Trial Advocacy—Success Defined by Diligence and Meticulous Preparation

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Introduction

Typically, attorneys think that a successful trial advocate is someone with excellent courtroom demeanor and the ability to speak eloquently. This understanding is only partially correct; it fails, however, to recognize that successful trial advocacy in the courtroom is, in reality, the culmination of an attorney's diligent efforts prior to walking into the courtroom. The backbone of trial advocacy, the essence of being a successful trial advocate, is thoughtful and meticulous preparation from case inception[1] through action by the convening authority.[2] A trial advocate's demeanor and eloquence are the result of diligence and careful preparation.[3]

The Deliberative Process

A court-martial is a process. After counsel introduce their evidence and the military judge instructs the members on the law that is to be applied,[4] the court is closed, and the deliberative process begins. The members "determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused."[5] Effective trial advocates understand this deliberative process and the significant interrelationship of facts and law. Successful trial advocates must prepare for trial while considering facts and law concurrently.[6]

Know the Facts of the Case

In preparing for trial, counsel should read and reread every statement, interview every witness, examine the evidence, and visit the crime scene. The trial advocate's goal 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.[7]

Know and Apply the Law

It is imperative for trial attorneys to understand the United States Constitution and its Amendments, the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), the Military Rules of Evidence (M.R.E.), appellate case law, applicable Army regulations (ARs),[8] and the local rules of court. Counsel can stay informed about changes in the law by reading case law as it develops[9] and by attending con-

1. For trial counsel, this begins with proper legal advice to law enforcement personnel who are investigating the alleged criminal activity. For defense counsel, this begins with professional advice to clients concerning the attorney-client relationship and the need for only the best of behavior by the potential accused.

2. If the accused is acquitted, advocacy terminates at the announcement of findings (even though there are administrative matters to attend to, such as the creation of the record of trial). If the accused is found guilty of any offense, advocacy continues through the clemency phase.

3. *See* U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]. Rule 1.1 states: "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id.*

4. Assuming, of course, that it is a trial with members. If not, the military judge will apply the same legal analysis without instructions being given. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920 (1995) [hereinafter MCM].

5. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, sec. V, at 50 (30 Sept. 1996) [hereinafter BENCHBOOK].

6. Trial advocates should review the *Military Judges' Benchbook* early in the process and ensure that they fully investigate and develop facts that will later require advantageous instructions. *See generally id.*

7. This is especially important for defense counsel who must attack the credibility of every government witness. Prior inconsistent statements are an effective method of attack. *See* MCM, *supra* note 4, MIL. R. EVID. 613 (pertaining to prior statements of witnesses).

8. Counsel must know the provisions of *AR 27-10*. *See* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (24 June 1996) [hereinafter AR 27-10]. For example, paragraph 5-26 of *AR 27-10*, which pertains to personal data and character of prior service of the accused, provides examples of evidence under R.C.M. 1001(b)(2) and 1001(d). Counsel should keep a copy of *AR 27-10* in a trial notebook and take it to court. The trial notebook should also contain: the script from the *Military Judges' Benchbook*, the local rules of court, a two or three page quick reference to the Military Rules of Evidence, a one-page list of common objections, common evidentiary foundations (business records for example), copies of new and important appellate case law, a calendar, a current pay chart, and other items of general interest such as the noncommissioned officers creed or leadership quotes from past leaders (that can be incorporated into sentencing arguments or used to cross-examine character witnesses who testify that the accused is a "good soldier").

tinuing legal education courses and officer professional development classes.

A thorough understanding of the law will benefit counsel in three ways. First, they will be able to analyze the available evidence and litigate its admissibility. Second, they will understand what admissible evidence is relevant to establishing an element of an offense or a potential defense. Third, they will be able to develop a case theme and a logical presentation that the members can consider during the deliberative process.

Attention to Detail

Specifications

Specifications must be written carefully to ensure they properly allege offenses.[10] Counsel should read the discussion to R.C.M. 307(c)(3), "How to draft specifications." This discussion and the sample specifications provided in Part IV of the *Manual for Courts-Martial* are counsel's primary references when drafting specifications. If imagination is required (for example, when drafting an Article 134 specification for crimes and offenses not capital) counsel should use extra care and seek the advice of experienced counsel.[11]

In a recent case, the specification read: "did between March and April 1996 . . . ." Is it wrong? Maybe it is, but maybe it is not. Surely, it is inartful. There is but a nanosecond between March and April, and it is more accurate to allege: "did between on or about 1 March 1996 and on or about 30 April 1996 . . . ." As stated in the *Manual for Courts-Martial*, "[a] specification is a plain, concise, and definite statement of the essential facts constituting the offense charged."[12] Counsel should allege dates with "sufficient precision" such that the accused can identify the offense and provide a defense.[13] While counsel can and should use terms such as "on or about" when a period of time is alleged (for example, when the specification alleges multiple acts occurring over a period of time), counsel should ensure that the interval has specific beginning and end dates.

In another recent case, the specification read: "did strike him in the head with a force likely to produce death or grievous bodily harm . . . and did thereby intentionally inflict grievous bodily harm upon him . . . ." This specification is duplicitous and violates R.C.M. 906(b)(5), which provides that each specification may state only one offense.[14] It alleges two offenses in one specification—aggravated assault by intentionally inflicting grievous bodily harm and aggravated assault with a force likely to produce death or grievous bodily harm. The normal remedy for a duplicitous specification is severance into two separate specifications; however, a lesser included offense should not be severed. The surplus language of the lesser included offense should be stricken from the specification, and the military judge should instruct the panel on the lesser offense.[15] Nonetheless, counsel should keep in mind that each specification should allege only one offense.[16]

The specification for an alleged violation of Article 92, UCMJ, on another recent charge sheet read: "did . . . violate a lawful general regulation . . . by wrongfully possessing drug paraphernalia." On its face, this specification would appear complete and correct. The issue is that the regulation which the accused is alleged to have violated prohibits the possession of drug paraphernalia *with the intent to use or deliver.* As written, does this specification allege an offense? Does the accused have notice of the alleged offense? Is the accused protected from reprosecution?[17] Counsel should ensure that Article 92 violations accurately allege criminal misconduct that is sanctioned by the order or regulation.[18]

Six specifications in another case alleged that the accused received stolen property, but the specifications failed to state

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9. Judge advocates who engage in trial work might consider creating a digest system in a word processing document with key words, such as "BAQ larceny." When a new case is published, or when the attorney researches a new issue, the attorney could then enter the case cite with a brief summary at the appropriate location in the digest. The next time the issue arises, the attorney will have a place to begin research.

