The Art of Trial Advocacy

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The Art of Clemency

Introduction

You might be surprised to see the term "post-trial" associated with *The Art of Trial Advocacy*, but those of you who are fortunate enough to have practiced in the post-trial arena appreciate the value of advocacy during this critical stage of the court-martial process, which is described as the accused's "best opportunity for relief."[1] Post-trial practitioners understand that when advocacy fails at the trial level and your client is convicted and severely sentenced, all is not necessarily lost.

Clemency is defined as "an act or instance of leniency."[2] It is synonymous with notions of mercy.[3] Pursuant to Rule for Courts-Martial 1107(b)(1),[4] the decision to grant clemency is within the sole discretion of the convening authority. United States Army Trial Defense Service (TDS) policy requires Army TDS counsel to submit clemency matters in every case, absent a specific waiver from the accused.[5] If we start with the assumption that not all cases are equally deserving of clemency, the current TDS policy poses a serious problem for defense counsel: how to prevent cases which are truly deserving of clemency from becoming lost among the more numerous, routine cases that are unworthy of clemency.

The challenge for the conscientious defense counsel is to prepare unique, yet credible, requests for clemency on behalf of each client and to communicate to the government that perhaps one particular case is more deserving than another. This note advises counsel of some[6] of the tools and techniques available to help them effectively advocate clemency on behalf of their convicted, but as yet, not finally sentenced clients.[7]

Counsel should not be surprised to discover that most convening authorities are inclined to approve the sentence adjudged by the military judge or court members. The same applies in cases involving a pretrial agreement, where the convening authority's natural inclination will be to approve the sentence as limited by the terms of the negotiated agreement. There are three major explanations for these initial perspectives of the convening authority: (1) court members are viewed as the *conscience of the community*; (2) military judges are usually more experienced in these matters and have a better understanding or *feel* for the appropriate sentence in a particular case; and (3) soldiers who are accused of crimes and agree to the terms of a pretrial agreement do so *voluntarily.* Consequently, convening authorities are understandably reluctant to second-guess the decisions made by judges and court members who observed the witnesses and know the facts. The convening authority prefers to let the system run its course. Of course, this same "system" also includes the right of an accused to submit clemency matters and the obligation of the convening authority to "consider" these matters.[8] It is the duty of defense counsel (and, for that matter, the staff judge advocate) to remind the convening authority of this very important obligation.

To overcome the convening authority's inclination to approve the findings and sentence adjudged, the defense must convince the convening authority that the decision of the judge, the court members, or the accused (who agreed to the sentence limitation in the pretrial agreement) is not the best result for the accused, the command, or the Army. One approach is a frontal attack on the wisdom and appropriateness of the adjudged sentence. This is a difficult approach because counsel must overcome the additional predilection of the convening authority to approve the decisions of his hand-picked panel members (who

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1. United States v. Boatner, 43 C.M.R. 216 (C.M.A. 1971).

2. WEBSTER'S NEW COLLEGIATE DICTIONARY 206 (1973).

3. *Id.*

4. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(b)(1) (1995) [hereinafter MCM]. "The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command discretion." *Id*.

5. Counsel are reminded of the recent decision of the Court of Appeals for the Armed Forces (CAAF) in *United States v. Hood*, 47 M.J. (1997). In *Hood*, the CAAF established the requirement that counsel coordinate with clients regarding matters to be submitted for clemency. *Id*. The court also clarified that the final decision regarding specific matters to be submitted ultimately rests with the accused. *Id.*

6. Rule for Courts-Martial 1105(b) permits the defense to submit "any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence." MCM, *supra* note 4, R.C.M. 1105(b). Consequently, matters which the defense may submit in pursuit of clemency are limited by a simple rule of reason.

7. *Id*. R.C.M. 1107(a) ("The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable.").

8. *Id.* R.C.M. 1107(b)(3)(A)(iii) ("Before taking action, the convening authority shall consider . . . [a]ny matters submitted by the accused.")

were selected, in part, on the basis of their perceived judicial temperament).[9] Attacking the decision of the military judge poses a different, yet no less daunting, task. The convening authority is more likely to defer to sentences handed down by military judges because military judges have experience and expertise in the area of sentencing.

