

**A View from the Bench**

**“You Don’t Know What You Don’t Know”**

**Perspectives from a New Trial Judge**

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**Introduction**

Last year, I was privileged to be selected to serve as a military judge. The job provides a great opportunity to experience the courtroom from a perspective different from that of a trial or defense counsel. However, one thing that has not changed is my role in training and mentoring counsel to help improve their advocacy skills. Throughout my career, I have watched judges mentor counsel in different ways, and I have tried to take what I have learned to assist those practicing before me now.

While I have seen counsel gradually improve their level of advocacy by avoiding some common mistakes, those who fail to improve can still do so if properly trained. As I always tell counsel, “you don’t know what you don’t know.” So, with that in mind, here are some observations I can share to help counsel become better litigators.

**Common Mistakes by Government Counsel with the Trial Script**

Misreading the trial script is one of the most common errors I have seen Government counsel commit. Often, counsel err because they do not understand what they are saying and do not ask questions to clarify the meaning behind the script. Frequently, no one appears to have taken the time to explain the various parts of the script to them.

Stating the wrong individual when announcing who preferred the charges is a common mistake. The correct individual is the accuser who swore to the charges, as reflected in block 11a on the DD Form 458, Charge Sheet. Instead, some counsel incorrectly identify the person who informed the accused of the sworn charges (in block 12) as the person who preferred the charges. While these two individuals can be the same person, often they are not.

Another common mistake is citing the wrong date for the service of referred charges on the accused. This date is often confused with the date charges were read by the command to the accused after preferral or the date the convening authority referred the charges. Both are incorrect. The appropriate date is the date referred charges were actually served on the accused. This is important because

the three- or five-day statutory waiting period under Article 35, Uniform Code of Military Justice, does not begin until actual service of the charges.

Finally, I have noticed that trial counsel sometimes indicate that the convening authority made a recommendation as to disposition of the charges. The convening authority does not make a recommendation as to disposition; the convening authority actually disposes of the charges, sometimes by referring them to either a special or general court-martial.

Many counsel make these simple mistakes, but they are easy to correct once they have been explained.

**Attention to Detail in Preparing Court-Martial Charges**

One circumstance that should not arise, but often does, is the preferral of court-martial charges drafted by a trial counsel who has not interviewed essential witnesses in the case. Instead of interviewing witnesses, some trial counsel rely solely on sworn statements for information about the case. This reliance on sworn statements raised issues in three recent contested courts-martial. In one case, a female victim revealed in her sworn statement that she was choked by the accused. The Government assumed the accused choked the victim with his hands and drafted the specification accordingly. During pretrial preparation, however, the victim told the trial counsel that the accused used his forearm to choke her. A basic interview with the victim before charges were preferred would have ensured the specification accurately reflected the manner of assault.

In two other cases the trial counsel charged the wrong location. In one, the specification alleged the offense occurred at Fort Hood when the offense actually occurred in San Antonio. In another case alleging desertion with the intent to shirk hazardous duty, the specification listed the accused’s unit as a forward operating base in Iraq that was actually four hours from the unit’s actual location. The preferral of charges listing a location that was not even near the unit’s location demonstrates the problems that can arise when counsel draft charges without talking to essential witnesses. Inattention to detail can significantly affect the

Government's case, particularly when an error is considered a major, rather than a minor, variance.

Something that should already be common practice is the review of charge sheets by more than one person. I often see specifications on charge sheets that have been changed after arraignment for numerous reasons, including the failure to include words of criminality or the omission of entire elements. Apparently, no one took the time to compare the specifications on the charge sheet with the model specifications in the *Manual for Courts-Martial (MCM)*<sup>1</sup> or the *Military Judges' Benchbook*.<sup>2</sup> Counsel should always endeavor to use the model specification, absent a compelling reason. Except for Article 133<sup>3</sup> offenses and clause 1 and clause 2 offenses under Article 134,<sup>4</sup> creativity in drafting specifications is not helpful. If the chief of justice does not review the charge sheets, then ask the deputy staff judge advocate or other experienced judge advocate to look over them. It should not be up to the military judge to catch the mistakes that result from poor preparation or inattention to detail.

### Think Before You Speak

Counsel on both sides of the aisle should think before speaking, especially in front of panels. Your words can greatly impact the panel's perception of you and, by extension, your case. In one contested panel case, after a witness had finished testifying on the merits, I asked both counsel whether the witness was excused temporarily or permanently. Without thinking, the defense counsel stated he wanted the witness temporarily excused *so he could recall the witness during sentencing proceedings*. The accused was subsequently convicted. While the Freudian slip may not have been the reason, a defense counsel should never give the members the impression that he or she thinks the accused is guilty. The military judge will not ask you why you want a witness temporarily excused, and do not volunteer one. If asked whether the witness should be temporarily or permanently excused, "Temporary excusal, Your Honor," will suffice, especially in front of members.

