Chapter 11

THE COLE TRAIN INTERVIEW SERIES
Lt Col Matt Neil

One of the best ways to become a good litigator (besides devouring this Compendium) is to learn from good litigators. In 2015, Joint Base Charleston was able to corral one of the Air Force's top litigators for a wide-ranging, question-and-answer training session. Here is the wisdom of Lt Col Matt Neil (now the Ft Meade Staff Judge Advocate, after attending Air Command and Staff College in residence). If you do not know Lt Col Neil, read his answers at hyperspeed and you'll get the idea (he's a fast talker).

Chapter 11 – The COLE Train Interview Series
Major Matt Neil

PrimeCOLE: So Major Matt Neil, thanks for joining us. ADC at Minot, and then a long and stellar career at JAJG, first as STC, then Special Victims STC, and then a little different than some folks you came back to JAJG and did some appellate work for some time and now you're also one of the new Chief Regional, Senior Trial Counsel Central Region… that's not exact … we'll call you King of the Central. And don't let it go to your head, but you're very successful … do you think the appellate experience has helped you as a litigator?

Matt Neil: Absolutely sir I believe it has. I've always been a scholar of the law, I've always loved to read cases, even before I was in the appellate shop, one thing I loved about law school was reading cases. Being in the appellate shop gave me a different perspective. Not just by reading cases but also advocating for those cases and identifying what the appellate shop was always screaming about when I was out trying cases, like protecting the record and things like that that are important on appeal. It helped me understand the importance of protecting the record when I went back into the courtroom.

PC: For the young counsel out there that don't have the opportunity to be appellate counsel, what can they do to gain that same type of experience?

MN: A couple things. One is they can talk with counsel who are at the appellate shop and get that experience from them. The folks up there at JAJG, and I know it from my time at the appellate shop, we live vicariously through the trial counsel out in the field. Call up, talk to them about your cases, they love to do that, they love to answer questions, and they love to identify those concerns that they might have in records that come up to them. The other big thing I have, and probably the number one piece of advice I have for junior counsel out there is read. Read cases. Go to the Court of Appeals for the Armed Forces website, go to each of the Service courts' websites, and read the cases that come out. Know the law, because that's the most important thing you can do going into a court-martial.

PC: OK, that nerdy stuff is great, but I know you're a fantastic litigator, world renowned litigator, I know you've worked some big cases, the *Cron* murder case out there in Korea, a couple other cases like that, tell us why you like litigation.
MN: My entire life I've been an athlete, I've been in competition, it's one of the things I strive for in life is competition, one of the things that lights my fire, keeps my engine going and for me litigation is the closest thing I come to competition in sports. So when a judge comes in and sits down and calls the court to order, that's like the referee blowing the whistle and starting that competition. It is an adversarial process, certainly it's a truth-finding process, but it's adversarial, both sides are advocating for a position, and we're advocating either to a judge or a panel of members and it's that exhilarating experience that I love so much and which keeps pulling me back to litigation.

PC: Obviously you have a good appellate background and love of the law, but are there other things tactically that make you successful as a litigator?
MN: What I've always been good at and pride myself on is a complete understanding of the rules, the rules of evidence and the law that applies in a court-martial. That allows me to control the battlefield in court and understand exactly what evidence comes in, why it comes in, and what evidence doesn't come in and why it doesn't come in before the members and thus be able to control that battlefield. I think that's what's assisted me in being a good litigator over the course of the years.

PC: Not asking you to name names, but what do you see young litigators or even more experienced ones having the most trouble with it terms of really being able to be good at their jobs?
MN: Piggyback on the same discussion we just had about the rules, it's been somewhat astonishing to me to see some of the lack of understanding of the rules at times in court-martial, particularly in cross examinations. A lack of understanding of prior-inconsistent statements, or refreshing recollection and attorneys not knowing how to lay the proper foundation for that and getting hung up in front of the members and when they are up there doing that and they can't lay the proper foundation and they keep having objections sustained it undercuts their credibility in court significantly and it shows that one side does understand the rules and the other side potentially does not. And that was the same experience I had as a defense attorney, trial counsel not understanding those rules from prior consistent and inconsistent statements and refreshing recollection.

