A View from the Bench: A Military Judge's Perspective on Objections

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Introduction

As a trial advocate, do you stand in the courtroom and speak the words, "Objection, Your Honor," at the appropriate time and with a valid legal basis? Similarly, do you properly respond to objections made during the presentation of your case? If you don't, you should, because making and responding to objections is a critical trial advocacy skill. As with all aspects of trial advocacy, preparation[1] and anticipation are the key factors to this skill. This note seeks to assist trial advocates in mastering the basics of making and responding to objections in courts-martial proceedings.

Preparing to Make and Respond to Objections

Making and responding to objections is not an inherent skill. It requires serious study and preparation. Of initial consideration are Military Rule of Evidence (M.R.E.) 103[2] and rule 19 of the *Rules of Practice Before Army Courts-Martial*,[3] which govern the making of an objection in courts-martial. Additionally, a trial advocate must have a detailed understanding of the Military Rules of Evidence and the foundations required for the admissibility of evidence. To this end, counsel must undertake a thorough study of the rules and have references available at trial that will assist them in making and responding to objections. To assist trial advocates, the Criminal Law Department of The Judge Advocate General's School has prepared an excellent "Courtroom Objections and Answers" handout for use by counsel.[4] Additionally, trial advocates would be well served by being intimately familiar with an evidentiary foundations text and having it close at hand during trial.[5]

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[1] The key to effective preparation is planning. After identifying the desired end state, plan backward from the end state by working out the details and timing of each step leading to that end. This backward planning concept is not new and was the subject of two excellent articles on trial planning for trial advocates. *See* Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21; Colonel Jeffery R. Nance, *A View from the Bench: So You Want to be a Litigator?*, ARMY. LAW., Nov. 2009, at 48.

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 103 (2008) [hereinafter MCM] (Ruling on Evidence).

> (a) *Effect of Erroneous ruling*. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
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> (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record; stating the specific ground of objection, if the specific ground was not apparent from the context; or
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> (2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United Sates as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.
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> (b) *Record of offer and ruling.* The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.
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> (c) *Hearing of members.* In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.
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> (d) *Plain error.* Nothing in these rules precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

[3] U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL r. 19 (15 Sept. 2009) [hereinafter RULES OF COURTS-MARTIAL PRACTICE] (Objections).

> When counsel initially enters an objection, he or she will state only "Objection, Your Honor." Counsel will not provide a specific basis for it unless asked by the judge. Opposing counsel will immediately cease examination and await the judge's resolution of the objection. Before making any argument on an objection, counsel will request permission from the judge. Any argument will be direct and succinct. Motions *in limine* are encouraged regarding evidentiary issues counsel believe are likely to be contested at trial. After the judge rules on an objection or makes any other ruling, counsel shall not make further argument or comment, except with the express permission of the judge. After a ruling, counsel may, however, make offers of proof to preserve an objection or issue for appellate purposes or request reconsideration. In trials with members, such offers of proof should normally be made in an Art. 39(a) session. *See* MRE 103(c).

Id.

[4] *Infra* Appendix.

[5] A number of excellent evidentiary foundation texts are available to include David A. Schlueter et al., *Military Evidentiary Foundations* (3d ed. 2007);

Objections Before Trial

Prior to trial, effective advocates anticipate evidence that may be offered by the opposition. When counsel suspect objectionable evidence may be introduced, they should file a motion *in limine* to address their objections up front.[6] A motion *in limine* has several benefits to include enabling the military judge to rule on the admissibility of prejudicial evidence outside the presence of a panel. Allowing the military judge to address the admissibility of evidence at a motions hearing also affords the judge adequate time to consider and fully research evidentiary issues. Lastly, a ruling on a motion *in limine* provides guidance to counsel for their case preparation and presentation.

Objections During the Trial

Making and responding to objections during trial is one of the most complex and difficult skills required of trial advocates. To be effective you must know the law, know your facts, and be prepared to object or respond within a moment's notice. You must also be able to recognize objectionable questions and evidence. This skill can be acquired through study of the Military Rules of Evidence, the foundations required for the admissibility of evidence, and knowledge of the facts of your case.

