ever worked for never acted like he was the smartest person in the room, though he likely was. He never acted like he was the most courageous person in the command post, though I am sure he was. He never yelled at me when I made a mistake, though he could have. He never belittled anyone who was obviously of lesser mettle. He never had to tell anyone he was in charge or that he was the guy they ought to turn to when something needed to get done; but he was, and they did—and not just other JAGs. He had presence. When he spoke, people listened. When he asked something of you, you gave your best. He was a leader.

"Presence" in the courtroom isn't about putting on airs or making sure everyone knows where you went to law school. It is fundamentally about leadership. If not already a part of the litigator's character, leadership can be learned if approached humbly and with purity of purpose. The presence of a leader commands attention and consideration. This is what every litigator desires when she opens her mouth in court. If feigned, however, it is easily detected.

Word Choice

Words matter. One should say what one means and mean what one says. Equivocation is the bane of the litigator. Precision in word brings about precision in result. The English language is so ripe with perfect expression that no user of it, having properly schooled himself in it, should ever want for precision.

I once heard a defense counsel give an argument where he referred to the accused, who had just pled guilty to numerous sexual assaults of a minor, some committed with inanimate objects, as being "good with tools." Hmm. He probably could have left that out all together. Some words or expressions will never do.

Some words or expressions will do, though others might do better. In the closing argument or in direct or cross-examination, using the exact word to convey your precise meaning is critical. During closing argument in a sexual assault trial, I once heard a trial counsel say, "The accused cared only for his own desires." That certainly works, but, it was not the most powerful. After trial, I suggested he could have said, "The accused selfishly sought to satisfy his sexual desires no matter what." I think that would have been more effective.

Sometimes we make mistakes in the words we use. In a closing argument when the heart is beating and the mind is racing, it is easy to get ahead of one's self and use one word when we meant to use another. In another sexual assault trial in which the sole issue was consent and mistake of fact as to consent, the trial counsel argued that the alleged victim was "pressing against him." What he meant to convey was that the victim had pushed him away as a way of resisting him. The phase "pressing against him," however, seemed to connote consent. That was the last message the trial counsel wanted to send in that situation.

All of us have had a slip of the tongue and said "he" when we meant "she," or something of that nature. When this happens in a trial the danger is not that the members or the judge will not be able to figure it out. Instead, the danger is that as the fact-finder sorts through what you meant to say, they are not hearing what you say while they are thinking. A person can only process one thought at a time. When the panel or the judge is forced to figure out what the litigator meant, they may miss something important. These mistakes are often due to nerves and a tendency to rush. The cure is to force oneself to slow down and relax. Listen to what you say. Listen to the questions you ask and the answers given. If what is said is confusing to you, pause or go back and correct it.

Voir dire is where I commonly see counsel demonstrate good word choice or lack thereof. Think of it. Voir dire is the first time the members hear you speak. If you underwhelm them by using poor grammar, legal jargon, confusing, or just plain stupid questions, you may not recover. Do not neglect diction in voir dire. Even though the judge reviews your questions, he is not likely to try to make you look smart by editing your work.

The words we use affect all aspects of litigation. Words can project confidence and knowledge, or lack thereof. They can demonstrate mastery of the law or a scant understanding. Even if a litigator knows the law and is confident, her words

must show it, or no one else will know it. William Penn once said, "Speak properly, and in as few Words as you can, but always plainly; for the End of Speech is not Ostentation, but to be understood."[17] Word choice matters.

Calmness Under Pressure and Thinking Well on Your Feet

These last two topics are related and will be treated together. Litigation is a pressure cooker. The adage "no plan ever survives first contact with the enemy" certainly applies to litigation. When things don't go exactly as planned, the good litigator must be able to remain calm—to keep his head and adapt accordingly. The litigator who can accomplish that difficult task will stand a far better chance of success and will be less likely to suffer adverse health consequences associated with stress.

I don't have any secrets for staying calm under pressure.[18] I believe it is achieved by sheer self-control. I once had a new litigator appear before me in his first case. He was well prepared, eager and had done all his homework. He knew the facts and the law. He was ready, but he was nervous. His nervousness manifested itself in the all too common and bothersome habit of saying "O.K." after the answer to each of his questions to every witness in the trial. It was distracting. I could tell the panel members noticed it. After trial, in the bridging-the-gap session I told him he did well for his first time, but he needed to lose the "O.K." The next trial, the most amazing thing happened: He did not say "O.K." one time—not once. I complimented him on that brilliant display of self-control. In the dozens of cases he tried before me after that, I never heard him say "O.K." again.

Self-control is the answer. Only you know what will help you stay calm under pressure, and it is different for everyone. Nevertheless, you can do it. More than half the battle is telling yourself that you must stay calm and that you can. If you absolutely cannot, then you may need to find something less stressful to do.

Thinking well on one's feet is an old catch phrase for being able to think of a solution to a problem in the heat of trial. Calmness sets the conditions necessary to achieve the skill. However, nearly everything else discussed in this article also contributes to this ability. It is impossible to think well on one's feet without knowing the facts well or understanding the law. That bad litigator may think he has something to say, but quick responses with no substance are transparent and unhelpful. What comes out instead are trite catch phrases like "I'm not offering it for the truth of the matter asserted" or some crazy thing absorbed from too many Hollywood courtroom dramas. Better, under such circumstances, to stop and say nothing at all, then process the issue and make an intelligent reply. I had the refreshing experience recently when a litigator was caught off guard by a hearsay objection. He responded by saying, "I am not going to respond to that objection, your honor." Later he told me he had no response, so rather than make one up on the fly and risk sounding stupid, he simply demurred. I wanted to give him a medal.

The litigator must be so well prepared and so organized that if he does not have the answer on the tip of his tongue, he has it at the tip of his fingers. He must have a unifying, common sense theme coloring everything he does.[19] Style is then achieved when he is able to access that information in a seamless way that not only makes his in-trial decisions correct but also adds dash to his presentation. Then he shows who is in charge, who should be most regarded, who is the master of the case.

Conclusion

Trial advocacy is not easy. To be a good litigator is hard work. It requires substance and style. Thought and effort should be given to each of these aspects in order to be a successful litigator. However, the effort is worth it. The true trial advocate, the litigator, not only achieves great personal satisfaction, but also improves the quality of our military justice system. The better we are at what we do, the more likely justice will be achieved in every case. That should be what we are all about.

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[17] WILLIAM PENN, FRUITS OF SOLITUDE, *available at* http://www5.bartleby.com/1/3/209.html (last visited Oct. 20, 2009).

[18] There are some techniques that have been suggested by authors and experts in the field of trial advocacy training that might work for you. *See generally* Lieutenant Colonel David H. Robertson, *Preparing Mind, Body, and Voice*, ARMY LAW., Nov. 2003, at 51.

[19] Pohl, *supra* note 2, at 22.