The Articulate Advocate

New Techniques of Persuasion for Trial Lawyers

Brian K. Johnson and Marsha Hunter

Crown King Books

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Printed in the United States of America on acid-free paper.

Last digit in print number: 0 6 2 0 0 8 5 4 3 2 1

Johnson, Brian K.
The articulate advocate : new techniques of persuasion for trial lawyers / Brian K. Johnson & Marsha Hunter.
p. cm.
Includes bibliographical references and index.
LCCN 2008927449
ISBN-13: 978-0-9796895-0-5
ISBN-10: 0-9796895-0-3

1. Trial practice--United States. 2. Public speaking. 3. Communication in law. 4. Persuasion (Psychology) I. Hunter, Marsha. II. Title.

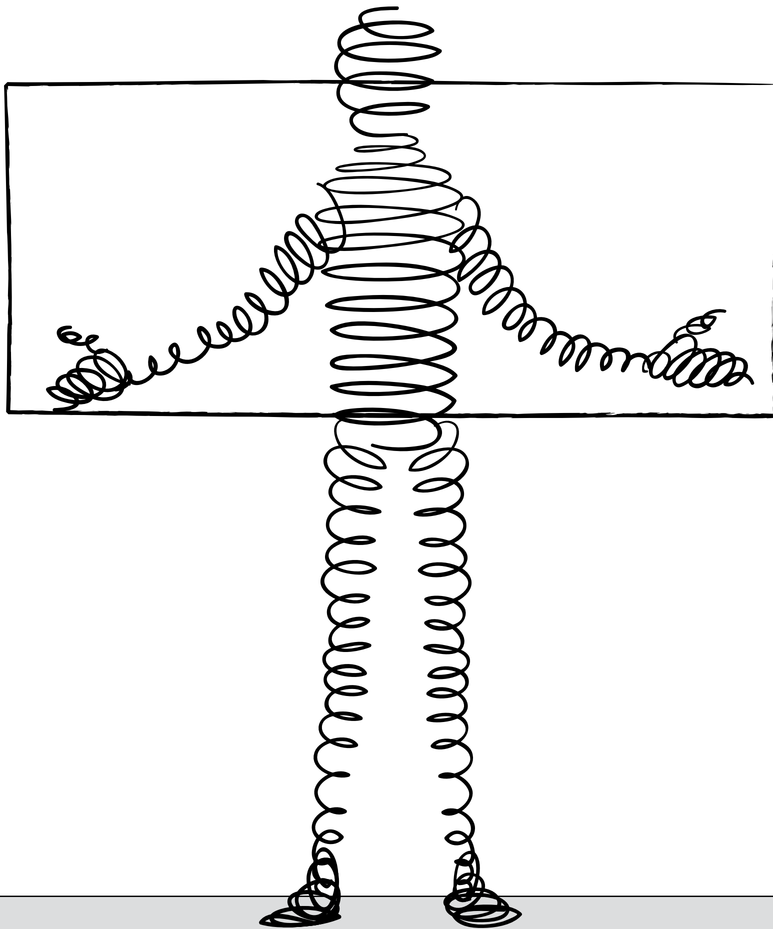
KF8915.J64 2009 347.73'75
QBI08-600351

Cover and book design by Charles Kreloff.
Illustrations by James Kacherlies and Jeanne K. Blahut.

Crown King Books
P.O. Box 4333
Prescott, Arizona 86302
www.crownkingbooks.com

Chapter Four

How to Practice



Practice is the path to expertise. It is the only way to improve skill in any discipline. The more complex the skill, the more practice is required. Whether you want to be a better golfer, pianist, or trial advocate, solitary, mindful practice is absolutely essential. "Practice makes perfect" is an endlessly repeated adage, and few would be foolish enough to argue the opposite: that you could acquire and improve a skill just by thinking, reading, or writing about it. Yet a surprising number of advocates don't practice—alone and aloud—the skills of advocacy. Practice, it turns out, is surprisingly hard work, difficult to fit into a busy lawyer's life. If you don't know how to practice efficiently and effectively, this hard work can be intimidating (and, like admonitions to exercise every day, easy to avoid). For some people, practice isn't so much intimidating as it is silly. Others find it downright embarrassing. Yet if you want to be a better trial lawyer, you must overcome any resistance you feel and learn how to practice.