10. *See* MCM, *supra* note 4, R.C.M. 907(b)(1)(B) (discussing motions to dismiss for failure to state an offense).

11. *See* BENCHBOOK, *supra* note 5, para. 3-60-2 (containing a sample specification for "Crimes and Offenses Not Capital").

12. MCM, *supra* note 4, R.C.M. 307(c)(3). *See* United States v. Sell, 11 C.M.R. 202 (C.M.A. 1953). One test for whether an amendment to a specification is a "minor change" is whether the amendment will mislead the accused. MCM, *supra* note 4, R.C.M. 603(a).

13. MCM, *supra* note 4, R.C.M. 307(c)(3), discussion, para. (D).

14. *Id*. R.C.M. 906(b)(5) and discussion. *But see* United States v. Mincey, 42 M.J. 376 (1995) (holding that the maximum punishment for a bad-check "mega-spec" is calculated by adding up the maximum punishments for each check alleged).

15. MCM, *supra* note 4, R.C.M. 307(c)(3), discussion, para. (G)(iv).

16. Similarly, it is incorrect to allege in one specification that the accused committed an aggravated assault by striking at the victim "with a dangerous weapon, a means or force likely to produce death or grievous bodily harm." This specification has alleged or described three types of aggravated assaults. Defense counsel should make a motion requiring the government to strike surplus language.

17. *See Sell*, 11 C.M.R. 202.

that, at the time the accused received the stolen property, the accused knew that the property had been stolen. Failure to include an element in a specification is disastrous, and a defense motion to dismiss will be granted in such a case. Additionally, this error created other issues (such as speedy trial) that plagued the case—errors beget errors.

Trial counsel should not rely upon others to draft charges and specifications. The trial counsel will be in court arguing whether a proposed amendment is a minor or a major change[19] or whether specifications and charges are multiplicious.[20] Additionally, the trial counsel should develop the theme of the case during the drafting of charges and specifications.

Panel Membership

A court-martial must be composed in accordance with rules on the number of members and their qualifications. Panel membership is jurisdictional and must be scrupulously monitored.[21] Days before trial, counsel should review the vicing and detailing orders to ensure that the court is properly composed.[22]

Counsel need to be intimately familiar with the convening authority's "automatic" detailing provisions. Are new members automatically detailed when excusals occur? In the alternative, is there a number the panel must fall below before alternate members are automatically detailed to bring the number of members back to a certain number? Either method is correct. The government should propose to the convening authority automatic detailing provisions that are easy to understand and simple to implement. Defense counsel should receive a copy of the description of the court-martial panel selection process, including automatic detailing provisions, as soon as the convening authority selects new members. Both trial and defense counsel should carefully review the process. Unless they understand how the convening authority's process works, defense counsel will not know if there is a basis to challenge member selection or replacement, and trial counsel will not be able to explain and to defend the vicing and detailing process.

Long before the morning of trial, trial counsel must ensure that the members have been notified personally to appear. While personal notification is recommended, members should never be told anything about the case other than the information on the convening order, the uniform, date, time, and location for the trial. Counsel should not wait until the last minute to check to see if someone else has properly performed these critical functions. The morning of trial may be too late, and everyone's time will be wasted in needless delay.

Discovery

The goals of the military justice system are truth and justice, and the discovery rules promote these goals by encouraging the free flow of information. Counsel should reacquaint themselves with R.C.M. 701, the M.R.E. Section III discovery requirements,[23] and local rules of court. For example, Section III of the M.R.E. requires disclosure to the defense of statements of the accused, seized property of the accused, or identifications of the accused.[24] This disclosure is required "prior to arraignment."[25] If the government has not provided this disclosure, defense counsel should consider objecting to arraignment taking place (by requesting a continuance under R.C.M. 701(g)(3)(B)) or, in the alternative, asking the court to prohibit the later introduction of the evidence. [26]

In several recent cases, trial counsel have attempted to satisfy the M.R.E. 304(d)(1) notice requirement by providing defense counsel with a memorandum that states: "All statements of the accused previously provided." This vague statement, which does not provide the specific notice required by the rules, is insufficient.[27]

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18. Additionally, counsel should check the purpose and applicability paragraphs to ensure that the regulation establishes prohibitions for the accused, at the alleged location, and for the alleged misconduct.

19. *See* MCM, *supra* note 4, R.C.M. 603.

20. *See id.* R.C.M. 907(b)(3)(B).

21. UCMJ arts. 16, 25 (West Supp. 1996). *See also* MCM, *supra* note 4, R.C.M. 201, 503, 505.

22. *See* MCM, *supra* note 4, R.C.M. 505(c). There is a difference between the convening authority *vicing* members and the staff judge advocate excusing members under R.C.M. 505(c)(1)(B). The latter is announced on the record when accounting for members and is not reflected on an amending court-martial convening order. *See* United States v. Gebhart, 34 M.J. 189, 192 (C.M.A. 1992). "The administration of this court-martial in terms of the detailing of the servicepersons to sit as members . . . and arranging for their presence prior to assembly of the court can best be described as slipshod." *Id.* The court held that the defense counsel waived any "administrative" error. *Id.*

23. MCM, *supra* note 4, MIL. R. EVID. 304(d)(1), 311(d)(1), 321(c)(1).

24. *Id.*

25. *Id.*

26. *See id.* R.C.M. 701(g)(3)(C).