PC: You've got a good reputation out there too, you're certainly a bulldog, well deserved, I think that's a good moniker, because I also think you're considered civil, a person who can work with all parties to the case, obviously

that's important, particularly in the JAG world where we go back and forth between prosecution and defense. How do you deal with an aggressive personality while maintaining an appropriate level of civility?
MN: It's difficult because as I said, I'm an athlete, it's a competition, so everyone wants to win. But that can also be a bad thing. That's one of the things I think sometimes counsel lose sight of. They take things personally, they ultimately come into court and they're trying to win and they put winning above everything else, win at all costs and that can be a detractor, that can be a significant negative because you lose sight of the big picture, you lost sight of what the purpose of a court-martial is and that's doing justice. And yes I'm willing to go into court, and yes I think one of my OPRs used the word "bulldog" when a military judge called me that, and when I go into court I'm aggressive, I'm probably one of the more aggressive attorneys that you'll see on the record. However, when the court is adjourned, when we are recessed, you have to be able to work with the other side and you have to be able to leave that aggressiveness in the courtroom, leave anything that may have happened there, you have to understand, one, what the big picture is and, two, what the other side of that picture is. Sometimes when you get too aggressive on something you have to keep it in check as you'll only see one side of the big picture, that aggressiveness puts blinders on you, and you have to be able to maintain that big picture look and not put blinders on when advocating a position. The biggest challenge for me is understanding that. But if you can understand that you can make sure that doesn't happen and that's how you maintain that civility.

PC: Is it tough for you to work with young counsel that do not have the confidence or experience that you do and they're not aggressive? How do you work that dynamic?
MN: That dynamic is not as challenging to work as you'd think. It's actually tougher for me to work with someone who is as aggressive as I am. For instance, right now I'm working a big case with a colleague of mine, certainly not lacking for experience, in fact I think he's more experienced than me, much to my chagrin, but he doesn't have the same tactics as I do, I think our tactics play off each other very well. I've learned a lot from him and honestly he's one of the best litigators that I know, it would be hard pressed to name anyone who's a better litigator than him, and certainly he doesn't have that same aggressive personality. But what everyone has to remember and something that I've always understood and tell junior counsel is that everybody has to pick what works for them, being aggressive, being the bulldog as I've been identified works for me, it doesn't work for everybody. Some people have to be more reasonable, some people do the bumbling idiot routine and it works for them and it works for them in court, but everyone has to find what works for them. I actually think one of the things my aggressive personality and my confidence in court does for those more junior or experienced counsel, they don't necessarily have

to be as aggressive as I am but what they can do is gain some of that confidence and it helps them and I try to pass that on to them. That's the biggest thing, build up their confidence, not necessarily making them aggressive, but build up that confidence for them.

PC: When you do deal with new trial counsel do you have a general approach to getting them involved in the case or getting them past problems you see young counsel dealing with in every trial?

MN: I do. First off, I like to be detailed to a case as early as possible. Sometimes that doesn't work. If I'm detailed at the ground floor I like to get them involved in discussions with me about the case. And one of the big reasons for that is that they have other things taking their attention away, they've got other responsibilities, but I will impress upon them how important this case is. I want to get them involved in trial strategy decisions. One thing I always tell every junior counsel that I think lets them feel that ownership part of the case, let's them feel invested in the case, is "hey, this is a team and I want your input and opinion on trial decisions." Ultimately as the lead counsel I am going to make those decisions in the end but your input matters and I want to show them that that input matters. And so I don't like to make decisions without going to that junior counsel and asking them what they think. One, as a sounding board to know if I'm sounding crazy, which sometimes happens, and two, so they feel like they're input ultimately does matter. Because to me it does. I learn by talking things out with people and for my own trial strategy decisions, I make decisions by talking them out, so it's helpful for me but it's also helpful for them because they feel like they're part of that process. I think one of the things that junior STCs do that's probably not so great, and it's just a learning curve, is they go in there and they are lead counsel and they just go in there and make the decisions and they do it without consulting their junior counsel, their assistant trial counsel, and then that assistant trial counsel just feels like they're just a potted plant or they're just the admin guy or the admin girl for the case and so they don't feel like they are part of the team, part of the case, and I think it's important early on that they feel invested in it.