Practicing is a skill in and of itself—arguably the ultimate skill. If you know how to practice, you can improve any skill you set your mind—and body—to learning. This chapter will guide you step-by-step through the required skills, and you'll learn to practice smarter, with better results in less time.

Some advocates want to believe that adequate preparation for trial advocacy can occur somehow without practice as the final, culminating step of that preparation. When asked how they prepared for a trial or trial advocacy training exercise, a surprising number of advocates confessed that they: 1) read carefully through the material (silently); 2) thought about it; 3) wrote copious notes on a legal pad; and 4) prayed that all their reading, thinking, and writing would somehow coalesce into articulate, persuasive speech, on the first attempt, under pressure in the courtroom. Don't put your trust in this self-delusion.

How can you prepare for speaking without *actually speaking*? Lawyers often rationalize: "I was too busy preparing to practice." But you can't prepare for trial advocacy only by reading, thinking, and writing. You've got to stand up on your feet and practice speaking.

Practice solo, at least at the beginning. Practicing alone, away from

the critical eyes and ears of peers, colleagues, or spouses, provides an opportunity to make mistakes in private. It is nearly impossible to say anything well on the first attempt. Everyone needs multiple tries to express ideas well. Solitary practice gives you a chance to rough draft out loud, get ideas flowing, and take risks and make errors when nobody is watching.

Practice must be out loud. The muscles engaged in the motor skill of talking need exercise, just as those involved with breathing and speaking require warming up, blood flow, and conditioning through repetition. Your entire body needs to practice standing still while talking and gesturing. Practice that simulates as closely as possible the way you will speak out loud in the courtroom should be your goal.

And you should practice a lot—as much as you can. Even busy students or professionals can find 10-or 20-minute blocks of time to rehearse. In addition to such individual practice sessions, stage mock trials with colleagues. All practice serves to improve performance.

You must practice alone, aloud and—ideally—a lot, in order to move ideas that you have read, considered, and written about from inside your head (your neo-cortex) to the tip of your tongue (your articulators). Persuasive advocacy is a motor skill.

To Know and Know How

There is a critical gap between your brain's capacity to *know* something and your body's ability to *know how* to do it physically. Practice bridges that gap. What your brain knows and understands, your body must practice to execute well. An example: suppose you wish to become an expert downhill skier. You read the best book available on the techniques required. Suppose, too, that you're blessed with a photographic memory and are able to remember every technique described in the book. By the time you've finished reading the book, your brain *knows* a great deal about skiing. But such *knowing* doesn't mean that your body possesses the *know-how* to tear down a black diamond run. You have

to practice what you learned in your reading to develop the physical know-how necessary to swoosh down a mountain like the ski patrol at Telluride. Your body's muscles, controlled by your motor cortex, need to *get the feel* of the required actions.

This chapter will help you practice to develop advocacy know-how. It will help you get the feel of it. To see the results you're hoping for, you *must* practice—because it is your brain that has read this book, not your body. Your body hasn't a clue about the meaning of the words and ideas in this text.

Trial lawyers used to have more opportunities to develop the know-how of trial advocacy than they do today. In the past, when small cases more often went to trial, advocates could learn the skills of advocacy through experience in the courtroom. For many attorneys in the 21st century, opportunities for on-the-job training no longer exist. Unless you are a prosecutor or a public defender, it is difficult to develop basic trial skills through actual work in real courtrooms. Given the risks of taking a case to trial today, cases are often too important to be entrusted to beginners. But if you lack frequent opportunities to refine and polish your trial skills in actual trials, you have all the more reason to practice those skills, so that you'll be ready when the opportunity to take a case to trial comes along.

