A View from the Bench: Make the Routine, Routine

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Introduction

I once attended the retirement dinner for a long time Army civilian employee. He happened to be a retired sergeant major with over forty-five years of combined service to the Army. When it came time for him to speak at the end of the evening, he pulled out a weathered and yellowed index card. On that card he had written his rules for success. One of those rules has always stuck with me. It simply said, "Make the routine, routine."

All counsel, and particularly new counsel, could learn from that old sergeant major. One of the best ways to begin building your professional reputation with the Court and opposing counsel is to make the routine, routine. Let us look at three areas where counsel, with little effort, can begin this process: specifications, script, and suspenses.

Specifications

Read them, read them, and then read them again. The first contact military judges have with a case is when they receive the referral packet. As a matter of course, the first thing we all do is read the charge sheet. We are often concerned with immediately spotting errors and issues with the drafting. Hopefully, the charges have been drafted and—prior to preferral—reviewed by several sets of eyes in the Office of the Staff Judge Advocate. For a general court-martial, the charges have been investigated[1] and the convening authority has been advised that "each specification alleges an offense under the [Uniform Code of Military Justice (UCMJ)]."[2] When you immediately spot a specification that fails to state an offense, it does not bode well for the credibility of the party responsible for those charges.[3] When the government has displayed the inability to perform the routine task of taking what it believes to be the facts of the case and inserting them into a properly drafted specification, its ability to perform more complex tasks is called into question.

This failure to review specifications is not confined to trial counsel. On more than one occasion, pretrial agreements (having been drafted by the defense, reviewed by the Office of the Staff Judge Advocate, and approved by the convening authority) contain offers by the accused to plead guilty to a specification that fails to state an offense. Again, this does nothing to enhance the credibility of those involved in the process. It also cannot inspire much confidence by the accused in the defense counsel if the judge dismisses a specification for failure to state an offense after that counsel advised the accused to plead guilty to that specification. Additionally, it creates more work for everyone (not to mention another visit to the convening authority) to ensure that the parties intend to be bound by the agreement if the defective specification is dismissed.

Nothing is more challenging in current practice than drafting specifications alleging violations of one of the many versions of Article 120, UCMJ. A suggested starting point is the relevant dates. Once you have these nailed down, counsel can determine with certainty the applicable version of Article 120 and either draft the specifications accordingly or review it against the sample specifications to ensure it states an offense. A best practice that is used in one jurisdiction is to state the Article 120 offense and applicable statute in parenthesis after the Specification (for example: Specification (sexual assault, offenses occurring on/after 28 June 2012)). This aids all parties in quickly determining if the Specification has been correctly drafted.

A good check on your draftsmanship is to hand the charge sheet and case file to another counsel in the office who has not been involved in the case. Things may immediately jump out to a fresh set of eyes that you do not notice because you have been working the case and can fall into the trap of seeing what should be there, not necessarily what is there.

It is not uncommon for new evidence to be discovered between the time the charges are initially drafted and referral. If this occurs, make the changes prior to referral. I have had cases where I point out an amendment that needs to be made to a specification only to have counsel tell me they were aware of the issue. Do not wait for the judge to find it; make the change prior to referral.

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2012).

[2] *Id.* R.C.M. 406(b)(1).

[3] In the author's view, credibility is the most important character attribute a trial attorney can have. Without it, a trial attorney cannot accomplish his two most important missions: educate and persuade the fact finder. Counsel at all times should be wary of the impact their actions may have on their credibility. But that is a topic for another article at another time.

From the defense perspective, pleading by exceptions and substitutions presents its own set of challenges. A quick way to make sure you do this successfully is to start with the specification as charged, delete the excepted words and/or figures, and then add the words and/or figures that are being substituted. Carefully examine the new specification. Does it state an offense? Is it the desired offense?[4] It takes more to make a wrongful sexual contact specification an assault consummated by a battery specification than excepting the words "wrongful sexual contact" and substituting the words "unlawfully touch." Yet many times approved pretrial agreements that purport to plead by exceptions and substitutions do not result in a specification that states an offense. Too often, the judge may be walking counsel through this process—for the first time—at arraignment. While counsel normally quickly see the problem, the problem could have been remedied much earlier (and possibly without another trip back to the convening authority with a newly revised pretrial agreement).

