

The Art of Trial Advocacy

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Making and Responding to Objections

During a court-martial, trial or defense counsel hears his opposing counsel's question of a witness, and realizes it is time to object. Whether the objection is as to the form of the question, or to the response sought by the question, counsel knows he wants to keep this information from the panel. A number of questions arise as counsel braces to object: Does the need to keep this information from the court justify the risk of aggravating the court with a legal objection? Are the court members even paying close enough attention that they understand the significance of the question? Will an objection heighten their curiosity about this issue? What exactly will the witness say in response to counsel's question if there is no objection? What evidentiary rule is it that precludes the witness from answering the question? Will the members think there is something to hide? How should one make the objection? When should the objection be made? What if the objection is not sustained?

These are just some of the questions that might go through counsel's mind when deciding whether to object. The true advocacy challenge is that an advocate has only a fraction of a second in which to resolve these issues and make the objection. Too often, the critical analysis required inclines counsel either to forego an objection altogether, or to follow the witness's damaging response with a meek objection. The "what, when, how, and why" of making objections reflects the art of trial advocacy; that is, there is no precise formula to guide counsel in what information to object to, or just how to state the objection.¹ The military judge and the Rules of Professional Conduct² will put some limits on excessive forms of objections. Ultimately, however, the lawyer trying the case must decide, in the interests of his client, whether the question at hand demands an objection. If an objection is warranted, counsel must step forth confidently and professionally and stop the proceedings.

In all aspects of trial advocacy, the key to making good decisions is preparation and anticipation. In making and responding to objections, "how" counsel presents his or her position can be the most important part of making or responding to an objection. Following are some guides to assist counsel in "how" to make objections at courts-martial.

Stop the Examination with an Objection

The reason counsel object is to stop the flow of information to the court. Accomplish this goal by quickly rising and, as you

stand, announcing to the court, "Objection, your honor." There is no need to shout, but neither should counsel be timid in making an objection. Demonstrate confidence and good military bearing to the court members by rising with a purpose.

State the Objection

When making an objection do not present an argument or discourse on the law, but give the military judge a legal basis for your objection, for example, "hearsay," "irrelevant," "MRE 609(a)," and the like. Note, too, that sometimes counsel may make "speaking objections,"³ designed simply to state your legal position in layman's terms. For example, in objecting based on relevance, counsel might state, "That matter is not an issue before this court-martial today." The speaking objection may also help out a counsel who knows that what is being said is objectionable, but cannot articulate the technical, legal prohibition or cite to a specific rule.

Make the Objection and Response to the Military Judge

The military judge decides whether to sustain or to deny an objection. The judge also determines how much argument or explanation he requires to make that decision. Thus, counsel should offer a legal basis for an objection and then avoid further argument or discussion until asked by the military judge. Similarly, counsel opposing the objection should avoid responding until asked to do so by the military judge. It is not altogether rare for a judge, about to deny an objection, to change his mind when the counsel opposing the objection unnecessarily speaks up and reveals an improper basis in his question. Such unnecessary argument invites the judge to note, "Oh, well, if that's your basis, counsel, then the objection is sustained." In responding to objections, a good adage to remember is to speak only when spoken to.

Don't Argue with the Military Judge

If the military judge, by his ruling on an objection, has closed an avenue, devote your energy to an alternative approach instead of complaining and arguing with the military judge. Not only will such unnecessary arguing irritate the military judge, but it surely will appear unprofessional to the panel members. While members expect to see counsel make objec-

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 103(a)(1) (1998).

2. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 3.5 (1 May 1992). Rule 3.5 provides: "A lawyer shall not: . . . (c) engage in conduct intended to disrupt a tribunal."

3. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 329 (1994).

tions to advocate for a client and to enforce the rules in a court-martial, so also do the members expect judge advocates to comport themselves as officers by accepting a decision once made and moving to the next point. If, however, you truly feel the military judge made a wrong decision or failed to consider your argument, then ask for a recess or wait until the next Article 39(a) hearing to state your position, and point out precisely why the military judge's ruling was not legally correct.

Do Not Thank the Military Judge

While civility is an admirable quality, and especially so among trial advocates, the military judge is only doing his job in ruling on objections. It appears obsequious to thank the military judge for a favorable ruling. The best course of action,

whether the military judge has ruled for or against you, is simply to move on as if what just happened is what you fully intended or expected. A professional, deliberate response conveys to the court members a sense of confidence in your position.

There is a broad range of permissible objections counsel may make during a court-martial,⁴ and counsel should prepare for any of these objections that may arise in a given case. But trial advocates should learn and adopt a technique for making any such objections in a proper, legal, and professional manner, thus enhancing their overall likelihood of success. Major Allen.

4. See generally THOMAS A. MAUET, TRIAL TECHNIQUES 426 (1996).