The lack of real trial opportunities has led to an increasing number of trial skills training programs for practicing attorneys as well as law students. Participants in such programs, especially busy practitioners, frequently complain that they haven't had enough time to completely digest and assimilate the facts in the case file. They're right. And practice—alone and aloud—is the only way to overcome this problem. When you live with a real case over time, you discuss the case with the client, witnesses, colleagues, opposing counsel, judges, in depositions, etc. You have lots of real-life opportunities to say the facts aloud before presenting the case to a jury. In the training environment, that out-loud experience is missing. Although you have studied the case file, chances are that you have never spoken it. Once you overcome any resistance to practicing alone, aloud, and a lot, you can jump-start your ability to remember the facts of your case and to speak them confidently, even if you've had little time to prepare.

Practice: Resistance and Avoidance

It's unfortunate that "practice makes perfect" sets an impossible expectation. Forget perfection! Your goal in practicing is not to make yourself perfect but to make yourself better—a more sensible and achievable goal. Perfection as an advocate is not only out of reach; it isn't even desirable. The jury doesn't want you to be perfect; they want you to be human, with all the forgivable foibles and imperfections that implies. Your humanity makes you credible.

Don't Use a Mirror

Another reason you may avoid practicing is the suggestion, almost ubiquitous in public speaking training, that you practice in front of a mirror. Pardon this heretical observation, but practicing in front of a mirror is, for most people, a really bad idea! The most important reason to practice is to shed your self-consciousness. Mirrors exist precisely to make the viewer self-conscious. You look in a mirror to make your "self" conscious of your hair, clothing, or makeup. Practicing in front of a mirror raises your self-consciousness, yet the very purpose of practice is to reduce it. The last thing you want is to stand in a courtroom and be overly self-conscious. Your goal is to be conscious of your jury or witness, and fully aware of the situation in the courtroom in all its complexity.

Practicing advocacy skills requires that you rehearse talking to other people, not to yourself. That is virtually impossible if you are staring at yourself in a mirror. After all, who is never going to be called to sit in your jury or be a witness in your case? You! There is no good reason to develop the skill of talking to yourself. You will not be able to monitor your physical behavior, because when you talk to yourself in the mirror you don't engage in the behaviors that you manifest when speaking with others—the very actions you're supposedly trying to see and control. (Later in this chapter, there are two exceptions to the injunction against practicing with a mirror.)

Rationalizations that Inhibit Practicing

"I'm not an actor!"

Some diffident people feel that practicing aloud is synonymous with artifice, pretending, and fakery. Uncomfortable with the self-awareness that practice requires, they worry that their personal integrity and authenticity may somehow be violated. Often they declare, "I'm not an actor! I just can't fake it."

If you are in this group, take a leap of faith. Practicing doesn't make you phony or insincere. Practice will help you find your natural and authentic self when the pressure is on. Once you practice a skill, it becomes second nature. You will have practiced it enough that it feels, appears, and is natural. But it wasn't at first—not until practice made it second nature.

"If this were a real case..."

In training programs, some advocates declare that they are simply too real to practice. This rationalization often begins with the phrase, "Now if this were a real case…" The reality of the case and the trial would supposedly inspire these people to perform well. Yet when asked for some evidence of this theoretical effectiveness, they can't make good on their own prediction. One imagines such people betting their money on athletes who are too real to practice, waiting for the real game to prove their mettle.

"I don't want to be overprepared."

Another frequently heard rationalization for avoiding practice is, "I don't want to be overprepared." What this usually means is that the advocate tried to practice for a short period of time, felt uncomfortable, and quit—and then rationalized quitting as a fear of being overprepared. With a skill as complex as litigation, the odds of your being overprepared are less than the odds of your being struck by lightning during your

underprepared opening statement, in the midst of which you may wish, in fact, to be struck by lightning—to end your suffering.