When to Object

Assume you have studied the Military Rules of Evidence and the foundations for the admissibility of evidence. You are now counsel in a court-martial and have just heard a question from opposing counsel that you believe to be objectionable. Do you object? In the few seconds it takes to decide whether to object, you should consider several issues,[7] to include the following: Is the evidence helpful to you? If so, what benefit would you derive from objecting? Is the evidence going to be admitted anyway? If the objection is strictly based on a lack of proper foundation, will opposing counsel be able to fix the problem? Is waiver applicable due to a guilty plea?[8] Will an objection make the members look more closely at the testimony? Will an objection heighten the members' curiosity on this issue? Will an objection cast you as an obstructionist in the search for truth in the eyes of the members? Without an objection, how will the witness respond? What evidentiary rule or rules preclude the admission of the evidence? What is the likely response from opposing counsel to your objection and how will you reply? What is the likely response from the military judge? Do you need to object to preserve the issue for an appeal?[9]

These considerations demonstrate that the decision to object is multifaceted and driven primarily by the law and facts of your case. However, just because you have a colorable basis to object does not mean you should object. Counsel must decide whether a question or proffered evidence merits an objection based on the interests of their client.

When Not to Object

It is improper to make an objection solely to disrupt your opponent's case.[10] Panel members and the military judge will recognize the objection for what it is and not be impressed. Such conduct will ultimately impact your credibility in the courtroom.

How to Object

The technicalities of making and responding to objections are subject to rule 19 of the *Rules of Practice Before Army Courts-Martial* and the preferences of your military judge.[11] For specific guidance on this issue, counsel should speak with their military judge as part of the Gateway to Practice program[12] or during an R.C.M. 802 session conducted prior to the commencement of a case.

To object, most military judges will simply require you to stand up and say, "Objection, Your Honor." Normally, counsel need not provide a specific basis for an objection unless asked by the military judge. The objection must be

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Edward J. Imwinkelreid, *Evidentiary Foundations* (7th ed. 2008); and Thomas A. Mauet, *Trial Techniques* (7th ed. 2007).

[6] A motion *in limine* seeks to exclude evidence in a case and is governed by Rule for Court-Martial (RCM). 906(b)(13). MCM, *supra* note 2, R.C.M. 906(b)(13).

[7] This list of issues to consider is derived in part from an excellent article, Major Norman F. Allen, *Making and Responding to Objections*, ARMY LAW., July 1999, at 38.

[8] Rule for Court-Martial 910(j) provides that [except for a conditional guilty plea under RCM 910(a)(2)] a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offenses to which the plea was made. MCM, *supra* note 2, R.C.M. 910(j), R.C.M. 910(a)(2).

[9] Failure to timely object to the admission of evidence waives any later claim of error in the absence of plain error. *Id.* MIL. R. EVID. 103(a),(d); United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005).

[10] U.S. DEP'T OF ARMY, REG 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.5 (1 May 1992). This rule provides in part: "A lawyer shall not: . . . *(c)* engage in conduct intended to disrupt a tribunal."

[11] *See* RULES OF COURTS-MARTIAL PRACTICE, *supra* note 3, r. 19.

[12] A Gateway to Practice program is managed by a military judge and provides initial information and guidance on local practice and procedures, reviews trial and defense counsel duties, and addresses areas in which counsel are traditionally weak. It is intended to be conducted in a group setting with special attention paid to those with limited trial experience.

timely[13] and specific,[14] and counsel are not required to cite evidentiary rules by number to adequately preserve the objection for later appellate review. Opposing counsel should immediately cease examination and await the military judge's resolution of the objection. Before making any argument on the objection, counsel should request permission from the military judge. Any argument should be direct and succinct. So long as counsel make sufficient arguments to make the issue known to the military judge, the issue will be preserved.[15]

When objecting, always be crisp, certain, and professional. Your tone of voice when making objections is important. Never sound indignant; a neutral tone is always appropriate. Remember that you are seeking to persuade the military judge to rule in your favor. Never act or sound desperate. A lack of confidence when making an objection may have an impact on a close evidentiary ruling. Additionally, never whine, attempt to get information in through the back door, make an argument without a request from the military judge, or communicate with a witness through an objection. Such conduct is unprofessional and will result in an admonishment from the military judge.

Lastly, with objections, it's the quality that counts, not the quantity.

How to Respond

The process of responding to objections should have started during your case preparation. In most cases, you can anticipate common objections to your evidence and prepare a response to those objections. An especially effective practice is to prepare a short (no more than one page) legal memorandum containing relevant statutory and case law on the various evidentiary issues you expect might arise during your trial. Hand the memorandum to the military judge at the time of an objection with a copy of any case of particular significance. Trial advocates who demonstrate this degree of preparation will see their stock rise with any military judge.

