

# The Power of Practicing the Fundamentals

By Ronald G. DeWaard

**P**rofessional musicians still play the scales. Major league baseball players regularly hit baseballs off tees. Yet when trial lawyers think about “practice,” we generally associate it with full rehearsals of opening and closing statements, or as scrimmages staged for mock juries and focus groups. While doing a full-blown dry run is obviously a useful exercise, there is a more elementary type of practice that is also effective—both for the novice and the seasoned trial lawyer—which involves practicing the fundamentals. Not unlike playing the scales or hitting off the tee, practicing basic phrases, techniques, and key portions of presentations will create the muscle memory that will not only polish your performance but also help you think more quickly under fire.

## Free Your Mind to Think

As Brian Johnson and Marsha Hunter explain in their book *The Articulate Advocate*, persuasive advocacy in trial is ultimately a motor skill.<sup>1</sup> Because of that, mere mental preparation for trial has its limitations. Some preparation should engage all the muscles and motor skills involved in active persuasion. By deliberately practicing concrete trial tasks, you can develop the muscle memory necessary to make them repeatable under pressure. However, the benefits do not end there.

Trial lawyers, like musicians and baseball players, are engaged in a complex endeavor that requires high-level thought and decision making while performing certain

motor skills under pressure. Practicing fundamental tasks so they become rote allows the mind freedom to focus on more complex tasks under the stress of performance. In fact, it has been suggested that rote practice and conceptual thinking can feed synergistically on each other, leaving the brain capacity for tasks requiring the most creativity.<sup>2</sup> Being able to think on your feet in the cauldron of trial is a goal of every trial lawyer. Fortunately, there are “practice tees” and “scales” for trials that can move you toward that ideal.

## Develop and Practice Your Own Toolkit of Basic Trial Phrases

Every trial will predictably require the use of certain phrases and statements, such as those needed when introducing evidence and making objections. These moments can offer an opportunity for a show of confidence to the judge and jury. However, the opposite image is projected when these phrases are stumbled over or mumbled. If you have limited trial experience, it would be beneficial to plan how you will phrase these types of statements and then practice them in advance of trial. Practicing such statements forces you to choose the most persuasive wording, emphasis, and inflection and will keep you from being distracted by such details during the trial.

For example, when introducing evidence, you may decide you will say, “Your Honor, Acme Corporation moves for the admission into evidence of Exhibit 1 for identification.” If you say this phrase a number of times, your mind and body will remember how to place the emphasis so you are making a confident statement instead of one that sounds like you are begging the court to allow you to do something. Having practiced the phrase, you will also avoid interrupting your thought process during your

examination to deliberate over the manner in which you will introduce evidence. You will look and feel confident. It will be a point scored.

It is not difficult to imagine the various stages of the trial to glean the phrases you will need for your toolkit. For instance, in the previous example, you could expand the practice exercise to include a request to approach the witness, the movement of showing the proposed exhibit to opposing counsel, and a request to the court to show the exhibit to the jury after it has been admitted. Other examples could include practicing how you intend to introduce yourself and your client to the jury, how you are going to call a witness to testify, how you will conclude your questioning of a witness, and how you will phrase basic objections in a confident and poised manner. Practicing these could be as simple as writing or visualizing the particular phrase and then repeating it until you are comfortable with how it sounds and feels. The more phrases and steps you can anticipate and practice before trial, the better your presentation and flow will be when you are under pressure.

## Practice Basic Trial Techniques

Nearly every trial will present the opportunity to employ certain basic techniques that can be practiced in advance. An excellent example of this is impeachment, which even experienced trial lawyers can benefit from practicing.

Impeachment with a prior inconsistent statement presents one of the greatest opportunities for advocacy and drama in a trial. However, that opportunity fades with a bungled impeachment, which can happen quickly with an uncooperative witness. Impeachment requires proper technique to be truly effective. The clarity and

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gravity of the contradiction must be laid bare for the jury while not giving the witness any opportunity for escape or explanation. The difficulty with preparing for a specific impeachment, though, is that it is not possible to know in advance with any certainty how witnesses might contradict themselves at trial. While mastery of the facts of your case—as well as making some educated guesses—is good preparation, it is not sufficient. What you can and should practice is the technique you will use to impeach so you have it ready to roll at trial.