In another contested panel case, a trial counsel announced in front of the panel his objection to a member's questions of a witness. Before speaking, the counsel failed to consider the impact his declaration could have on the panel's perception of the Government's case or the possibility that the panel would see the objection as an attempt to keep evidence from them. If you need to discuss

<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

<sup>2</sup> U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Jan. 2010).

<sup>3</sup> MCM, *supra* note 1, R.C.M. 133.

<sup>4</sup> *Id.* R.C.M. 134.

a matter, indicate so in writing on the bottom of the panel member's question or ask the judge for an Article 39(a) session so the issue can be addressed outside of the presence of the members.

Supervisory attorneys for both trial and defense counsel can resolve some of these issues by spending more time with them in court. This should include observing their subordinates in court so they can provide feedback on their performance after trial; sitting with newer counsel as a second chair in contested panel cases; reviewing common procedural issues and rehearsing how they could be handled; and reading records of trial so counsel mistakes can be identified and corrected before the next trial.

### Exuding Confidence

Even if petrified in court, successful counsel give the illusion of confidence in front of panels. You must harness your emotions, control your nervous habits, and be able to speak to the fact-finder without notes. You should strive to reach a point where you feel comfortable giving every opening statement and closing argument extemporaneously, focusing on the fact-finder when telling your story. Counsel who has prepared properly for trial will know the facts of the case inside and out, and the ability to present a case without notes or scripted examinations and arguments gives the appearance of confidence and lends credibility before the panel. Practicing opening and closing statements in front of others seated in the panel box can help prepare counsel for trial. Reading openings and closings rarely inspires confidence.

### Keeping Track of the Elements

Counsel's failure to keep track of evidence that has been introduced for each element of the offenses is another frequent problem. I have presided over more than a few judge-alone cases where I have asked more questions than the trial counsel, including asking witnesses about elements that were not covered by the Government. At a minimum, Government counsel should track the evidence that has been presented to ensure the case survives a Rule for Court-Martial 917 motion.<sup>5</sup> Noting what evidence has already been presented, on an elements checklist or other tracking document, can be a good job for a co-counsel or second chair. Once evidence to prove an element has been elicited—through witness testimony, a stipulation of fact or stipulation of expected testimony, documentary evidence, or judicial notice—the element can be checked off the list. Before resting, both trial counsel should review the elements checklist to ensure they have offered evidence to prove each element of each offense beyond reasonable doubt. With

<sup>5</sup> *Id.* R.C.M. 917.

easy access to the electronic *Benchbook* on the Trial Judiciary Homepage,<sup>6</sup> counsel have no excuse for not having the elements printed off and ready for use at trial.

### **Discovery Issues**

An issue that never seems to disappear is lack of discovery. I recently witnessed Government counsel attempt to admit evidence at trial that appeared to be clearly covered by a defense discovery request but that was not turned over prior to trial. When asked to explain the failure to provide discovery, I usually hear three responses: (1) I was not the initial counsel on the case so providing discovery was not my responsibility; (2) I thought the material had already been turned over; and (3) I didn't believe the material was covered by the defense discovery request. All of these answers are not very helpful during trial.

The easiest solution, especially when a specific defense discovery request has been made, is to ensure you can show you provided the evidence to the defense. One way to do this is to e-mail all the evidence to the defense. Keeping a

copy of the e-mail with all attachments creates an electronic record showing what material was provided and when it was provided. Alternatively, the Government can simply list each document provided to the defense and have the defense counsel or a defense paralegal sign for the documents. All too often at trial, the military judge must excuse the members and hear argument on whether certain documents were or were not provided to the defense. Simple recordkeeping and documentation of discovery maintained by the trial counsel can settle many discovery issues that arise at trial and prevent unnecessary delay of the case.

### **Conclusion**

Government and defense counsel can overcome basic mistakes with better trial preparation, greater attention to detail, and greater involvement by first-line supervisors. Counsel should not hesitate to seek the advice of more experienced practitioners and bounce ideas off more experienced litigators. The bottom line is that counsel should periodically remind themselves: "I don't know what I don't know."

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<sup>6</sup> U.S. Army Trial Judiciary, [https://www.jagcnet2.army.mil/JAGCNETINET/TERNET/HOMEPAGES/AC/USARMYTJ.NSF/\(JAGCNetDocID\)/Home?OpenDocument](https://www.jagcnet2.army.mil/JAGCNETINET/TERNET/HOMEPAGES/AC/USARMYTJ.NSF/(JAGCNetDocID)/Home?OpenDocument) (last visited July 15, 2010) (password protected).