Once an objection is made, stop talking and listen to the objection. Have appropriate references with you in the courtroom to address and respond to the objection (e.g., the *Manual for Courts-Martial*, the Military Rules of Evidence, an evidentiary foundations text, etc.). When prompted by the military judge, succinctly respond to the objection, making sure to address the military judge and not opposing counsel. In panel cases, do not be argumentative in front of the panel. If argument is required, request a UCMJ article 39(a) session outside the presence of the panel from the military judge.

Ruling by the Military Judge

When the military judge has ruled on an objection, the trial should proceed as before the objection. Do not argue with the military judge over a ruling. If you believe the military judge has entered an erroneous ruling, respectfully request reconsideration of the ruling. However, do not expect the military judge to reverse his or her ruling unless you have additional facts, law, or argument to share with the court. Be judicious with requests for reconsideration; they slow the trial process and are perceived as a waste of time by military judges absent an adequate basis for the request. Furthermore, never show emotion due to the ruling. Be prepared to move on as if nothing happened. Lastly, do not thank a military judge for a favorable ruling. It is unseemly.

Continuing Objection

If a military judge provides a definitive ruling on a pre-trial motion *in limine*, there is no need to repeat the objection at trial to preserve the issue for appeal. However, even though counsel do not have to repeat objections to an unconditional, unfavorable ruling decided in an out-of-court session, if the military judge has admitted new or additional evidence at trial, counsel should object to the repetition of the same or similar alleged errors until the military judge states that you need not object to a continuing line of questioning.

Offer of Proof

If the military judge sustains an objection to the tender of evidence, the proponent generally must make an offer to preserve the issue for appeal.[16] Counsel should request to make an offer of proof predicated on the ruling and then be guided by the military judge regarding the making of such an offer at a sidebar[17] or UCMJ article 39(a) session. At a minimum, the offer should include the substance of the proffered evidence, the affected issue, and how the issue is affected by the military judge's ruling. An added benefit of an offer of proof is that the tendered information may

[13] "Timely" means objection as soon as the grounds for the objection become apparent which may be immediate (e.g., form of the question), or later (e.g., at the time the evidence is offered when the foundation is deficient).

[14] "Specific" means what the objection is and why (that is, the specific legal ground).

[15] *Datz*, 61 M.J. at 42.

[16] MCM, *supra* note 2, MIL. R. EVID. 103(a)(2).

[17] A sidebar conference is held on the side of the military judge's bench opposite the panel. Such conferences are generally disfavored by military judges due to problems of recording the conferences and the possibility that panel members may overhear the conferences.

persuade the military judge to reconsider his or her evidentiary ruling.

Conclusion

Making and responding to objections during a trial is an art involving legal, factual, and tactical concerns. Trial advocates should devote themselves to this art and seek to become more than just merely adequate in this skill. Once this skill is mastered, the judicious use of an objection or an astute response to an objection may be the decisive factor in a trial.

Appendix

Courtroom Objections Guide and Answers

Objections to Questions:

Ambiguous – MRE 611(a) – The question may be taken in more than one sense.

Argumentative – MRE 611(a) – (1) Counsel summarizes facts, draws a conclusion, and demands that the witness agree; or (2) Counsel's question is an argument in the guise of a question.

Asked and Answered – MRE 611(a) – Unfair to emphasize evidence through repetition. Greater leeway allowed on cross.

Assumes A Fact Not In Evidence – MRE 103(c) and MRE 611(a) – Question contains a fact that has not been entered into evidence.

Beyond Scope – MRE 611(b) – Question unrelated to examination immediately preceding, counsel should be required to call witness as own.

Bolstering – MRE 608(a) – Attempting to support character for truthfulness prior to attack by opponent.

Calls For Conclusion – MRE 602, 701, 702 – Witnesses must testify to facts, conclusions must be left to the fact finder (and counsel during closing arguments). Watch for "why" and "would" questions. Those often call for conclusions.

Calls For Improper Opinion – MRE 602, 701, 702 – Used when an expert hasn't been properly qualified or when a lay person's testimony would be beyond the scope of the rules.