Counsel should review the discussions about R.C.M. 701(a)(6) and R.C.M. 701(b)(5) in the *Manual for Courts-Martial*, which provide detailed listings of government and defense discovery requirements, some of which are often overlooked. If counsel fail to provide required discovery, military judges have broad discretion under R.C.M. 701(g)(3) to fashion appropriate remedies.

Entry of Pleas

Defense counsel must carefully prepare the entry of pleas. Even if local rules of court do not require the filing of notice of pleas with the military judge prior to trial, it is evidence of professional trial preparation. Providing the military judge and opposing counsel with notice of pleas in cases of mixed pleas, and when counsel are pleading by exceptions or by exceptions and substitutions, avoids errors during a critical phase of a court-martial.[28] When an accused is represented by civilian counsel, military defense counsel should provide the civilian counsel with written pleas. Military defense counsel should not assume that civilian counsel are familiar with the peculiarities of military pleas.

Pretrial Agreements

Pretrial agreements must be precise and should define exactly what happens to every specification, charge, and greater offense to which the accused pleads not guilty. For example, the accused is charged with four specifications of drug distribution. In accordance with the pretrial agreement, she will plead guilty to specifications one, two, and three, and the charge. The document should explicitly state the agreement concerning specification four—it can be withdrawn,[29] the government could agree not to present evidence on it[30] (resulting in dismissal), or the government can attempt to prove it.

If the accused is pleading guilty to an offense with a sentencing aggravator, the agreement should address the issue of the aggravator. For example, the accused is charged with larceny of military property of a value of more than $100.00.[31] The sentence aggravators for this Article 121 offense are the type of property (military) and the value of the property (more than $100). The offer portion of the pretrial agreement should not simply state that the accused will plead guilty to larceny. That does not establish if the sentencing aggravators apply. Rather, the agreement should state that the accused agrees to plead guilty to larceny of military property of a value in excess of $100.00.

As for the quantum portion of the agreement, counsel must carefully word the sentence limitation so that it does not violate the jurisdictional limits of the court. For example, at a special court-martial, the quantum portion should not provide that the convening authority may approve forfeitures of all pay and allowances for six months.[32]

Stipulations of Fact

At a minimum, a guilty plea stipulation of fact should contain every relevant fact in support of every element of the applicable offenses. It should tell the who, what, where, when, and, if possible, the why of the criminal activity. It should not merely be conclusory statements of the elements. The stipulation of fact should read like a story.[33] The parties should be introduced, and the tale should be told, including the law enforcement investigation.[34] The stipulation will be published to the members, either by the trial counsel reading it to them or by providing a copy to each member. Putting the facts in a chronological, story-like format makes the stipulation easier to comprehend.

The trial counsel should write the stipulation of fact as soon as the offer to plead guilty is received from the defense. In the stipulation's introductory paragraph, all parties should agree to the truth and admissibility of the stipulation's contents and that all objections are waived.[35] Additionally, the government should ensure that stipulations of fact contain sufficient facts to waive all potential defenses. For example, if the accused is pleading guilty to an assault by intentional offer and the facts

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27. *See id.* MIL. R. EVID. 304(d)(1), analysis. "Disclosure should be made in writing in order to prove compliance with the Rule and to prevent misunderstandings." *Id.* A general statement, such as "all statements of the accused previously provided," will not later serve as sufficient proof of compliance.

28. *See generally id.* R.C.M. 910. If counsel enters pleas to a named lesser included offense without the use of exceptions and substitutions, the defense counsel "should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit." *Id.* R.C.M. 910(a)(1) discussion.

29. *Id.* R.C.M. 705(b)(2)(C).

30. *Id.* R.C.M. 705(b)(2)(D).

31. Part IV, paragraph 46e, of the *MCM* lists the maximum punishments for larceny and wrongful appropriation. The nature of the property (military property, property other than military property, motor vehicle, aircraft, vessel, firearm, or explosive) and the value of the property (of a value of more than $100.00 or of a value of $100.00 or less) are sentencing enhancers. *See id*, pt. IV, para. 46e.

32. The jurisdictional limitation of a special court-martial for forfeitures is forfeiture of two-thirds pay per month for six months. UCMJ art. 19 (West Supp. 1996).

33. Consider, for example, "It was the best of times, it was the worst of times . . . ." CHARLES DICKENS, A TALE OF TWO CITIES 1 (The Riverside Press, Cambridge 1891).

provide that the accused consumed four bottles of beer in the two-hour period prior to the intentional offer, the stipulation of fact should include the following language:

> Although the accused drank four twelve-ounce bottles of beer in the two-hour period prior to the assault, the accused's ordinary thought process was not materially affected. The accused is seventy-four inches tall, weighs 200 pounds, and is in excellent health. He consumed food along with the four bottles of beer. The accused was not intoxicated. The accused was aware at the time of the offense of his actions and their probable results. The accused was able to have, and did in fact have, the specific intent to offer to do bodily harm to the victim.

Counsel should consider enclosing exhibits with the stipulation, such as the accused's pretrial statements or photographs of evidence, the crime scene, or the victim. Enclosed exhibits help the military judge conduct a thorough providence inquiry, and they then accompany the sentencing authority into closed session deliberations. From the government's perspective, the stipulation of fact will contain all aggravation evidence that is directly related to the guilty plea offenses.[36] If exhibits are enclosed with the stipulation, however, counsel should not simply staple the exhibits to the stipulation without referencing them in appropriate locations within the story.

Documentary Evidence

Prior to trial, opposing counsel must review all documentary evidence and consider all potential objections. For example, has the proper person authenticated the offered exhibit? It is impermissible for a "substitute" to sign an authentication certificate "for" the records custodian; an offered exhibit requires "an attesting certificate of the custodian of the document or record."[37] Additionally, the authentication sheet should be compared to the documents attached. In a recent case, an authentication sheet claimed to authenticate *only* the accused's DA Form 2A and DA Form 2-1, but the accused's enlistment contract, with inadmissible arrest information, was erroneously attached with the DA Forms 2A and 2-1. In another case, the DA Forms 2A and 2-1 that were attached to the certificate belonged to another soldier with a similar name.