While the art of cross-examination is a lengthy subject unto itself, the form of a basic impeachment can be practiced and mastered. A tried and true method employs the three Cs: *confirm* the statement made on direct, *credit* the circumstances of the previous inconsistent statement (e.g., it was made in a deposition or a report), and *confront* the witness with the inconsistency. There are a number of outstanding articles and resources on different phrasing that can be used to set up those elements of the impeachment. However, once you settle on the words you want to use, the technique is nearly universal because most of the statements leading up to the drama—such as when you reinforce the reliability of the previous statement—do not change with the subject matter. You can have at the ready numerous short foundational questions on cross-examination to underscore testimony given at a deposition (e.g., “There was a court reporter there, you raised your right hand, you gave an oath, and you swore to tell the truth...”). Thus, once you decide how to proceed with your impeachments, you can practice them using simple hypothetical scenarios.

For instance, you can practice impeachment by creating a contradiction in the anticipated testimony in your own case or by using something as simple as a red light/green light contradiction. The substance of the practice session is not that relevant because the essential setup and phrasing remain fundamentally the same. Once again, practicing forces you to not only choose language for the form you want to use, but also trains the muscles of your mouth and voice for maximum persuasive effect. You will learn to create a dramatic moment before you are under fire. Moreover, just like

the music scales and the practice tee, even experienced trial lawyers, who may not be in court every day, can benefit from a basic run-through of an impeachment before trial. It is a simple way to shake off the rust.

Another example of a technique that can be practiced in advance of trial is the cadence of cross-examination. One of the most difficult things to teach students in a trial practice seminar is not the substance of a leading question, but the manner in which a leading question must be asked. When done correctly, such a question is, in reality, not a question at all but a statement by the questioner to which the witness is compelled to assent. Apart from the substance, the phrasing of such statements is generally short. Emphasis must be placed on key words with the inflection at the end of the statement descending instead of ascending. When the inflection rises at the end of the statement, the unintended result is that it sounds like an invitation to the witness to testify—the death knell of a good cross-examination.

The proper cadence of truly leading cross-examination questions can be practiced quickly and effectively. Think of an irritated parent remonstrating the prodigal son: you don't *call*; you don't *write*; we *never* hear from you, do we? Those statements (minus the irritated tone, of course) demonstrate the proper cross-examination cadence because a parent would never say the statements in such a way that would invite an explanation. The parent allows no response other than agreement. The emphasis is on the italicized words, and the inflection descends rather than ascends at the end of the statement. This drill can be practiced with random phrases to get the feel for the rhythm and cadence of cross-examination. By practicing beforehand, that rhythm and cadence will come naturally at trial because your body and mind internalize it, helping you to focus on the substance of your cross-examination rather than the cadence of your delivery.

### Focus on Key Phrases and Transitions in Practicing Openings and Closings

It is, of course, worthwhile to practice your complete opening and closing in ad-

vance. Focus on the words you will use at the beginning, in key transitions, and at the end. Memorizing whole performances or attempting to read them does not make for effective public speaking. Again, the deliberate practice of key phrases and the structure of your presentation will free up your mind so you can think as you speak.

### You Have Time for Practice

Another advantage of most of the practice techniques suggested here is that you have time for them. While too much precious trial preparation time can be spent on written materials juries will never see such as motions in limine, trial briefs, and detailed pretrial orders, the described techniques won't consume large chunks of your work day. The exercises can be effectively accomplished away from work—driving in your car, riding in the elevator, or as a replacement to singing in the shower. In fact, this type of practice can be a constructive alternative to some of the fretting you may be doing while trying to anticipate every strategy the opposition *might* come up with at trial. These things *will* come up at trial; practicing them can help free your mind to handle everything else that may. ■



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### ENDNOTES

1. Johnson & Hunter, *The Articulate Advocate* (Phoenix: Crown King Books, 2010), pp 136–170.
2. Lemov, *Practice Makes Perfect—And Not Just for Jocks and Musicians*, *The Wall Street Journal*, October 26, 2012; see also Lemov, Woolway & Yezzi, *Practice Perfect: 42 Rules for Getting Better at Getting Better* (San Francisco: Jossey-Bass, 2012).