Script

Follow the script. It is there for a reason. If you have not invested time in learning (and understanding) the script, how can a judge have much confidence in your ability to actually present a case? Do not just memorize and mindlessly read the script; listen to yourself. What day was the accused served? What day is the arraignment being held? This information tells you if the statutory waiting period has expired.[5] Do not say it has expired if the dates you announce do not support that conclusion.

Defense counsel, there are several places in the script where the judge is going to ask, "Does the accused have a copy in front of him?" This should not be your cue to start shuffling though the case file looking for the pretrial agreement, stipulation of fact, or other appropriate document. Have the documents ready. You know what the judge is going to ask for and when he is going to ask for it.[6] Be prepared. Be professional.

Trial counsel, think about how you are going to swear in and identify witnesses. This is not difficult; yet it is an area where new counsel and some not-so-new counsel constantly struggle. For most witnesses, this will be their first time testifying at trial. They are nervous and not quite sure about where to go and what to do. Often times as the witness is trying to make their way to the witness stand, counsel will blurt out as quickly as possible, "Please state your name, rank, and unit of assignment." The witness invariably gets only part of the way through their answer before asking, "What was the third question?" This is an area where counsel need to slow down and take their time. Allow the witness to get to the witness stand before asking him to face you and raise his right hand. Once he has completed the oath, give him time to get seated comfortably in the witness chair. Only then should you ask him for the appropriate identifying information.[7]

A good procedure for handling this matter is found in Rule 16.3 of the *Rules of Practice Before Army Courts-Martial*. The trial counsel can simply ask the witness all the required information as a leading question so all the witness has to do is respond "Yes." This gets all the information on the record, does not confuse the witness, and provides an efficient and smooth beginning to the testimony.

Suspenses

Meet them. They are not a surprise. Usually, they will be set out in the pretrial order or, in the absence of a pretrial order, in the *Rules of Practice before Army Courts-Martial* or the Rules for Courts-Martial. In those cases where you cannot meet them, ask the judge for an extension before the suspense expires. Not only is this a rule, it is basic professional courtesy. Failure to meet a suspense date set by the Court sends the signal that you are not prepared for trial. For example, how can a party be late submitting its witness list for trial when the witness list is due beyond the date the party said it was "ready" for trial at arraignment? How can you tell the Court you are "ready for trial" if you have not decided who you are going to call as witnesses? Post-referral is not the time to begin trial preparation. That may not be what is going on, but that is the impression it gives. As an advocate, you should always be mindful of the appearance of your actions.

As mentioned, if you know you will not be able to meet a suspense date, contact the judge and ask for an extension *prior to* the suspense date. New evidence may be discovered, witnesses' testimony may change, or any

[4] Note that the *Rules of Practice Before Army Courts-Martial*, Rule 2.2.2, requires defense counsel to provide written notice of such a plea to the judge. If that plea is to a lesser-included offense, that notice will include a re-written specification. RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL (1 Nov. 2013). It is good practice for counsel to provide this re-written specification to the judge in all situations in which the accused is entering a plea other than "guilty" or "not guilty" to the specifications of all charges and all charges.

[5] Many judges will provide counsel with a pretrial issues checklist, containing a list of questions designed to force counsel to "do the math" on these kinds of issues prior to arraignment. If your judge does provide you with such a checklist, do the judge the courtesy of having the answers to those questions prior to the Rule for Courts-Martial 802 session before trial starts.

[6] The pretrial issues checklist will likely also have a list of items the accused should have in front of him in either a guilty plea or a contested trial. Again, the judge provides this to you to force you to be prepared, but also to avoid those avoidable hiccups during trial that negatively impact counsels' credibility. No judge wants you to look bad on the record.

[7] Both trial and defense counsel should consider taking their witnesses into the courtroom as part of their witness preparation. Actually seeing where the witness will need to walk and sit when actually testifying will go a long way toward alleviating some of their nervousness.

number of things may happen that require you to seek additional time. Be proactive when this happens. Do not put judges in the position of having to constantly contact counsel to keep cases moving.

A final thought about suspenses: they are not a "no earlier than" date. It is certainly permissible (and appreciated) to receive some information earlier than the suspense date. What better way to show opposing counsel and the Court you are ready for trial than providing information earlier than required? You are ready to go! Do you want to be known as a counsel who keeps things moving or one constantly struggling to keep up? This is especially true with notice of forum and pleas. As these two decisions have a direct impact on docketing, the earlier you can provide this information to the Court, the more efficient the Court can be in allocating time and resources.

Conclusion

"Make the routine, routine." It sounds simple. All it takes is a little time and attention to detail.