Counsel must remain vigilant and ensure that proponents of offered documents lay the required foundations.[38] While government counsel are usually prepared to lay the required foundation for the business records exception to the hearsay rule, defense counsel sometimes forget that they too are required to lay this foundation prior to the admittance of documents during the findings portion of the trial.

Counsel should keep in mind that documentary evidence may not be admissible if the document contains evidence that would not be admissible through testimony. For example, defense sentencing letters from friends or family of the accused may not be admissible (without redaction) if they seek to inform the panel that a punitive discharge is not appropriate. A witness would not be allowed to testify concerning this opinion under R.C.M. 1001; likewise, a letter from the accused's relative or acquaintance may not be admissible with such an opinion, unless the inadmissible material is redacted.[39]

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34. Language like that contained in the following example could be included in a stipulation:

> When Sergeant Smith learned of the accused's criminal activity, he immediately reported the accused's conduct to the accused's chain of command. The company commander notified the CID. The CID then interviewed the accused on 8 July 1997. The interview began with Special Agent Jones advising the accused of his rights. The accused waived his rights on a DA Form 3881 (enclosure 1) and agreed to be interviewed. At first, the accused denied even knowing the victim. This denial lasted for approximately one hour. After being caught in several inconsistencies, however, the accused orally and in writing admitted that . . . . The accused's written statement is enclosure 2.

35. For example, a stipulation of fact should provide in its introductory paragraph:

> The government and the defense, with the express consent of the accused, stipulate that the following facts are true, susceptible of proof, and admissible in evidence. These facts may be considered by the military judge and any appellate authority in determining the providence of the accused's pleas of guilty and may then be considered by the sentencing authority and on appeal in determining an appropriate sentence, even if the evidence of such facts is deemed otherwise inadmissible. The accused expressly waives any objections he may have to the admission of these facts into evidence at trial under the Military Rules of Evidence, the Rules for Courts-Martial, the United States Constitution, or applicable case law. Any objection to or modification of this stipulation of fact without the consent of the trial counsel amounts to a breach of the pretrial agreement, from which the convening authority may withdraw.

Of course, this assumes that the pretrial agreement contains a provision requiring the accused to agree to a stipulation of fact. With such an introductory paragraph, if defense counsel objects to facts contained in the stipulation, the government should not be bound by the pretrial agreement. *See* MCM, *supra* note 4, R.C.M. 811; *see also* United States v. DeYoung, 29 M.J. 78 (C.M.A. 1989).

36. *See* MCM, *supra* note 4, R.C.M. 1001(b)(4).

37. *Id.* MIL. R. EVID. 902(4a).

38. *See* Colonel Gary J. Holland, *Tips and Observations from the Trial Bench: The Sequel*, ARMY LAW., Nov. 1995, at 8 (containing a succinct example of foundation questions for the business record exception to the hearsay rule, M.R.E. 803(6)).

The Evidence is Admitted—Argue It

Every piece of evidence must be logically and legally relevant to be admitted. That is the purpose of M.R.E.s 401, 402, and 403. Once relevant evidence is admitted, counsel must argue the relevance of that evidence to the factfinder. For example, if counsel fought hard to get the accused's nonjudicial punishment admitted into evidence during the presentencing proceedings, he should pay attention to detail and argue the relevance of that nonjudicial punishment—the accused was involved in prior misconduct, was provided an opportunity at rehabilitation, and chose subsequent criminal misconduct.

Anything Worth Doing Is Worth Doing Well

The need to focus on details continues at every stage of the trial. Counsel must ensure that they and the accused are in the proper uniform and that medals are properly worn. Trial counsel must properly subpoena all witnesses;[40] make sure that the flyer is correct;[41] enclose in the members' packets the correct flyer, the convening order or orders, members' question forms, paper, and pencils; and correctly draft the findings and sentencing worksheets.[42] 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 forty-six volumes of the Military Justice Reporters containing reported cases.

Critically Analyze the Elements of the Offenses

The trial counsel's analysis of what offenses to charge, and the defense counsel's analysis of those charges, should include a careful examination of each element of the offenses.[43] Counsel can best accomplish this task by mapping out the elements of the offenses and aligning next to each element the *admissible* evidence and instructions that can be relied upon to establish that element.

For example, if the accused is charged with larceny of nonmilitary property, the four elements of the charge[44] should be listed on a sheet of paper. Counsel should then list, branching out from each element, the admissible[45] evidence and witnesses to establish those elements. Counsel for each side should analyze and evaluate all potential evidence in terms of admissibility and foundation requirements.[46] Additionally, counsel should list next to their corresponding elements the instructions that will apply. For example, to establish the first element, that the accused "took" certain property, there is a permissible inference and a corresponding instruction that the accused took this property if the facts establish that the property was wrongfully taken and was shortly thereafter found in the knowing, conscious, and unexplained possession of the accused.[47] This permissible inference instruction should be listed next to the first element in the analysis.[48] Hopefully, counsel will recognize the importance of this instruction and incorporate it into the development of their theme, voir dire, opening statement, and closing argument.

Defense counsel should also diagram the elements, available evidence, and instructions. A thorough, critical analysis of the government's evidence in relation to the law will reveal

39. While R.C.M. 1001(c)(3) allows the military judge to relax the rules of evidence for extenuating and mitigating evidence, even to the extent that unauthenticated letters from friends or relatives may be admitted, the content of the letters should be reviewed by counsel for objectionable material.

40. MCM, *supra* note 4, R.C.M. 703(e)(2).

41. For example, if the accused pleads guilty by exceptions and substitutions and has elected to be sentenced by members, the flyer must reflect the findings of the court rather than the original charges and specifications. This flyer should be done in advance of the court-martial, but the timing depends on the defense counsel providing timely notice of the accused's pleas.

