

The Art of Trial Advocacy

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Tips in Hemp Product Cases

The hemp product (specifically hemp oil) defense has been used successfully by the defense in recent cases.¹ It is not, however, a guaranteed “winner” for the defense. As in any case, to use or rebut it successfully, both sides need to be thoroughly prepared before they go to court. Both sides also need to be ready to react to developments during trial. This note looks at four areas that have particular relevance for a hemp product defense: (1) notice of the defense, (2) whether to put the accused on the stand, (3) the government’s rebuttal strategy, and (4) the need for a clarifying instruction on whether the consumed item is a “controlled substance.”

Notice

Rule for Courts-Martial (R.C.M.) 701(b)(2) requires the defense to notify the government of an innocent ingestion defense prior to trial on the merits.² This must include the place or places where the ingestion took place as well as the circumstances under which it took place, and the names and addresses of witnesses on whom the defense is going to rely on to establish the defense.³ The rule, however, does not require a specific time when this information needs to be disclosed; it simply requires that the defense disclose the information “before the beginning of trial on the merits.”⁴

Notice or the absence of notice can impact either side in hemp product cases. Often, the defense may be “locked in” to a hemp product defense because of an accused’s prior statements. In these cases, the government should expect a hemp product defense and, even without specific notice, it should interview witnesses who allegedly saw the accused obtain or use the product. The government should also have the product tested.⁵ On the defense side, if the accused has not “locked in” the trial strategy with prior statements or acts, counsel should be wary of tipping their hand too soon regarding the defense

they intend to use. Defense counsel often reveal their strategy in urinalysis cases by requesting the government to pay for the defense expert. A way to avoid this is to have the accused pay for an expert, thus, avoiding this potentially de facto notification of the defense strategy.

If the defense does not reveal its hemp product strategy until (as the rules permit) just prior to the trial on the merits, the government may well have to seek a continuance. Obviously, if the government has had no opportunity to examine the defense’s hemp oil case, it may be unprepared to rebut it at trial. Taking the necessary steps, such as testing the hemp product for THC, could likely take weeks and may slow down the docket. In this situation, the government may face a skeptical or impatient military judge. The best solution for the government is to anticipate the hemp product defense, even if not formally notified of it, and be ready to proceed as best as possible, in case a continuance is not granted.

Should the Accused Testify?

Whether the accused takes the stand may be the most important decision the defense makes. The accused may have made previous incriminating statements, or there may be independent evidence linking him to marijuana use. To plausibly explain his defense, the defense may feel compelled to put the accused on the stand. A recent case demonstrates that the accused does not always need to take the stand to be successful.

In that case, a Marine Corps lance corporal successfully raised a hemp oil defense after testing positive on a random urinalysis.⁶ The defense was able to admit into evidence valuable information about the accused’s alleged consumption of hemp oil products without having the accused testify.⁷ Rather, a defense witness (a high school friend of the accused’s wife who was staying at their home) testified that she had seen the

1. See, e.g., John Pulley, *AF Acquittal Prompts Review of Drug Testing*, ARMY TIMES, Jan. 26, 1998, at 6; James W. Crawley, *Military’s Drug-Test Program Shaken: Marine Cleared; Says He Used Diet Product*, SAN DIEGO UNION-TRIB. Apr. 4, 1998, at 1.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(b)(2) (1995) [hereinafter MCM].

3. *Id.* Technically, a hemp product defense is not an “innocent ingestion” defense at all, since the accused is not saying he innocently ingested a controlled substance. Rather, he is saying that he (innocently or not) consumed a *legal* substance. The policy behind the disclosure of both defenses is the same—allowing the government enough time to respond to the defense, thus, saving the time and expense of a continuance.

4. *Id.* There may be local rules that require earlier notice.

5. Memorandum from Trial Counsel Assistance Program (TCAP) to MAJ Walter Hudson, subject: Hemp Oil Cases (undated) (on file with author). The TCAP recommends that trial counsel contact TCAP as soon as possible after a hemp product defense arises.