"I feel so silly."

There is one very real emotional challenge regarding practicing. Talking aloud in a room alone is typically taken as a sign of madness! It makes everyone feel, initially, a bit silly, and that feeling may be compounded by the unwarranted fear that someone is listening just outside the door. Frankly, the only solution to this problem is to get over it. Would you rather feel silly in private or in public? Would you rather feel a bit silly—temporarily—talking aloud in a room alone, or feel infinitely more foolish struggling in front of clients and peers in real life?

Since the case ultimately is your client's case and not yours, how do you suppose your client would answer if you were to ask: Should I practice or not? If you yourself were ever a party in a lawsuit, which kind of lawyer would you prefer: the one who is unable or unwilling to practice because she feels silly, or the one who comes into court fully prepared to fight for your cause?

Be Patient

Given how complicated these skills are, be gentle, and generous with yourself as you practice. Be patient. The substantive challenge alone is enormous, and in addition you must also understand the issues of style you will use deliver that substance. It will take time to assimilate and coordinate the necessary knowledge. Your progress will be gradual. The progression of steps in skill acquisition range from beginner to novice, to competent, then proficient, and finally, expert. If you are a beginner, it will take you time, experience, and diligent practice to develop the skills to become a novice, then competent, and finally, proficient. To become expert is an arduous process, but one well worth pursuing.

Persistence

Coaching an experienced intellectual property litigator on his opening statement, Brian Johnson asks him to practice multi-tasking. “Concentrate on eliminating thinking noises,” he urges, “and gesture consciously by placing ‘on the shelf’ the three steps of a conflicts check.” He gamely tries, but afterward confesses, “I don’t think I did any better that time. In fact, because I was distracted thinking about my gestures, I thought I actually said it worse! And there were still *ums.”* He was correct. Practice requires patience and repetition.

On second attempt he does better. His gestures now flow across “the shelf.” Having practiced what he wanted to say, he turns his attention to eliminating thinking noises. It still isn’t perfect—but practice doesn’t make perfect; it makes *better.*

Remember: Practice is a patient progression toward improvement.

How to Practice Step-by-Step

When you stand up in a room alone to practice speaking aloud, your goal is to use, develop, and refine the cognitive skill of structured improvisation. Remember: you will not practice the skill of reading aloud a text you have previously written; you will not practice reciting words that you have memorized; you will not practice in order to memorize your presentation word-for-word so that you can eventually recite it from memory. You will practice extemporaneous speech. You will practice giving your brain an opportunity to process thoughts into words in much the same way you do in everyday conversation, but with one enormous difference: you must be able to think and speak for much longer periods of time, strategically structuring your ideas while obey-

ing the many rules of courtroom procedure governing what you can say and how you can say it.

Practice in order to use the same structure, but not the same words, each time. The structure remains the same; the words are improvised. The exact words will change each time. Your brain already is good at it; now trust that you can do it for longer periods of time in the courtroom.

Before you stand up to talk, create notes so you can practice using them. They should provide a structure for your presentation in outline or bullet point format. Review Chapter Two for suggestions about creating the most effective notes.

Set up your practice room to simulate a courtroom. If you're practicing making an opening statement or closing argument, specify an area across the room where the imaginary jury is seated. Place two chairs far apart enough to indicate the right and left ends of the jury box. Practice speaking to the imaginary jurors. When you practice an examination, place an empty chair across the room to mark the location of the witness stand. Your eyes need a target to focus on, so treat the chair as if a witness were seated there. Focusing your eyes will help focus your brain.

Practice in the Courtroom

If possible, get permission to practice in the actual courtroom where you will conduct your trial. Ask a court official if you can gain access to the courtroom. Speak from the well of the courtroom and fill the room with your voice. Take the witness stand and see that perspective. Sit in the jury box. Bring your visual aids and make certain they are readable by the jury.

Helpful hint: The more you get the feel for a space, the more comfortable you will be.