PC: We'll drill down on particular aspects of a case in a minute, but let's talk real tactically about what young trial counsel can do in the well better, whether it's movement or tone, what are they usually lacking.

MN: Big picture they should focus on a couple of things. Knowing the rules that govern what you do in the well. That is to me even more than half the battle. You know the rules and you know what rules are going to come into play and you are going to gain that confidence in the well. It's going to transfer to what you are doing in the courtroom, you're going to understand it and then you are going to be able to control the battlefield. For me the most the biggest part in the courtroom is that

confidence. Perception is everything and even if you don't necessarily feel like you know what you are doing and you might not know it, but if you look like you know what you are doing the members are going to believe you know what you are doing. And so knowing the rules is more than half the battle to getting yourself there. And then beyond that it's always moving and doing things with a purpose. Why? Ask yourself that question "why?" Why am I asking this question, why am I moving this way, why am I standing over here, those are all questions I ask myself beforehand. Where am I going to stand when I do a cross examination, where am I going to stand when I do a direct. How am I going to move when I do a closing argument. Because those things are the things that the members pick up on. And those are the things I don't think junior counsel are thinking about. The question of why. Why am I doing this. What is my purpose for doing it and if you answer that question and you have a purpose in mind it's going to pay dividends down the road.

PC: That raises another issue. How should young counsel work with witnesses to get them ready to be in the courtroom?

MN: The way I do it with witnesses and I think this is a good tactic to have and frankly every junior counsel should be doing it, should be talking to the witnesses frequently. Particularly when talking about victims in the case. That doesn't mean you have to ask them substantive questions about everything that happened, or interview them over and over, but you need to make sure you are keeping in touch with them to keep that rapport going, to make sure they understand what's going on, and answering the questions they have. Because that's going to make them feel much more comfortable. And then I bring every witness into the courtroom, show them the courtroom, they should sit in the witness chair and I think they should understand how to answer questions from that witness stand. I tell them exactly where I am going to stand when I ask my questions, and I also tell them where I think defense counsel is going to stand, because that's how I did it as a defense counsel and why defense counsel might stand there so they understand that coming in. I also explain to them defense counsel are doing their job for their client, their job is to try to get a rise out of that witness so I want to make sure that they are ready for that, understand the type of questions they are going to get, and the way those questions will be asked, and what the purpose of asking those questions so they understand that so they're ready for it when the other side asks their questions. Also make sure every witness understands that even though the other side is going to be able to ask cross examination questions, we always get to get back up and have them explain everything. So making them understand that process and having them see the courtroom … I've testified as a witness in a court-martial before, as a senior trial counsel I had to testify, and it was nerve racking. I was nervous. Midway through the trial it was a 39a and I thought to myself "how did I get to this point" because it is such a nervous experience for me and that wasn't anything substantive about the

case. So understanding that's how every witness feels coming into court, it's not a pleasant experience, making that as comfortable as possible is the most important thing.

PC: Let's talk about some things that folk do well or poorly at various stages of trial and tips you can provide. Let's start at the start, *voir dire*.
MN: Biggest thing is thinking about the questions you are asking. Tailoring your *voir dire* to the case that you're actually trying. Too many times people used canned *voir dire* … quick example that I use. I won't name names but I got a call from a STC who told me "hey, I've got this big *voir dire* you did for a case" that they had pulled off of a Sharepoint site "and I'm going to ask these questions about Goldilocks and the Three Bears but I was really wondering why you ask those questions." So I asked him "where did you get those questions from" because I did not remember ever asking Goldilocks and the Three Bears *voir dire* questions. It turns out, an instructor from the JAG School had pulled the original *voir dire* down from the Sharepoint site to use it for one of the mock cases they were doing and had changed some of the questions and then had unknowingly edited the original document on Sharepoint, then someone pulled down the edited versions and said "OK, we're going to use this for our *voir dire*" and they were going to ask about Goldilocks and the Three Bears! Crazy. So think about the questions you're asking. And with *voir dire*, the main thing for me, the biggest thing for me is not to lose credibility with the members, you want to connect with them and not lose credibility, it's your first opportunity, your first experience to talk with them and you don't want to lose credibility with them so make sure you are asking questions that actually have a purpose and questions that are simple, not lawyer questions.