6. Crawley, *supra* note 1.

7. E-mail message from Capt. David P. Berry, Judge Advocate Military Justice, Headquarters, U.S. Marine Corps to Maj. Brian T. Palmer, Judge Advocate Military Justice, Headquarters, U.S. Marine Corps forwarded to LTC William M. Mayes (Apr. 10, 1998) (on file with author).

accused using hemp seed oil.⁸ The defense also had a physiologist testify as an expert about hemp seed oil products being high in “Omega 3 fatty acids.” The physiologist also testified about the accused’s diet, based upon conversations he had had with the accused.⁹ This was very effective for the defense. Not only did the accused not have to testify, but an expert gave additional credibility to the defense by explaining the accused’s use of the product.

The successful use of this testimony in the case described above should cause the defense to consider whether putting the accused on the stand would be the best option. If the government has no (or very little) evidence to rebut the hemp product defense, and the defense has extensive evidence to establish it, exposing the client to cross-examination seems very risky. It may be an unnecessary risk, especially if the defense is up against a seasoned and well-prepared prosecutor.

Government Rebuttal

Before deciding how to proceed with its case, to include its rebuttal case, the government will have to gather all of the facts. The government will need to get very precise information, as in any typical innocent ingestion defense. It will need to find out how much of the product the accused consumed, when and where he consumed the product, who observed him consume it, and (not to be forgotten) *why* the accused consumed the product.¹⁰ The government should not forget, however, that a key part of rebuttal strategy (surprise) is lost in dealing with a hemp product defense, because R.C.M. 701(a)(3)(B) requires defense notification.¹¹

Who are potential rebuttal witnesses for the government? If possible, the government should have an expert who can rebut the hemp product defense by testifying that the product could not produce THC in sufficient levels to register a positive THC result. The expert should also testify that there is a disparity between the THC level in the product and the urine, or some other such anomaly. The government may want to have a second type of drug test that would indicate that the accused is being untruthful. For example, if the accused said he used the

hemp oil product only once, or very infrequently, a hair test could establish more frequent and longer term use.¹²

The Need for an Instruction on Whether the Metabolite is the Result of a Controlled Substance

The hemp product defense is different than the innocent ingestion defense in a fundamental way. An innocent ingestion defense deals with the mental status of the accused (he did not *know* the substance he consumed was a controlled substance). When he asserts the hemp product defense, he asserts that he consumed a *legal* product. The issue is not the accused’s knowledge, but the actual nature of the substance (part of the first element of Article 112(a), Uniform Code of Military Justice).¹³

In light of a hemp product defense, the fact-finder must determine whether the metabolite in the accused’s urine was the result (at least in part) of marijuana use. If it was the result of a legal hemp product, the remaining elements of Article 112(a) may be irrelevant.¹⁴ If the fact-finder is convinced that the metabolite in the urine is a legal hemp product, the accused’s knowledge makes no difference. Even, for example, if he believed that the product he was using *was* marijuana, if it was a legal hemp product, he has committed no crime.

Defense counsel must make sure the panel understands this point and should make it clear by offering an instruction that states that (1) the hemp product the accused alleges to have used is legal, and (2) that the panel must determine whether the metabolite found in the urine was the result of a controlled substance and not a legal product.¹⁵ The defense should request an instruction that only if the panel determines that the metabolite was the result (at least in part) of a controlled substance can it properly go on to determine whether the use was wrongful.

These are just a few points that may prove useful when presenting or rebutting a hemp product defense. The hemp product defense is currently the “defense of the month” in urinalysis cases. Therefore, at least for the immediate future, both sides must understand the defense, and how to use it or counter it effectively at trial. Major Hudson.

8. *Id.* Furthermore, the accused had allegedly taken the product as a body building supplement, and he looked “like Arnold Schwarzenegger at the counsel table.” *Id.*

9. *Id.*

10. David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 17.

11. MCM, *supra* note 2, R.C.M. 701(a)(3)(B).

12. See Samuel J. Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10 (discussing hair analysis).

13. The two parts of the first element of use are: (1) use by the accused and (2) of a controlled substance. UCMJ art. 112(a) (1995).

14. The government must ensure that the fact-finder understands that simply establishing that the accused used legal hemp products does not necessarily mean he did not also smoke marijuana (he may have consumed both). He may have used legal hemp products deliberately to mask his marijuana use.

15. *The Military Judge’s Benchbook* instruction for wrongful use of a controlled substance contains no instruction defining a “controlled substance.” U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE’S BENCHBOOK, para. 3-37-2 (30 Sept. 1996).