Convincing the Convening Authority that Circumstances Have Changed

A better approach is to demonstrate to the convening authority that either the circumstances have changed since the sentence was adjudged or those who adjudged the sentence were unaware of all of the facts relevant to determining an appropriate sentence. Counsel need not attack the wisdom of the decision maker, or even the wisdom of the sentence adjudged at trial. The focus is on the fact that, when the decision was made, the decision maker was not aware of all of the information relevant to determining the truly appropriate sentence.

Despite the relaxed application of the rules of evidence to the sentencing phase of a court-martial, the defense is sometimes prevented from presenting certain evidence to the members or the military judge. This is particularly true with respect to collateral consequences of certain punishments under the Uniform Code of Military Justice (UCMJ). As a general rule, members are instructed not to concern themselves with collateral consequences of a court-martial sentence.[10] Consequently, the panel members (and, in theory, military judges) should not consider such matters as: (1) how the length of confinement will determine the confinement facility to which the accused will be assigned; (2) the potential loss of retirement benefits due to a punitive discharge;[11] or (3) the obligation an officer may have to repay education costs if sentenced to a dismissal.

There are no such limitations placed on the information an accused may include in his clemency submission. Rule for Courts-Martial 1105(b) permits an accused to submit any written matters which *may reasonably tend to affect* the convening authority's decision to grant clemency.[12] The enormous number of potentially adverse collateral consequences arising from the various military punishments under the UCMJ provide fertile ground for aggressive counsel to make the argument that the court members might have adjudged a different sentence if they had known of the adverse collateral consequences.[13]

Evidence suppressed during the merits phase of the trial may also be relevant to an appropriate sentence. If evidence of the victim's prior sexual history was suppressed under the rape shield rule of Military Rule of Evidence 412,[14] counsel might consider presenting the suppressed evidence to the convening authority, perhaps to show how the impact on the victim *was not as severe as was originally presented to the court members*. Similar evidence might be presented to support an argument for clemency in the form of approving only a lesser included offense (for example, simple assault rather than assault with the intent to inflict grievous bodily harm).[15] Evidence of diminished victim impact may be discovered after the fact. In some cases, defense counsel are well served by contacting victims after trial to determine their reaction to the adjudged sentence. A change of heart or forgiveness from the victim often weighs heavily in a convening authority's decision whether to grant clemency.

Information regarding the sentences received by co-accuseds is another example of information which counsel can present to the convening authority which was not considered by the court members during sentencing deliberations. The success of defense efforts to convince the convening authority to cross-level sentences among co-accuseds depends greatly upon

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9. *See* UCMJ art. 25 (West Supp. 1996) (setting forth the criteria upon which a convening authority may select court-members).

10. There is a "longstanding rule that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the *collateral* administrative effects of the penalty under consideration." United States v. Henderson, 29 M.J. 221, 222 (C.M.A. 1989) (emphasis in original).

11. The issue of retirement benefits is one area where the appellate courts have begun to acknowledge the need to inform members of potential collateral consequences. *See* United States v. Greaves, 46 M.J. 133 (1997) (holding that it was error for the military judge not to answer questions of members regarding the impact of a bad-conduct discharge on retirement benefits when the accused was nine weeks from retirement eligibility).

12. MCM, *supra* note 4, R.C.M. 1105(b) ("The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence.").

13. *Id.* R.C.M. 1105(b)(4) (authorizing counsel to submit clemency recommendations "by any member, military judge, or any other person" and noting that "the defense may ask any person for such a recommendation"). Counsel may want to consider asking court members if they are willing to submit a clemency recommendation based on the fact they would have adjudged a lesser sentence if certain evidence had not been precluded from their deliberations by the military judge. When approaching members, counsel must be wary of the rules prohibiting disclosure of matters effecting deliberations or votes of the members. *See* MCM, *supra* note 4, MIL. R. EVID. 606. One other source counsel may look to for clemency is the command sergeant major (CSM). The CSM typically has direct access to the convening authority and is the person whom the convening authority relies on for advice on matters affecting the enlisted soldiers in his command.

14. *See* MCM, *supra* note 4, MIL. R. EVID. 412.

15. Although the focus of this note is clemency in the form of sentence reduction, counsel should also consider creative methods to request clemency in the form of modifying the findings of the court-martial.

the relative culpability of the client and the severity of his sentence in comparison to the others.