Calls For Narrative – MRE 103(c), 611(a) – Question may allow witness to ramble and possibly present hearsay, incompetent or irrelevant evidence. Judge has broad discretion here.

Calls For Speculation – MRE 602 – Question requires witness to guess.

Compound – MRE 611(a) – More than one question contained in counsel's question.

Counsel Testifying – MRE 603 – When counsel is making a statement, not asking a question.

Confusing And Unintelligible – MRE 611(a) – Counsel has used unfamiliar words, disjointed phrases or has confused the facts or evidence.

Cumulative – MRE 102 and 611(a) – Repeated presentation of testimony is unfair, unnecessary and wastes time. Judge is responsible to control this.

Degrading Question – MRE 303 – Question is immaterial and used simply to humiliate.

Hearsay (Question) – MRE 802 – Answer would elicit hearsay and no exception has been shown.

Improper – If you know the question is bad but can't think of the basis, use this to give you time to think. The judge may sustain you anyway and supply the basis. If not, you've gained that moment to decide on a basis. Don't overuse this!

Improper Impeachment – MRE 607–610 – Only specific, limited means of impeachment are authorized.

Improper Use Of Memorandum – MRE 612 – Used when opposing counsel has confused present recollection refreshed (MRE 612) and past recollection recorded (MRE 803(5)).

Improper Use Of Prior Statement – MRE 613 – When counsel is attempting to introduce extrinsic evidence of the statement without affording witness opportunity to explain or deny.

Irrelevant – MRE 402 (see also 401 and 403) – Doesn't tend to prove or disprove any fact or circumstance related to any issue before the fact finder.

Leading – MRE 611(c) – When the form of the question suggests the answer.

Misstating The Evidence – MRE 103 – Question either misstates what a witness said earlier or mischaracterizes earlier evidence. Similar to assuming facts not in evidence.

Objections to Evidence (Answers):

Best Evidence Rule – MRE 1002 – If the contents of the document are to be proved, the original must be offered or its absence accounted for.

Cumulative – MRE 102 and 611(a) – Repeated presentation of evidence is unfair, unnecessary and wastes time. Judge is responsible to control this.

Expert Witness Not Qualified – MRE 702 – Lack of foundation for specific expertise.

Hearsay (Answer) – MRE 801–805 – Question didn't call for hearsay, but witness gave it anyway. Counsel should move to strike and ask judge to instruct jury to disregard answer.

Improper Bolstering – MRE 608(a) – Using some form other than character for truthfulness.

Improper Characterization – MRE 404, 405, 611(a) – Attempting to use improper means to prove character.

Improper Lay Opinion – MRE 701 – Failure to limit the opinion to a rational basis of the witness' perceptions.

Incompetent Witness – MRE 104(a), 602, 603, 605, 606 – Lack of qualification, mental capacity, or personal knowledge.

Incompetent Evidence – MRE 103, 104 and Section III – Illegally seized evidence and involuntary confessions and admissions. Ask for a 39(a), if the evidence is even suggested by the question, consider asking for a mistrial.

Irrelevant – MRE 402 (see also 401 and 403) – Doesn't tend to prove or disprove any fact or circumstances related to any issue before the factfinder.

Narrative Response – MRE 103(c) and 611(a) – Witness rambling beyond scope of question.

Prejudice Outweighs Probative Value – MRE 403 – Request immediate 39(a). Argue the 403 balancing test. (Don't ever let the members hear you call evidence prejudicial, it will stick with them!)

Uncharged Misconduct – MRE 404(b) – Not admissible to show action in conformity therewith, see rule for exceptions.

Unresponsive – MRE 103(c) and 611(a) – Answer not to the question asked, usually from a hostile witness.

Lack of Foundation:

For Expert Opinion – MRE 702.

For Exhibit – MRE 104, 401, 801–805.

Exhibit Not Properly Authenticated – MRE 901(a)–903 – Failure to prove that the exhibit is in fact what it is claimed to be.

Privileges:

Used where the question/answer would violate one of the following privileges.

Clergy – MRE 503.

Comment On Or Inference From Claim Of Privilege – MRE 512 – Ask for an instruction.

Government Information/Classified – MRE 505–506.

Spousal Privilege – MRE 504.

Identity Of Informant – MRE 507.

Attorney-Client – MRE 502.

Mental Examination Of Accused – MRE 302.

Self-Incrimination – MRE 301.