

# The Art of Trial Advocacy

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## Instructions—An Often Overlooked Advocacy Tool

### Introduction

You have just questioned the last witness in your first court-martial, a hotly contested case. As you sink into your seat, you find yourself mentally and physically exhausted, but pleased with yourself for surviving the two-day ordeal. You now start thinking about the spectacular closing argument that you have rehearsed and refined over the past month. Suddenly, the judge's voice brings you back to reality when she says, "Counsel, after a short recess let's discuss any proposed instructions that you have." You remember something about instructions from the basic course, but you thought that preparing instructions was the judge's job. To make matters worse, the opposing counsel walks over and drops a thirty-page packet of his proposed instructions on your desk. Suddenly you get a pounding headache and curse yourself for not thinking about instructions during your trial preparation.

All too often counsel neglect the instructions phase of trial preparation until very late in the process. In so doing, they fail to use a valuable advocacy tool to help them prepare their case and focus panel members on the weaknesses of the opponent's case. During the instructions phase of a trial, the military judge advises the members on the relevant points of law that apply to the case and other issues that have been raised by the evidence.<sup>1</sup> Prepared counsel can reference these instructions at key points of the trial to enhance the credibility of their position. Counsel can also draft and propose instructions to the military judge that will be helpful to their case. This, however, requires prior planning.

### Time to Prepare

As the above scenario illustrates, the end of the trial is not the time to start thinking about instructions. Effective use of instructions requires backward planning. Just as it is a good practice to begin your case preparation by writing a closing argument,<sup>2</sup> it is also important to look at potential instructions early in the case. After analyzing the strengths and weaknesses of your case and your opponent's case, start looking at the

instructions that may apply. This includes instructions on the charged offenses, lesser-included offenses that may be raised by the evidence, special defenses, and evidentiary instructions. If you do this early in the process, you will have a better grasp of the legal concepts that apply to your case. You will also know what issues you will need to raise to get favorable instructions, and how to prepare your case to avoid unfavorable instructions.

### Sources of Instructions

There are several sources to look to for instructions. The first source should always be the *Military Judge's Benchbook (Benchbook)*.<sup>3</sup> The *Benchbook* sets out the instructions that judges must give on the elements of the charged offenses and any lesser-included offenses that are raised by the evidence. It also contains detailed instructions on special defenses and other evidentiary instructions. To see what instructions may apply to your case, look at the list of instructions at Appendix J of the *Benchbook*.

Advocates can also look to other sources for instructions not contained in the *Benchbook*. Military and federal cases are an excellent source for this information. Another good source is *Federal Jury Practice and Instructions*.<sup>4</sup>

### Prepare a Packet

Counsel can also draft a set of proposed instructions for the military judge in advance. This is more effective than simply asking the judge to give an instruction and relying on the judge to do all the drafting. If you can present the judge and opposing counsel with a draft that the judge can modify, you will save time and make the judge's job much easier. You will also be able to craft the instruction in a light that is most favorable to your position. While the judge may modify your proposals, at least you have provided him with a starting point. With the advent of the *Computerized Benchbook*,<sup>5</sup> counsel should have little difficulty drafting instructions to fit the facts of their case.

1. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920 (1995).

2. See Lieutenant Colonel James L. Pohl, *Trial Plan . . . From the Rear March*, ARMY LAWYER, June 1998, at 21.

3. U. S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK (30 Sept. 1996).

4. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS (1992).

5. The *Computerized Benchbook* is found in the Benchbook Download Library in the Files section on the BBS main menu.

### *Incorporate Instructions*

Thinking about instructions in advance of trial also allows you to incorporate important instructions into portions of your case. For example, if you know that your case will involve issues of self-defense, you can refer to the instructions in voir dire and elicit a promise from the panel members that they will follow the judge's instructions when deciding if self-defense exists. Closing argument is another opportunity to incorporate instructions. If you impeached a key witness by demonstrating his character for untruthfulness, referring members to the instruction the judge gave on witness credibility will strengthen

your presentation because you are associating your position with information that the judge provided.

### *Conclusion*

Counsel who wait until the end of the trial to start thinking about instructions ignore a powerful advocacy tool. The effective use of instructions will enable counsel to reinforce the theory of the case, associate arguments with statements made by the judge, and focus panel members on the weaknesses of the opposing counsel's position. The key is to think ahead and to prepare instructions early in the process. Major Hansen.