The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

Advocacy in Front of the Military Judge

Much of advocacy training focuses on finding ways to persuade and convince fact finders at various trial stages. Too often, however, judge advocates forget that there is another person in the courtroom that they must often try to convince just as much. That person, of course, is the military judge! On questions of law, whether arguing for the admissibility of evidence or to sustain a particular objection, advocacy can be just as important as when judge advocates present pure questions of "fact" to panel members. This note addresses ways to improve advocacy in front of the military judge. It addresses general points, such as "knowing your judge" and being courteous. It also discusses ways to ensure the military judge gets in the "comfort zone." Finally, it will present some advocacy tips for objections and motions practice.

Know Your Judge

Judge advocates have heard this adage many times before, but it bears repeating: advocacy is an art, not a science. Advocacy is practiced in front of human beings, all of whom come to court with flaws, gifts, reputations, and an infinite variety of life experiences. The most brilliant "by the book" lawyer is ineffective in court if he cannot grasp the human element in each case. The judge is neither a computer who can endlessly absorb and process information, nor a Solomon who can dispense profound wisdom without effort, but a human being with an attention span of a certain length and an intelligence of a particular depth. He may also possess idiosyncrasies to a peculiar degree.

Knowing such things about judges is important when trying cases, and may require some detective work on the judge advocate's part, especially if the judge is visiting or new to the circuit. Calling colleagues in other circuits who have tried cases before a new or unknown judge is always wise. Finding out "track records" for judges in sentencing (and keeping your own track records if it is your judge) is another important tool. Getting a copy of his rules of court and mastering them is also a necessity.

Trial counsel will usually have to ensure that the courtroom is configured the way the judge likes it. Find out if you do not know. If the judge is visiting, find out if he will need certain references available. A visiting judge will usually bring a laptop computer with him, so make sure there is a printer in the chambers for him to use–he should not have to run down the hall or across the street to the criminal law office every time he wants to print something. Finally, before going to court in your case, watching the judge try someone else's case, so you can get a feel for his habits, quirks, and pet peeves, is invaluable.

Courtesy at All Times

As James McElhaney states, "The adversary system applies to the lawyers, not the judge. Do not start a war with the judge–you are not likely to win."[1] Because judge advocates deal with military judges so often, they often fail to show basic military courtesy–something they would never fail to show to a battalion or brigade commander. Attention by counsel to elementary manners and military courtesy will avoid embarrassing and even disrespectful moments.

Of course, counsel should always stand when addressing the military judge, refer to the judge as "Your Honor" or "Sir or Ma'am," and always accord the judge the respect that he is due. Additionally, one sure way of displaying a lack of courtesy and of being–perhaps embarrassingly–corrected in front of members is to play "ping-pong" with opposing counsel. Counsel must not address each other in a heated exchange, rather than addressing the judge. This is especially true during an objection.

Counsel should also, as a matter of basic courtesy and respect, start the trial with documents and evidence previously marked, having gone over them with the court reporter prior to trial. Trial counsel should ensure the flyer and findings and sentencing worksheets are prepared. This saves time and makes counsel look professional and better prepared. Finally, trial and defense counsel should coordinate and negotiate issues before approaching the judge. This eliminates a possibly needless extra step and reassures the judge that counsel are genuinely working together.

Getting Judges in the Comfort Zone

If there is one thing most judges dislike, it is going "out on a limb" to make a ruling. Judges like to rely on standard practices, established rules, and *stare decisis*. No judge wants to be scrutinized by a "higher" authority, to be told that his decision was bad, and then have this published for everyone–especially his peers–to see. That is what happens when a judge is overturned by an appellate court. What counsel should be aware of is the need to get judges "in the comfort zone"–in an area where they are comfortable when making their rulings. To help them get there, counsel should do the following:

1. JAMES MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 700 (1994).

Use the language of the rules, and then some—One way to get a judge into the comfort zone is to use the "tried and true" language of the rules and familiar words and terms. This may actually involve using language that is not required to satisfy a legal burden. By meeting a more stringent legal burden, the judge will feel assured that he is also certainly satisfying the lesser standard actually required by law.

Take for example the required test for determining probable cause. As announced in *Illinois v. Gates*,[2] the standard for determining probable cause is that under the "totality of the circumstances" there was probable cause that the evidence is located at a particular location.[3] This replaces the older, more stringent *Aguilar-Spinnelli* test, which requires two factors to be satisfied: (1) that informant had a solid basis of information, and (2) that the informant was sufficiently reliable.[4]

At first glance, one may question why a trial counsel would want to use the more stringent *Aguilar-Spinelli* test in arguing that probable cause was satisfied. The reason is twofold. First, the "totality of the circumstances" test of Gates is sometimes considered hard to grasp because it is so highly amorphous.[5] Second, by meeting the more restrictive test, the military judge will undoubtedly feel more comfortable and certain that he has satisfied the less stringent *Gates* test.[6]

Think carefully about which argument you want to make—Do you want to argue on the "cutting edge," or rely on a more "tried and true" approach? The latter is not only more likely to withstand appeal, it is the approach the judge will probably be more familiar and comfortable with.

For example, assume you are the government counsel in a case involving a search of the barracks room that defense counsel wants to suppress. One argument you could make is to assert that, following *United States v. McCarthy*,[7] there is no reasonable expectation of privacy in the barracks room, and therefore the Fourth Amendment requirements for valid searches does not apply. This argument is very tempting, especially if it is in the context of a possible "subterfuge" search which requires a higher burden of proof for the government to enter in a piece of evidence.[8] But this argument forces the judge to decide an issue using still unsettled law. If the judge is going to rule that, based on *McCarthy*, there is no expectation of privacy in the barracks or at least a highly reduced, he is undoubtedly setting up an issue on appeal. Furthermore, the judge may be signaling to government counsel in his jurisdiction that warrantless intrusions in the barracks are legally sufficient as a matter of course–a signal he would probably not want to give.