42. For example, at a special court-martial empowered to adjudge a bad-conduct discharge, the trial counsel must ensure that the sentencing worksheet complies with the jurisdictional limits of the court and does not provide for confinement for a period of years. Depending upon the local rules of court, there may be a requirement to provide findings and sentencing worksheets to the military judge one day prior to trial. Even if there is no requirement, it is sound practice to review these important documents with the military judge in an R.C.M. 802 conference prior to trial. Ensuring the correctness of these documents prior to trial eliminates the need to have members wait while the worksheets are reviewed and corrected during trial.

43. As part of this examination, counsel should read the specific UCMJ articles, the *Manual for Courts-Martial* elements and accompanying text, and the *Military Judges' Benchbook*.

44. *See* MCM, *supra* note 4, pt. IV, para. 46.

45. The admissibility of the evidence is crucial. If it is not admissible, it should not be used in this critical analysis of the elements of the offense.

46. Counsel should evaluate the evidence critically and ensure that they have an established methodology for its introduction. For example, to establish value, counsel might seek to introduce store records of the initial sale of the item or the current replacement cost. Prior to these documents being admitted, they must be properly authenticated, and a hearsay exception must be established. *See* MCM, *supra* note 4, MIL. R. EVID. 803(6), 901. These issues need to be considered early in the process so that counsel can identify required witnesses.

47. BENCHBOOK, *supra* note 5, paras. 3-46-1 (larceny), 3-46-2 (wrongful appropriation).

strengths and weaknesses in the government's case and will also aid in the development of the defense theme. Additionally, this analysis is invaluable when keeping track of evidence that has been introduced during the court-martial and when presenting motions to dismiss under R.C.M. 917.

Analogously, both counsel should analyze potential defenses. For example, in a drug distribution case, based upon the facts, counsel may need to analyze whether the defense of entrapment exists. Although this defense does not have traditional "elements," there are components that can be critically analyzed in order to determine if the defense exists.[49] Defense counsel should use this analysis to carefully plan how the defense will be established. The government should use this analysis to plan an appropriate response, recognizing that the government must prove beyond a reasonable doubt that the defense of entrapment does not exist.[50]

Mapping out the elements of the charged offenses and potential defenses provides early, thorough, critical analysis of the facts and the application of the law to the facts. It is the origin of the case theme.

Develop a Theme

In courts-martial, themes are very important. Military personnel thrive on consistency and order, march in step in perfectly composed rectangles, and are taught that a lack of order is detrimental to war-fighting capability. They seek unity.[51] Criminal conduct is defined as "prejudicial to *good order* and discipline."[52] The Court of Appeals for the Armed Forces has held that prejudice to good order and discipline is implicit in all offenses under the UCMJ.[53] Given this perspective, the military factfinder will apply logic, attempt to put the evidence in proper order, and seek a theme that packages the evidence so that it "makes sense." The trial advocate's goal is to have the factfinder accept his theme.[54]

When evidence fits within a consistent theme, it is judged as being more believable. Advocates should seek to convince the factfinder that what they are presenting fits within their logical theme, is more believable, and should therefore be accepted as true. Counsel should consider a theme as being tinted eyeglasses through which counsel want the factfinder to view all of the evidence presented. If the factfinder accepts a particular advocate's theme, the factfinder will wear those eyeglasses and view the evidence with that advocate's tint on it.

How does an advocate develop a theme? He must ask himself, what is the proposition or concept which, if the factfinder believes it to be true, will lead to the conclusion that the evidence must also be true? Within this theme or framework, an advocate presents evidence that both reinforces the theme and establishes or defeats the elements of the offense, depending upon which side the advocate represents. While the theme is not an element of the offense, it provides a context within which the factfinder can evaluate the evidence.

The following example illustrates how to develop and to use a theme in a court-martial. In a murder case, the prosecution recognizes that the keys to proving premeditated murder will be establishing beyond a reasonable doubt the identity of the accused as the killer and that at the time of the killing the accused had a premeditated design to kill. As a result, the prosecution decides that its theme must encompass the motive for the killing. If the panel believes the accused had a motive, they will view the evidence through the tint of the motive, and they will be more likely to believe that the accused killed the victim and that the homicide was premeditated.[55] The evidence supports the theme that the accused was a rejected paramour who could not allow the victim to live because she refused his love. The government will develop the following facts within this theme: the accused had a romantic relationship with the victim; the victim acrimoniously terminated the relationship; the accused had several confrontations with the victim in the days prior to the shooting; and the accused obtained a weapon. These facts establish the theme. The theme then provides the

48. Likewise, during the analysis of the elements, the value instruction should be listed next to the value element and the circumstantial evidence instruction should be listed next to the intent element. *See id.* para. 7-16, 7-3; *see also* MCM, *supra* note 4, pt. IV, para. 46c(1)(f)(ii) (explaining the intent element of larceny). Paragraph 46c(1)(f)(ii) of the *MCM*, part IV, provides insight into the types of circumstantial evidence that can be presented at trial and incorporated into a specific intent, circumstantial evidence instruction.

49. The three components of entrapment are: (1) the transaction was completed; (2) the accused lacked the predisposition to commit the offense; and (3) the government induced the accused to commit the offense.

50. "When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition." MCM, *supra* note 4, R.C.M. 916(g), discussion (citing MIL. R. EVID. 404(b)).

51. U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-4 through 2-6 (14 June 1993) [hereinafter FM 100-5].

52. *See* UCMJ art. 134 (West Supp. 1996).