PC: It's always my advice to trial counsel that they follow the doctors Hippocratic Oath and first do no harm. That is no more true for trial counsel than in *voir dire*. That's your opportunity to lose all credibility with the members…
MN: My advice from the government side is the biggest thing you always want to do is avoid putting your foot in your mouth in front of the members and losing that credibility and if you do that you can count that as a win in *voir dire*.

PC: How about opening statement?
MN: Opening statement you want to tell a concise yet compelling story. And you want to make it a story, not a rote recitation of the facts that they are going to hear. Often times when I get the initial opening statement in the case, the initial draft, it's a lot of "the evidence is going to show" this or "the witness is going to say" this. I don't like this. I like it to be a story, a story about the facts, a very concise story, it shouldn't be too long, a concise story and compelling story, and the biggest thing for

me is not to oversell your case. Because the one thing I like to take from opening statement when I stand up in closing argument is I like to be able to say "members, think back to opening statement, we kept every promise we made to you." And I want to be able to say that in every case. And that's the biggest advice I can give for opening statements; concise, compelling story that doesn't oversell the case.

PC: I often see theme and theory sort of jammed down the throat of members during opening statements. I think theme and theory is important and I like to carry a general theme and theory from the start to the finish, one that works from the start to the finish, but how do you get that across to the members without hammering it, without being too cute?

MN: Probably no surprise I'm not a big cutesy theme and theory guy I don't like that for a couple of reasons, one I think the members get tired of hearing the repetition of that, it's forced, and it can be turned around against you these cutesy theme and theories. For opening statement, you begin with it and you end with it. And as long as your opening statement isn't too long, that's enough. But you want it to be a central fact of your case to use as a theme and theory, a quote, sensory details about an event, things that can really resonate with the members, things that ultimate are going to be the central aspect of your case rather than trying to come up with a contrived theme and theory. Just come up with a short, concise recitation of the fact of your case that really summarizes everything. And use that as your theme and theory and then it's not going to come across as forced, that you're trying to hammer down on everyone's head. Junior counsel are being trained that you have to come up with a cutesy theme and theory for every case, contrived, and then you have to say it over and over again in opening statement. I'm not a big fan of that.

PC: What are your thoughts on how young trial counsel particularly since they are doing a lot of the directs, can do that better?

MN: Sometimes crosses are easier because you are asking a yes and no question. In directs you're asking open-ended questions and you don't always know what you are going to get or get what you expect you're going to get. The biggest thing I see with trial counsel as a failure is that they don't listen to witnesses' answers. They've got their questions written out, and I'm never telling them don't write questions, but listen to your witnesses answers. Because a lot of times they answer that next question and then trial counsel asks them about it again, and then you can see the quizzical look from the members when the question is asked to the witness that they just answered and it's because counsel wasn't listening to what their witness said. So the biggest advice I can give to junior counsel is to listen to your witnesses and use those answers, loop them in as you're asking the next question.

PC: Right, cross examination can be easier because your control of that. Give us your thoughts on that.

MN: Can be easier but when I see it done poorly is when counsel get up and they give this long cross examination that simply restates the direct. When I do a cross examination, you will hardly ever hear me ask a question that was asked on direct unless I'm confirming the answer so I can then impeach them. You should not just be reiterating the direct of the witness. When I was a defense counsel, particularly when there wasn't a STC on the case, I'd call my client to testify, even in sentencing because I knew the government was going to get up, that they didn't prepare for it, that they were going to get up and just reiterate the direct which was going to do no harm to my case. And where I think that comes from is that I think a lot of people don't think about the cross examinations before trial. I prepare my cross examinations, I ask myself what direct would I ask this witness if I was calling them and then I prepare a cross examination and I know what I want to get out and I keep it concise to that. Because a lot of the times if you make it too long, ultimately you're going to lose the point you were trying to make, the members are going to lose it. So you keep it short, you get out the points that you want, you keep it tight, and you don't reiterate the direct. Those are the biggest tips I have for cross examination.