Evidence of restitution or a public apology from an accused, if presented to the convening authority as information not considered by the court-members or the military judge, may lend further support to a clemency request. Finally, convincing one's client to cooperate with the government to solve other crimes or to assist in the prosecution of other cases is yet another example of an *after the fact* circumstance warranting clemency.[16]

Clemency and the Pretrial Agreement

The most difficult cases for defense counsel to win clemency are those which involve pretrial agreements. In these situations, counsel must overcome the natural belief that the defendant, by agreeing to the terms of the pretrial agreement, has acknowledged in some respects that the agreement represented an appropriate and just sentence. This may not necessarily be the case, and counsel must ensure that the government understands the difference between sentence reduction pursuant to a pretrial agreement and clemency. In *United States v. Griffaw*,[17] the Air Force Court of Criminal Appeals recently compared the sentence cap in a military pretrial agreement to a "flood insurance policy on a house."[18] You buy insurance not because you want a flood to occur, but to put a ceiling on the loss in the event that "disaster strike[s]."[19]

Counsel should echo this same argument in their clemency submissions. Counsel should emphasize that the accused's willingness to enter into a pretrial agreement was not an admission that the terms of the agreement constitute a fair sentence; the agreement was simply the high end of a much broader spectrum of potentially appropriate sentences. More importantly, counsel should also remind the convening authority that sentence reduction pursuant to the terms of the pretrial agreement *is not an act of clemency.* This principle was reinforced by *Griffaw,* where the staff judge advocate erroneously advised the convening authority that "the accused has already received clemency in the form of six months off the sentence adjudged by the court" as required by the terms of the pretrial agreement.[20]

Regrettably, in those cases where defense advocacy efforts succeed at trial and the accused "beats the deal," counsel are hard-pressed to convince the convening authority that clemency is warranted. Nevertheless, counsel should remind the convening authority that the sentence adjudged at trial, like the terms of a pretrial agreement, is not a matter of clemency. The sentence adjudged at trial is simply a determination of an appropriate sentence, *based on the evidence presented at trial*. In this respect, the sentence adjudged at a guilty plea is no different from that of a contested case in which there is no pretrial agreement. Counsel should bolster their pleas for clemency with the same arguments and evidence of changed circumstances discussed above.

Good Habits for Clemency

The scope and content of clemency petitions depend on the facts and circumstances of each case and each client. There are, however, certain steps that competent counsel should take in every case, the first of which is to get to know your opponent, the convening authority, as well as possible. Find out his personality by talking with the staff judge advocate, the chief of justice, or other nonlegal members of his staff. There is no telling when you might discover something that might later assist your efforts to convince this person to grant clemency.

Another good habit is to humanize each and every client. Counsel should never assume that the convening authority will read the unsworn (or sworn) statement of the accused in the record of trial.[21] Consequently, the convening authority may know very little about the accused, other than his service record and military awards, since little else is required of the staff judge advocate's post-trial review and recommendation.[22] This void can be filled by providing a short (or, if warranted, lengthy) personal history of the accused.[23] The ability of the defense to portray the individual personality, background, and character of the client is frequently the key to winning clemency from the convening authority.

16. Counsel must balance these latter options against the potential risk that if the client's case is reversed on appeal, the admissions of guilt or incriminating testimony given against a co-accused may be used against him in a retrial.

17. 46 M.J. 791 (A.F. Ct. Crim. App. 1997).

18. *Id.* at 793.

19. *Id.*

20. *Id.* at 792. The court emphasized that sentence reduction pursuant to a pretrial agreement is done as required by law, as compared to clemency, which is granted solely as a matter of command prerogative. *Id.*

21. In fact, counsel should do just the opposite, as the convening authority is no longer required to consider the record of trial. MCM, *supra* note 4, R.C.M. 1107(b)(3)(A). Actual review of the record is now a matter of discretion for the convening authority. *Id*. R.C.M. 1107(b)(3)(B). In practice, it is the rare convening authority who reads a record of trial other than in the most extraordinary cases.

22. *See id*. R.C.M. 1106(d).

One final comment regarding efforts to personalize your client concerns the decision to request a personal appearance before the convening authority. While the convening authority is not required to grant such requests, counsel are not prohibited from asking.[24] This may be an effective means for counsel to convince the government that this is the truly meritorious case for clemency. Counsel should use caution in exercising this option too often, lest it lose its impact on the government.

