

# The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, United States Army

## Military Judge Questions: An Indication of Your Next Move

Some counsel think that military judges are on a mission to destroy counsel's will to survive. This is a temporary matter of perspective. Fortunately, with experience, counsel usually understand that a military judge only wants to preside over a trial in which both attorneys employ good advocacy skills.

One great thing that military judges do is ask questions that provide counsel with a roadmap for excellent advocacy. There are many situations in which the military judge will signal counsel, through questions, whether to take or to forego a particular action. A few examples will illustrate this point.

*Challenge for Cause.* Imagine that you and opposing counsel have completed voir dire. When the military judge asked opposing counsel whether he wanted to exercise challenges for cause against the panel, counsel responded affirmatively, made the challenge, and provided the military judge with good reasons (based on the voir dire) to support the challenge. The military judge turned to you and spryly asked, "Counsel, do you have *any* argument in opposition?" The signal from this question is to forego argument and join (or at least not oppose) opposing counsel's challenge for cause. If the military judge really wanted to hear your position on the challenge, or did not think that there was a good basis to support the challenge, the question would have been, "Counsel, what is your position on this matter?" The latter question indicates that the military judge is willing to consider what you have to say because he or she is not sure about your opponent's reasons for the challenge. The former question does not give the same indication. In a challenge for cause situation, the military judge is more likely to send this signal to trial counsel.

*"The Government Rests."* You (defense counsel), the accused, and the trial counsel are involved in a hard fought larceny contest. Trial counsel called five witnesses on the merits, and you conducted vigorous cross-examination. Trial counsel presented documentary evidence that you vigorously questioned, but the military judge admitted it anyway. Finally, after six hours, the trial counsel stood up and bellowed, "The government rests." The military judge turned to you and asked, "Is the defense ready to proceed, and do you have any motions?" Your signal from the military judge is to exercise a motion for a finding of not guilty. It is obvious to the military judge that the government missed an element of the larceny offense. It may not be apparent to you, but it should be apparent from the military

judge's question that something is wrong. At the very least, you should take a recess to consider the military judge's question.

*Government Sentencing Hearing.* During the preliminary phase of the sentencing hearing, the military judge asked you how many witnesses you intended to call. You indicated six. The judge let out a brief sigh and told you to begin presenting your testimonial evidence. After the fourth witness, the military judge looked in your direction and asked, "Counsel, is that the last one of your witnesses?" This question is a signal that it may not be necessary to call further witnesses. Considering that counsel have a duty to present all of the evidence which is relevant to proper sentencing, how does the keen advocate react to this question? At the very least, you should request a recess to consider whether the testimonial evidence is cumulative. For defense counsel, the question to the trial counsel is a signal that the military judge is ready to entertain a cumulativeness objection.

Similarly, when the evidence portion of the same sentencing hearing terminates, the military judge looks to trial counsel and asks, "Counsel, do you care to make a sentencing argument?" The cue from this question is that both counsel should forego making lengthy sentencing arguments. It is highly unlikely that the military judge will send this cue in a members trial. Although the military judge has not determined an appropriate sentence in such a situation, the military judge's question indicates that counsel have clearly laid out all of the aggravating, extenuating, and mitigating circumstances. A lengthy sentencing argument from either counsel may be excessive.

## Conclusion

Trial and defense counsel have the ultimate responsibility to provide effective representation for their clients. No one, other than the client or supervisory judge advocate, should determine trial strategy. Counsel, however, must be attuned to questions from the military judge. In many instances, as indicated above, these questions provide a roadmap to excellent advocacy. They are a means for the military judge to communicate strategy to counsel. Counsel who stay attuned to the military judge's questions may find it easier to prosecute or to defend a case successfully.