53. United States v. Foster, 40 M.J. 140, 143 (1996).

54. The factfinder may adopt a theme somewhere in between. For example, in adult-on-adult sexual assault cases, the prosecution and defense evidence often appears to be at opposite ends of the consensual spectrum. The prosecutrix alleges that nothing she did could have been mistaken as granting consent. The accused, on the other side of the spectrum, alleges that the prosecutrix agreed to everything prior to and during the alleged offenses. Faced with these contrary themes, factfinders could and have adopted a theme somewhere in between (recognizing that the government has the burden of proving lack of consent beyond a reasonable doubt).

context or "tint" by which identity and premeditation can further be established. For example, scientific evidence such as analysis of blood stains found on the accused's clothing becomes more incriminating. Eyewitness identifications of the accused are more convincing. The accused's self-serving statements are less believable. Having established its theme, the government finds it easier to prove identity and premeditation because the factfinder is wearing the "eyeglasses" tinted with motive. Of course, this theme should be woven into the government's voir dire, opening statement, presentation of evidence, and closing arguments.

In the same example, the defense theory may be that the accused did not commit premeditated murder; rather, the accused killed the victim while in a fit of anger and, therefore, can be guilty only of voluntary manslaughter. The defense theme provides that there was no plan because the accused acted on an uncontrollable impulse. Here, the defense seeks to focus on the accused's acts only at the time of the killing, because it was at this point that the accused was "in the heat of sudden passion caused by adequate provocation."[56] Although a rejected paramour, the accused visited the victim to rekindle their relationship. The victim treated the accused mercilessly, taunted him, and sent him into a rage. It was the victim's maliciousness at the time of the killing that caused the regrettable event.

These themes are inconsistent as to the accused's degree of guilt, but the government's burden of proof has not shifted. The factfinder will decide which theme is more logical when evaluating the evidence. Within the framework of the more logical theme, the factfinder will evaluate the credibility of witnesses and decide if the government has carried its burden of proof.

If the trial advocate does not provide a theme, the factfinder (military personnel trained to apply logic[57]) will develop their own theme. It is to the trial advocate's advantage to assist factfinders in the development of a theme or context within which members can *logically* analyze the evidence.

Apply Common Sense to the Case and Its Presentation

Having noted that factfinders seek a theme within which they can evaluate evidence, counsel should also recognize that factfinders will use common sense in evaluating the evidence. Members are selected based upon age, education, training, experience, length of service, and judicial temperament.[58] The purpose of establishing these criteria is the creation of a panel with common sense and maturity of judgment. Noting their qualifications, the military judge will instruct the members to use their common sense, knowledge of human nature, and ways of the world.[59]

If counsel do not use common sense when orchestrating their presentations, factfinders will note the deficiencies of counsel and, to counsels' detriment, apply their own common sense. For example, the accused is charged with assault in which grievous bodily harm is intentionally inflicted. The accused is claiming voluntary intoxication for the purpose of raising a reasonable doubt as to the existence of specific intent.[60] The accused takes the witness stand on the merits. While the accused testifies that he cannot remember anything incriminating because of his intoxication, he can amazingly remember everything that is exculpatory and which took place just prior to, during, and after the incident. While the accused may have consumed numerous alcoholic beverages, common sense will lead the factfinder to conclude that the defense of voluntary intoxication does not apply and that the accused lacks credibility.[61]

In another example, the accused pleads guilty to receiving stolen military property (explosives). After having been found guilty, the accused states in his unsworn statement that although he knew the explosives were stolen when he received them, he did not turn the property over to his chain of command because they were "distant and aloof." The accused alleges that the chain of command consisted of poor leaders who had closed down lines of communication with the lower-ranking enlisted soldiers. At this point, such a contention seems plausible because there is no logic error. The accused has presented extenuating evidence of why he kept the stolen explosives hidden in his room—he could not turn to the poor leaders in his

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55. Motive is such strong evidence that members may equate it with an element of the offense. While its potency makes it a strong theme, counsel must be wary. Trial counsel should use this strength if it is available. If there is no apparent motive, defense counsel should consider using its absence as the defense theme: "There is no reason, no motive, for the accused to have committed this crime. Common sense tells you that based upon this lack of motive, the accused did not commit this crime."

56. *See* MCM, *supra* note 4, pt. IV, para. 44.

57. *See* FM 100-5, *supra* note 51, at 2-12 (discussing the logic framework within which commanders integrate and coordinate functions to synchronize battle effects).

58. UCMJ art. 25 (West Supp. 1996).

59. The closing substantive instructions on findings include the following: "In weighing and evaluating the evidence, you are expected to utilize your own common sense, your knowledge of human nature, and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence." BENCHBOOK, *supra* note 5, at 53.

60. *See* MCM, *supra* note 4, R.C.M. 916(l)(2).

61. *See* BENCHBOOK, *supra* note 5, instr. 7-7-1 (pertaining to the credibility of witnesses). "These rules apply equally to the testimony given by the accused." *Id.*

chain of command. Next, the defense presents numerous members of the accused's chain of command, to include past and present team leaders, squad leaders, platoon sergeants, and platoon leaders. They all claim to have worked closely with the accused (to include daily contact with the accused during the period that covers the possession of stolen explosives), to know the accused extremely well, and to have opinions concerning his outstanding rehabilitative potential. Are these two presentations logical? Common sense provides that they are inconsistent. The defense began by attacking the professionalism of the chain of command and impeaching their abilities as leaders. Then, the defense called upon this same chain of command to render good-soldier testimony, as if they are competent leaders with opinions that should matter. Which of these two inconsistent presentations should be believed? Has the defense presentation lost credibility, making both presentations unbelievable?