Counsel should not assume that the convening authority will read, or otherwise be informed of, defense evidence presented in extenuation and mitigation at trial. Rather than simply photocopying favorable testimony from the trial and attaching it as an enclosure to the clemency submission, counsel should summarize the testimony in the light most favorable to the accused and present it in a form that is easy for the convening authority to digest. While counsel must not lose sight of the fact that convening authorities are busy people with precious little time for details, they should also remind the convening authority of the obligation to "consider"[25] all written matters submitted by the accused prior to acting on the adjudged sentence.

Put your bottom line up front. Even though the convening authority must consider all written clemency matters, counsel should not expect convening authorities to spend several hours reviewing clemency submissions. Brevity and packaging are critical to gaining the attention and interest of the convening authority. Consider short, easy-to-read, bullet-type comments. Avoid legalese from the party of the first part (your client) to the party of the second part (the convening authority). Highlight your best arguments in **bold type,** *italics*, or underlined text. If your submission includes pictures (TAB A), letters from family (TAB B) and friends (TAB C), or other enclosures (TAB D), tab and index them for easy reference. Do not rely on the government to package your final submission. Never forget that busy commanders do not like to read documents which are as long as this note. They prefer to read one- to two-page documents.

Although recent changes to the *Manual for Courts-Martial* excuse the convening authority from considering *unwritten* clemency matters,[26] these changes do not prohibit the convening authority from doing so. If you believe that circumstances justify the submission of a videotape, submit one, but also submit a written explanation of why it is important for the convening authority to review the tape in addition to the written matters. This might be appropriate if you have a forgiving victim who is willing to be videotaped. As another example, a videotape of the alleged victim having a good time at a party can be used to rebut the victim's trial testimony that the victim was afraid to socialize with others as a result of the attack.

Counsel are also wise to monitor the results of cases in the local jurisdiction and beyond. Sentence disparity is probably the leading cause of clemency. In cases involving multiple offenders, sentence disparity is an issue which counsel must explore. By tracking cases on a broader scale, counsel are better prepared to highlight to the convening authority additional examples of the often inverse relationship between culpability and approved punishments.

Counsel should also monitor the convening authority's track record for granting clemency. If you have exhausted the well of all other approaches to clemency, you may have to resort to a simple plea for mercy. Such pleas for mercy can be bolstered by reminding the convening authority that it has been quite some time since he last demonstrated such compassion and benevolence.

Finally, when preparing clemency matters, counsel must strive to avoid two common pitfalls. First, counsel must be careful not to exaggerate or to minimize the significance or impact of certain facts. This provides easy openings for the government—which has the eyes and ears of the convening authority (not to mention the final say)—to refute or to contradict your arguments. Even if the dispute is over a minor point, it may be sufficient to kill any hopes of clemency for your client. The second pitfall to avoid is being overly apologetic for your client's behavior. There is no need to repeat how bad a person your client is. The government will take care of that. If you must acknowledge the shady side of your client's conduct (and sometimes you will have to), do it quickly and move on to your more persuasive arguments which are worthy of **bold**, *italicized*, or underlined type.

Conclusion

There is an art to practically everything you do as a defense counsel. Admittedly, most of the artwork noticed by the public occurs within the four walls of the courtroom. By virtue of the UCMJ's unique post-trial clemency stage, however, military defense counsel are obligated (or, from a more positive perspective, given the additional opportunity) to continue their advocacy until the convening authority takes final action on a case. Hopefully, the tools and techniques described in this note will help sharpen your post-trial advocacy skills so that you can

23. Counsel may want to supplement this history with enclosures from family, friends, former teachers and coaches, and others who knew the accused. If counsel choose to do this, they should take the extra time to summarize the information for the convening authority.

24. Counsel should not limit their options to requests for the accused to appear before the convening authority. Other options to consider are family members, other soldiers, or simply the defense counsel.

25. MCM, *supra* note 4, R.C.M 1107(b)(3).

26. UCMJ art. 60(b) (West Supp. 1996).

consistently and confidently provide your clients a realistic "best opportunity for relief." Lieutenant Colonel Lovejoy.