Doing it the judge's way – if you can—Related to using well-established rules and familiar language is the following point by McElhaney: "When the judge gives you a clue to what words he expects in a foundation, make them the words you use. If you think something else is required, put that in, to be sure. But do not insist on your terminology just for its own sake."[9] Again, the idea is to make a judge comfortable so he will agree with your position. Part of doing that is not just using the applicable rules, standards, and terms the judge is familiar with, but also using the requirements and language the judge wants and likes to hear. Does the judge dislike the phrase "let the record reflect"? If so, eliminate it from your vocabulary. Does the judge want a legend drawn on every diagram offered into evidence? If so, make sure that this is done by the appropriate witness. Does he require a certain way of laying a foundation? If so, rehearse it beforehand, and then do it in court as he wants it done. Doing it the judge's way not only puts him in the comfort zone, it also helps you avoid embarrassing (and possibly discrediting) interruptions in front of panel members.

Objections: State What You Want and Why

What do you want to achieve with a particular objection? Why should the judge grant your objection? Stating why you are objecting is particularly important. Military Rule of Evidence 103(a)(1) specifies that unless a counsel states an objection and asserts "the specific ground of objection . . . [e]rror

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2. Illinois v. Gates, 462 U.S. 213 (1983).

3. *Id.*

4. The "*Aguilar-Spinnelli*" test is based on two older Supreme Court cases, Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969).

5. At the May 1999 Military Judge's Course held at TJAGSA, several judges (some new, some experienced) commented on the superiority of the older *Aguilar-Spinelli* test precisely because it gave clearer guidelines than *Gates* did.

6. The recent case, United States v. Hester, 47 M.J. 461 (1998), is a good example of this. In that case, the Court of Appeals for the Armed Forces used the more stringent *Aguilar-Spinelli* test in affirming the lower court's determination of sufficient probable cause, even though it acknowledged that use of such a test was not required. *Id.*

7. 38 M.J. 398 (C.M.A. 1993).

8. When dealing with a possible "subterfuge" inspection, the burden for the government is not preponderance of the evidence. Rather the government must show by "clear and convincing evidence" that the primary purpose of the "intrusion" was administrative, not criminal. MANUAL FOR COURTS-MARTIAL, MIL. R. EVID. 313(B) (1998) [hereinafter MCM].

9. MCELHANEY, *supra* note 1, at 700.

may not be predicated upon [the] ruling which admits or excludes evidence."[10] In other words, you need to do more than simply object: you need to state why you are objecting or you have probably waived preserving the error on appeal.

Some Points on Motions

Bottom Line Up Front (BLUF)—When requesting relief in the form of a motion, you should let the judge know up front what you want in the motion when you address him–a concept known in the military as "BLUF." Organize the argument in four parts: the requested relief, the pertinent law, a more in-depth discussion of the legal principle, and evidence to support the motion.

First, briefly request relief: "Your honor, the defense makes a motion to suppress the bag of marijuana. It was unlawfully obtained during a government inspection of Specialist Snuffy's barracks room." Next briefly state the law: "The inspection violated Military Rule of Evidence 313(b)[11] because it was conducted immediately after report of someone having drugs in the barracks, and there was insufficient probable cause." Next go into the rule itself, briefly explaining it and citing the relevant case law, having hard copies of cases available for the judge and opposing counsel. Finally, as mentioned above, present evidence in support of your motion.

Arguments ARE NOT Enough: One significant problem noted by many judges is the failure of counsel to present evidence when arguing their motions.[12] The counsel simply assume that their arguments are enough. This is often not the case, especially when the judge will probably have to make essential findings of fact. Those findings will be closely scrutinized by the appellate courts if the case ends in a conviction. You must ensure that you have *some* evidence to present other than just your bald assertions. Presenting this evidence should not be too difficult–remember, Military Rule of Evidence 104(a) allows the judge to accept virtually any type of unprivileged information when determining a preliminary matter.[13] Hearsay statements, unauthenticated documents, and information possibly excludable under Section III of the Military Rules of Evidence can all be used in these preliminary determinations. Criminal Investigation Command reports, Article 32 reports, and sworn statements should all be available for use. The accused himself can make a statement for the limited purposes of a motion. Also, when possible, counsel on both sides should create a stipulation of fact or expected testimony. This both saves time and simplifies matters for the judge, because he can adopt the stipulation as part of his facts. The bottom line is that counsel should support everything they say in argument with the appropriate law *and* evidence on record.

These are just a few tips to help you in your advocacy in front of the military judge. If judge advocates remember that there are real people on the bench, just as there are real people in the panel boxes, they will serve their clients and the cause of justice even better. Major Hudson

10. MCM, *supra* note 8, MIL R. EVID. 103(a)(i).

11. *Id.*, MIL. R. EVID. 313(b).

12. Colonel Gary Smith, Remarks at the 12th Criminal Law Advocacy Course (CLAC), The Judge Advocate General's School (TJAGSA) (Sept. 24, 1999).

13. MCM, *supra* note 8, MIL. R. EVID. 104(a). The rule states that when the judge rules on preliminary questions, he "is not bound by the rules of evidence except those with respect to privileges." *Id.*