Voir Dire

The discussion for R.C.M. 912(d), Examination of Members, states that "[t]he opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."[62] Not minimizing the requirement to select a fair and impartial panel, counsel should nonetheless also use voir dire to educate the panel and to introduce case themes.[63]

Establishing the Theme

Voir dire is the first opportunity to educate the panel concerning the key issues of the case and respective themes. During voir dire, counsel should present their themes through well-worded questions that take the members from general statements with which everyone agrees to more pointed questions that establish counsel's themes. The following example illustrates this technique: Defense counsel in a rape case wants the members to accept the theme that the prosecutrix is lying about lack of consent so that she can preserve her marriage. Going from general to more particular, questions might be:

> The military judge will instruct you that an element of rape is that the sexual intercourse must be nonconsensual. Does everyone understand that it is not rape if the woman consented to sex?
>
> Do each of you understand that you have the duty to determine the credibility of witnesses?
>
> Does everyone agree that one way for you to determine credibility is if a person has a motive to lie?
>
> Do you all agree that in general, no one wants to be caught doing something to cause their divorce?
>
> Does everyone agree that infidelity is a cause of divorce?
>
> Does everyone generally agree that a woman could lie about her infidelity to protect her marriage?

These voir dire questions begin by educating the panel concerning the lack of consent element required for a rape conviction. The second and third questions address credibility in general. The remaining questions become more focused and introduce the defense theme—a married prosecutrix wants to protect her marriage and will lie concerning consensual sex. Since the military judge will later similarly instruct the panel concerning rape's required element of lack of consent and determining witness credibility, it is beneficial for defense counsel to link these key instructions to the defense theme as early as voir dire.

Establishing Challenges for Cause

Counsel should not use group voir dire to establish individual challenges for cause. In the ordinary voir dire setting, the military judge asks the panel members numerous "qualification" questions from the *Military Judges' Benchbook*, and all members answer either affirmatively or negatively in unison. If a panel member provides a response that indicates a potential disqualification, counsel should note the response and address the issue during individual voir dire of the member. Asking questions that attack the impartiality of a member in front of the other members could be viewed by the group as an attack upon the group itself.[64]

Once in individual voir dire, counsel should not begin an attempt to establish a challenge for cause by asking the individual member leading questions that call for legal conclusions. For example, counsel should not ask "Isn't it true that because your senior rater is also on the panel, you would not independently weigh the evidence and vote your conscience?" Rather, he should begin with questions that require factual answers. Counsel should ask how often the individual member and his senior rater work together, when was the last time the junior told the senior that he disagreed with the senior in the presence of others, when is the junior member due to receive an officer or noncommissioned officer evaluation report, and whether the

62. MCM, *supra* note 4, R.C.M. 912(d), discussion.

63. Counsel should draft questions carefully, ensuring that the questions have a proper purpose and are not compound or confusing. Counsel do not want to be interrupted and corrected while making their first impression with the members.

64. Also, a member's response to a question has the potential to taint others. This issue can be avoided by using individual voir dire to ask questions that could disqualify others. *See* MCM, *supra* note 4, R.C.M. 912(d), discussion.

junior member will be in a promotion zone or a service school zone in the near future. These facts lay a foundation, and counsel can then ask leading questions, such as: "Wouldn't you agree that someone who is receiving a rating within a month may be hesitant to express disagreement with her rater?" The fact-based questions have accomplished two purposes: (1) they have exposed the potential disqualification to the military judge, and (2) they have exposed the bias to the member such that the member might be unable to give clear, reassuring, unequivocal answers concerning the potential disqualification.

When exercising challenges for cause, counsel should combine several reasons together and argue the mandate of the military appellate courts to liberally grant challenges. For example, a member is an officer who is rated by another member, knows a witness, and has "some" law enforcement training. While none of these facts alone establishes a challenge for cause, when grouped together and argued with the "liberal grant" mandate, an argument could be made that a challenge should be granted "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[65]

You Can Never Talk to a Witness Too Often

Trial attorneys should talk to potential witnesses early in the trial process and should talk to them often. During the entire process, counsel must remember to treat witnesses with courtesy and respect and to keep them informed of the status of the case. Counsel should also tell witnesses to call if the opposing party interviews them. This will enable counsel to stay apprised of opposing counsel's discussions with witnesses. To put witnesses at ease, counsel should also consider interviewing witnesses at their locations. Who knows what counsel will discover if they find themselves at the accused's unit?

Counsel should not discourage their witnesses from speaking to opposing counsel, with limited exceptions.[66] Justice is served when both counsel have full knowledge of the facts of the case. The court-martial is then a true test of the evidence.

Assisting Victims and Witnesses

If the witness is a victim, the witness will be more eager to assist in the trial process when counsel are eager to help the witness. When appropriate, trial counsel should inform the victim of her rights under Article 139.[67] Although it is often overlooked, Article 139 provides a method for compensating victims of certain property crimes. Counsel should be thoroughly familiar with procedures to direct meritorious claimants through the claims process. Additionally, counsel should strive to protect victim and witness rights under Chapter 8, *Army Regulation 27-10*.[68] Protecting the rights of victims ensures justice and mitigates victim suffering.

Cross-Examine Every Witness[69]

Cross-examination should be brief and to the point—less is usually better. When asking non-foundational, essential ques-

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65. *Id.* R.C.M. 912(f)(1)(N). *See* United States v. Guthrie, 25 M.J. 808 (A.C.M.R. 1988).

66. AR 27-26, *supra* note 3, Rule 3.4. The rule provides that:

> A lawyer shall not:
>
> . . . .
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
> (1) the person is a relative or an employee or other agent to a client; and
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Id. The comment to Rule 3.4 notes:

> The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like . . . .
>
> . . . .
>
> Paragraph (f) permits a lawyer to advise relatives, employees, or other agents of a client to refrain from giving information to another party, for such persons may identify their interests with those of the client.

Id. comment.

67. UCMJ art. 139 (West Supp. 1996) (pertaining to the redress of injuries to property).

68. *See* AR 27-10, *supra* note 8, ch. 18 (pertaining to victim/witness assistance).

tions, counsel should phrase the question in a leading fashion. Every question should have a purpose and should be written out in advance.[70] Counsel should seek to impeach foundations, to expose biases, and to impeach memory. To be effective, trial attorneys must not simply rehash direct examination. Additionally, counsel should never cross-examine in chronological order because chronology allows the witness to simply repeat the story as practiced. Instead, counsel should ask questions out of their natural sequence so that the witness' memory will truly be tested.

