

Note From the Field

Trial Plan: From the Rear . . . March!

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A contested criminal trial proceeds in stages. After disposing of legal issues in motions, every trial, military or civilian, will begin with voir dire and then proceed through opening statement, each side's case-in-chief (if the defense chooses to put on evidence), rebuttal (occasionally), instructions, and closing argument. This note discusses the need to backward plan one's trial presentation. The proposed methodology is designed to give practitioners an organized approach to integrating each stage of the trial process by beginning at the end when planning for trial and working one's way back to the beginning.¹

If You Do Not Know Where You Are Going, All Roads Will Get You There

After conducting the initial investigation into the law and the facts, one drafts a theory of the case. Investigation continues throughout the entire process. As new information is discovered, the theory of the case is modified or, in some cases, entirely changed to account for all of the information that will come out at trial. Ignoring bad facts or hoping that the members will be sleeping when the damaging evidence comes out are not approaches grounded in reality.² The theory must incorporate all undisputed facts that will come out at trial.

Every case has to have a theory. Accurately developing the proper theory of the case is the most critical aspect of trial preparation because the theory drives every aspect of every stage of the trial. The theory of the case is the destination for the case. All evidence, objections, questions, and every other part of the trial presentation must support the theory.

Before discussing what a theory of the case is, it is important to note what it is not. A theory of the case is not "reasonable doubt." It is not "the accused must have done it because he is the only accused we have." It is not the elements of the offense. The theory of the case is the emotional or equitable "hook" that convinces the factfinder that your desired result is the just result. The theory of the case is the *simple* explanation of what

happened and why. An effective theory of the case creates an emotional bond between the life experiences of the members and your side.

The theory of the case drives the backward planning process. Although the theory can be modified and changed, it provides the guidepost for the rest of the trial planning.

Courts-Martial: Tried Forward but Planned Backward

After conceptualizing the theory of the case, one begins to consider the closing argument. The closing will contain the facts, and inferences from the facts, developed during trial that support the theory. Each stage, from voir dire through the close of evidence to instructions, is designed to support closing. As each stage supports the overall theory of the case, each will also necessarily support the closing argument, since the closing is a summation of all that came before. One begins to prepare the closing by asking, "what does one want to argue?" Then, one game plans the trial to answer that question.

One must next consider the instructions that support the theory, as articulated in the closing. Most instructions are boilerplate, but it may be essential to weave some tailored instructions into a persuasive closing argument. For example, in a rape case where the victim is intimidated by the rank or duty position of the accused, counsel may wish to draft a constructive force instruction that is tailored to the facts of the case.

Next, one should consider the cross-examination evidence that supports the theory. Evidence from cross-examination is preferable to evidence from direct examination for two reasons. First, the open-ended nature of direct examination questions can result in non-responsive and damaging answers from one's own witnesses. Under the pressure of testifying, even the best prepared and rehearsed witness may say something new on direct which hurts the proponent's case.³ This leads to the second point of the value of cross over direct. It is more persuasive

1. Like most thoughts on trial advocacy, there will be those who disagree with some, if not all, of my ideas. These concepts are one way to prepare for trial and are not offered as the only way or even the best way for everyone.

2. Suppressing damaging evidence so that it is not introduced is an effective way to counteract bad facts and need not be considered in the theory of the case.

3. If you are not convinced of this point, review the unsworn statement by the accused in the last three sentencing cases in your jurisdiction to see if he or she did not say something that the *government* could argue in closing.

if a fact which helps your side comes from the other side's witnesses. For example, this would allow the defense to argue: "The government's own witness believes SGT Jones (the accused) is a good NCO."

After determining which points one can make in cross, the next step is to prepare the direct examination needed to fill in the gaps for the closing argument. Trial counsel must devote much more time to preparing this stage since he has no guarantee that the defense will put on any witnesses to cross-examine.

Next, one should conceptualize the opening statement that will take the factfinder through the case. Opening statements are critical to trial success. A defense counsel who reserves opening lets the government's version of the case go un rebutted and misses the first opportunity to educate the members on the defense case.⁴ A well-prepared opening, which is then supported by the evidence, enhances the advocate's credibility with the members—credibility that is critical to a persuasive closing.

The last stage to conceptualize is voir dire. Voir dire is hard. One should not do it unless one can do it well. If done well, however, an effective voir dire not only identifies challenges but also educates the members on the theory of the case. In a barracks larceny case, for example, the trial counsel could question the members on their views on the special need for trust in the Army.

Although this note addressed the trial stages in a linear fashion, the process is anything but linear. As the pretrial investigation continues, new information can lead to adjustments in each stage. For example, if the trial judge has a reputation for severely limiting voir dire, one may want to move some points from voir dire into the opening statement. If a new court decision impacts on one's theory, one may want to request a different instruction and, depending on the ruling, may have to modify the closing.

The theory of the case as a unifying theme assists not only in pretrial preparation but also in making decisions during the heat of battle itself. Only object if it furthers the theory of the case. Only cross-examine if it furthers the theory of the case. Only impeach if it furthers the theory of the case. One of the most difficult things for the trial attorney to say is nothing. If nothing

is gained by cross-examining, do not cross-examine. If an objection will highlight the damaging (but probably admissible) evidence, do not object. If the government witness has given the defense some nuggets which support the defense theory, defense counsel should not impeach the witness. The theory of the case is a mental benchmark to assist the advocate in making quick decisions during trial.

The following example briefly illustrates how each stage sets up the next in furtherance of the theory of the case to support the closing argument. A defense counsel in a urinalysis case with chain of custody problems could use the concept of duty to persuade members to acquit. The theory of the case could be articulated as follows: (1) the unit has a duty to follow the regulations; (2) this duty protects the integrity of the process; (3) the members have a duty to be fair to the accused; (4) if the unit fails in its duty to follow regulatory guidance, the members have a duty to acquit. (From a defense perspective, the nice, but unspoken, emotional hook in a urinalysis case is that each member can identify with the accused in that they all have taken urinalyses and fear what a false positive could do to their careers.)

In this case, the defense counsel could voir dire the panel on the concept of duty. If the accused is not going to testify, the defense can also voir dire on the lack of a duty for the defense to put on any evidence. Then, during instructions, defense counsel could request that the judge give the instruction that the accused has a right not to testify. All of this sets up the closing argument of the unit's duty to follow the regulations, the government's duty to convince the members beyond a reasonable doubt, and the accused's absence of a duty to prove his innocence.

Conclusion

Developing a theory of the case and backward planning each stage leads to an integrated, cohesive presentation to the factfinder. Using this organized approach ensures that every aspect of trial strategy focuses on a consistent and persuasive theme, which maximizes the chances for success.

4. Defense counsel who reserve opening to surprise the government should also consider the fact that they are surprising the factfinder as well.