

The Art of Trial Advocacy

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Worried About Objecting to a Document? Just BARPH.¹

You are the defense counsel in a general court-martial. Your client is charged with aggravated assault of his squad leader, who was stabbed while sleeping during a field training exercise. A Criminal Investigation Command agent is testifying about a letter found during a consent search of the accused's quarters. The agent found the following letter on the nightstand of the accused's wife.

Dear Sweetheart,

I miss you. The field problem is almost over. I look forward to seeing you this weekend. This month in the field has been tough. That sergeant is still picking on me, like I told you during the last phone call, but I showed him. I probably shouldn't have done it, but I couldn't take it anymore. Don't mention it to anyone. I will tell you all about it when I get home.

Love,

Your L'il Sugarplum

The trial counsel offers the letter into evidence. You stand up and object. The judge looks at you and asks for the basis of your objection. You know there is a valid objection, but you cannot think of it. You think back to your evidence class in law school, but all the rules are just a jumbled mess in your mind. Your client is looking at you. The judge says, "Well, counsel?" You are lightheaded and start to feel sick to your stomach.

BARPH is a mnemonic device to assist trial advocates in remembering the different foundations that are commonly required for documentary evidence: **B**est evidence, **A**uthentication, **R**elevance, **P**rivilege, and **H**earsay.² Documentary evidence is a part of most courts-martial. In some trials, there are enough documents to wallpaper the courtroom. However, foundational requirements for documents intimidate some

advocates. One of the main reasons is that documents often require multiple foundations, which vary in number and type for each document. The mnemonic enhances trial advocacy by arming counsel with the ability to respond quickly with the possible objections to documents.³ Both trial counsel and defense counsel offer documents into evidence, so counsel on both sides of the bar need to be able to recall the different foundational objections. As Professor James McElhane says, "The trouble with foundations is that they lurk everywhere, waiting for a chance to trip you up."⁴ A mnemonic can assist the opponent in enlisting the help of those lurking villains by articulating the bases of foundational objections. For example, in the above scenario, the defense counsel could go through the following analysis.

Best Evidence Rule. To prove the contents of a "writing," the "original" is generally required.⁵ In the above scenario, the rule would not be a valid objection, because the trial counsel is offering the original letter into evidence.

Authentication. The proponent must present proof that an object is what it is purported to be.⁶ In the scenario, the trial counsel is purporting the letter to be from the accused. If it was not from the accused, it would be irrelevant (or possibly exculpatory). The letter could be authenticated by the handwriting. An expert could compare the letter to exemplars, a lay person familiar with the accused's handwriting could offer an opinion, or the trier of fact could compare the letter to known writings of the accused. If that has not been done, then the defense counsel should object on the basis of authentication.

Relevance. The evidence must make a fact of consequence to the case more or less probable.⁷ In the scenario, if the letter is authenticated as being from the accused, then it does make it more likely that the accused stabbed his squad leader. Relevance would not be a valid objection.

1. Not to be confused with the word "barf," which is a slang noun of uncertain origin from circa 1955-1960 that means vomit. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 167 (2d ed. 1998).

2. While I would like to take credit for this colorful mnemonic, I picked it up at Notre Dame Law School in 1992. Several of the professors used the mnemonic during trial advocacy classes.

3. This article offers a mnemonic device to identify possible objections to documents, but it does not attempt to provide a detailed explanation of the different foundations. The explanations of each of those foundations would require articles of their own.

4. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 304 (3d ed. 1994).

5. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1001-1008 (1998).

6. *Id.* MIL. R. EVID. 901-903.

7. *Id.* MIL. R. EVID. 401-414.

Privilege. Section V of the Military Rules of Evidence (MRE) contains several different rules on privileges, including the marital privilege in MRE 504. In the scenario, it appears that the letter was a confidential communication from the accused to his wife. The defense counsel should object on the basis of marital privilege.

Hearsay. An out-of-court statement offered to prove the truth of the matter asserted is hearsay and not admissible, unless it falls within an exemption or exception.⁸ In the scenario, if the letter is authenticated as being from the accused, then it falls within the party-opponent exemption in MRE 801, and hearsay would not be a meritorious objection.

In the scenario, after BARPing, the defense counsel could stand and confidently state, "Your Honor, I object to the admission of the exhibit on the grounds of insufficient authentication and privileged communication." The mnemonic helped the defense counsel to maintain credibility and control, which are key to persuading the members of the court-martial.⁹ Some mnemonics themselves are hard to remember, but hopefully BARP evokes such a colorful image that it stays in your long-term memory ready to be used when needed. Major Grammel.

8. *Id.* MIL. R. EVID. 801-806.

9. Although the mnemonic provides a helpful advocacy tool for quickly articulating objections to documents, a thorough understanding of the foundational requirements in the rules of evidence is necessary. Also, pretrial preparation is crucial to success. *See generally* Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21 (proposing a methodology of backward planning for trial preparation). As a part of pretrial preparation, trial advocates should consider possible objections to expected exhibits.