Trial counsel must *always* be prepared to cross-examine the accused. If the opportunity to cross-examine the accused on findings or on sentencing arises, trial counsel should seize the opportunity. Cross-examination of the accused can be, and often is, the turning point in a court-martial. Trial counsel should attempt to get the accused to agree with some, if not all, of the elements. For example, the prosecutor could ask the accused, "You agree that the compact disk player is worth $125.00?" When he agrees, value is then uncontroverted.

All too often, the government counsel is unwilling to ask the defense's good-soldier witness relevant questions that test the foundation of the witness' opinion. Assume the accused's staff sergeant supervisor testifies that the accused is a good soldier. Counsel should cross-examine the witness with pointed questions. For example, trial counsel could ask the good-soldier witness how many promotion points the accused has and what the cutoff score is for the accused's military occupational specialty. If the witness doesn't know, the factfinder may discount the good-soldier opinion because the witness lacks sufficient knowledge of the accused, his current status, and his service record. Has the witness ever recommended the accused for an award, a citation, or soldier of the month? Has the witness ever given the accused, the alleged excellent performer, a positive counseling statement? If the accused is really that good, why didn't the witness somehow tangibly recognize the accused's work performance? Additonally, if there is uncharged misconduct, counsel may cross-examine the good-soldier witness about that misconduct if it would logically bear upon a character trait to which the witness testified.[71]

Argument

Every panel member in front of whom military counsel will argue has given or has attended military briefings. They anticipate a similar format from trial advocates: an introduction, a body, and a conclusion. For an advocate to be successful, he should use the introduction and conclusion to stress his theme.

In the introduction, counsel should inform the members that his presentation has a certain number of major points in support of the theme, and he should identify those points. The body should be organized into three to five components or major topic areas. All components must support the theme. Although major topics will necessarily vary from case to case, some common major topics are: elements of the offenses and the facts of the case, physical evidence, credibility of witnesses, investigator errors, eyewitness identification, special defenses, and a discussion of instructions (for example, a discussion of why the panel should or should not apply the permissible inference relating to the unexplained possession of recently stolen property in a larceny case[72]).

Organization

As an advocate proceeds through the major topics, he must keep the members on track. In this vein, counsel could tell the members, "I am now going to address the second major point—the lack of credibility of the government's witnesses." Counsel could then argue the issue as it applies to each witness. The members expect counsel to be organized. If counsel is not organized, he will lose credibility with the members.

Being organized begs for the use of charts or diagrams. Charts force advocates to outline their presentations and to think in terms of three to five major components. They give the factfinder visual aids which make them better able to follow, to understand, and, hopefully, to adopt an advocate's arguments and theme. Every trial and defense counsel has access to some graphics presentation program, and they should use it. Since the members will not have access to the visual aids during their closed-court deliberations, counsel can tell the members to copy important information from the visual aids.

The members will hold a full and free discussion prior to voting. Advocates should encourage the members to use that time to discuss the major topics in the sequence in which they

69. The exception to this general rule may be the accused's parents during sentencing.

70. This is possible because counsel will have interviewed every witness; knows what every witness will say; and can, therefore, plan a cross-examination accordingly. Counsel should keep in mind the adage which warns, "Do not ask a question to which you do not know the answer."

71. *See* United States v. Brewer, 43 M.J. 43, 47 (1995).

> "[I]nstances of conduct in between the period that was the basis of the opinion and the time of the offense equally are relevant on the question whether, as the direct testimony would imply, appellant had the same character traits when the charged crime occurred as when the witness knew him."

Id.

72. BENCHBOOK, *supra* note 5, para. 3-46-1, note 4.

were presented. An advocate's chances for success increase when the members follow the sequence of his topics.

Avoid Arguing Personal Beliefs or Opinions

Counsel must not argue personal beliefs or opinions,[73] such as: "I (or we or the government) believe the accused committed larceny." Instead, counsel should argue: "The accused committed larceny."

Be Pessimistic

Prior to the first Article 39a session in a case, counsel should assume that things will go wrong with their cases and should plan accordingly. Has everything been done to ensure that the crime laboratory will be done with the evidence prior to trial? What if the military judge holds that some critical piece of evidence is not admissible? What if opposing counsel "opens a door" or introduces a certain piece of evidence? Does a potential ruling render one of the elements unsupported by evidence? Is there an alternate plan?[74] Counsel must be prepared for anything and everything. If advocates expect and plan for the worst, nothing will take them by surprise.

Project Confidence

While a pessimist prior to trial, an advocate must exude confidence once he is in court. He must always be and look in control. When opposing counsel calls a witness, counsel should pull out his manila folder for that witness[75] and show the members that he is ready. Counsel should know what his opponent's cross-examination of witnesses will be and should have effective redirect questions prepared.

Counsel should be positive and use positive language. For example, the following argument uses weak language: "The government hopes that you adjudge a bad-conduct discharge." A more positive way to make the argument is: "A bad-conduct discharge is the required punishment for the accused's serious criminal misconduct. Give him what he deserves. Justice demands it." Counsel who have carefully prepared can and should be confident.

Conclusion

There is no secret to success in the courtroom. Diligence and careful preparation produce quality presentations and result in justice being served. The accused, the convening authority, the triers of fact, the military justice system, and the United States deserve nothing less.

73. United States v. Clifton, 15 M.J. 26 (C.M.A. 1983); United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977).

74. Evidence that may be held inadmissible for one purpose may become admissible for another. For example, the military judge may hold that certain uncharged misconduct is inadmissible under M.R.E. 404(b), other crimes, wrongs, or acts. This evidence may become admissible for cross-examination of a defense character witness under M.R.E. 405(a).

75. If using a file system, the folder should contain the prepared direct or cross-examination for that witness, as well as unmarked copies of all prior statements of that witness. The prior statements may be needed for refreshing the witness' memory or for impeachment. *See* MCM, *supra* note 4, MIL. R. EVID. 612, 613.