PC: Closing argument.

MN: Closing argument, the best part of trial. I imagine most litigators will tell you that closing argument is probably their favorite part of trial. It certainly is mine.

PC: Why?

MN: Because that's really where I get to get up and sell my position to either the military judge or panel of members. It is my show at that point and I'm pulling everything together. All the work that I've done in preparation before trial, the witness interviews, the evidence review, knowing the rules, getting the evidence out there during trial is all leading up to that moment. It's that moment before I hand it over to the finder of fact to make their decision … I think we know from studies that it is not as important as you think it is but we still think that it is as litigators and approach it that way, that it'll destroy our egos if it isn't as important as we think. It really is that culminating moment of all the work you've done that you get to put into closing argument and that's what the most exciting aspect of trial.

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C: And generally in sentencing what are you seeing folks doing or not doing that catches your eye?

MN: The biggest thing is that there's not a lot done on sentencing, particularly in litigated cases. We put so much work into findings, we have our foot on the gas for findings, and then the members come back with guilty, whew, it's a sigh of relief and then you'll usually see these three or four day findings cases and then you'll see an

hour of sentencing. We're not going out and actually doing the investigation for sentencing and understanding what evidence can come in sentencing. Certainly sentencing evidence is somewhat restricted for the government versus the defense but we need to do a better job of actually putting together a sentencing case for the members so they understand why the sentence we ultimately recommend is an appropriate sentence. Why that is so important is if you look at findings instructions in the case you're going to see 10-15 pages of findings instructions, for sentencing the judge essentially tells them you can go from no punishment to the max, good luck, have fun. So it's important that we actually do that investigation, consider sentencing beforehand rather than just focusing only on findings and then basically almost ad hoc sentencing after we get the verdict from the members. So the preparation beforehand and identifying sentencing evidence is the biggest thing I think counsel need to do out there in the field.

PC: I expect it's tough for you to give up closing argument to a young counsel. So what can a young counsel do to convince you that they are ready to take the next step and do something more substantive than maybe they have done in prior cases?

MN: There's a couple things they can do … though in the interest of full disclosure, it hasn't happened in my career as a litigator, but what counsel can do, first, it's not something that I am going to go and offer them. So the first step is they have to ask for it. They have to want it. They have to come to me and say "I want to do closing argument." Ok, that's the first step. Second step is that they have to be able to prove to me that they can do it. And that's through preparing a closing argument, and actually giving it for me, giving it in front of a murder board, and I don't mean the night before closing, they need to have that prepared before trial, at least in a form they can give it as it'll change during the course of trial as the evidence comes in, but they have to be prepared to give it. They also have to have their boss on board, the SJA at the base, I will always talk to the SJA if they want to do closing and find out "what do you think?" If the SJA says "no, she can't do it," that's usually going to be a veto power for them. But they have to have the desire to do it, the ability to do it, and be able to demonstrate that ability. And even then, I will say, there are some cases where what we're asking for, what we're advocating for, given the consequences that finding could have, where someone who's just out of JASOC with three ribbons, might be a lieutenant or very junior captain, just doesn't necessarily have the credibility to stand in front of a military panel and make that argument. So even then, sometimes, most times, I'm probably still going to give that closing argument. But those are the things that they have to do, ultimately, to demonstrate that they can.

PC: Do you have a favorite case that you've worked on?
MN: Yes, *United States v. Cron.* It was one of the more complex cases I've done, a premediated murder case that originally was capital and then a pretrial agreement was approved. And it, you know, sometimes we as litigators lose sight of exactly why we're doing what we do. But in that case one of my main responsibilities, it was a case down at Kadena, and I was one of the stateside STC, I was the family liaison. And getting close to that family, and getting to know them gave me a new perspective and still touches me even to this day. I'm still in communication with the family, every time I go up to DC I meet with the family, and we still communicate very frequently. That cases still sticks with me, and just the challenging aspects of it both from the emotional aspect and the legal aspect of it, so that would have to be the case I'd identify as my favorite.