The Art of Trial Advocacy

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

Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!

> *The contour of the land is an aid to an army; sizing up opponents to determine victory, assessing dangers and distances, is the proper course of action for military leaders. Those who do battle knowing these will win, those who do battle without knowing these will lose.*[1]

Introduction

From the government's standpoint, trial advocacy begins with the charging decision. Equating a court-martial to a battlefield, the art of advocacy is like the art of war. In war, commanders attempt to shape the battlefield to their advantage by electing to fight on terrain of their own choosing. In trial practice, the government possesses the initial advantage because trial counsel have the ability to shape the battlefield through the charging decision. Effective trial counsel recognize the tactical importance of selecting the most advantageous terrain through the charging process. They realize that trial advocacy does not begin with opening statements or even voir dire. Trial advocacy begins when counsel draft charges against an accused.

The art of tactical charging starts with listing all potential charges and then asking "why" each of the charges should end up on the charge sheet.[2] Tactical charging focuses on preferring only those charges that are consistent with the government's theory or provide a particular tactical advantage for the prosecution. Unfortunately, many trial counsel complete their charging analysis after determining "what" they can charge. Additionally, most guidance from chiefs of justice, military judges, and criminal law instructors focuses on the problems associated with overcharging, mischarging, or inartful drafting.[3] Yet, the real threat to effective advocacy involves "random" charging—failing to charge in a manner consistent with theory and tactics.

Certainly, "poorly drafted charges and specifications can damage or doom the government's case at the outset,"[4] and trial counsel should heed guidance regarding the mechanics of charging. However, this article's purpose is not to offer another primer on how to avoid embarrassment or prevent losing by following a set of charging guidelines.[5] Instead, this article focuses on how trial counsel can seize the high ground well before a case goes to trial.

Three areas are particularly relevant to a discussion of tactical charging. First, before preferring charges, trial counsel should always develop a clear theory of the case and charge consistent with the theory. Second, trial counsel should consider how the charges selected for preferral will enhance the government's presentation of evidence at trial and increase the potential for success. Third, trial counsel should refrain from alienating panel members or the military judge by overcharging in a manner that evokes "unwarranted sympathy for the accused"[6] and thereby allows the defense to shift the battle to terrain of their choosing.

Theory Development and the Charging Decision

The theory of a case is a logical and persuasive adaptation of the story to the legal issues in the case.[7] It communicates to the fact-finder "what really happened."[8] First, a successful theory must be logical. "It must be consistent with the credible evi-

1. Sun Tzu, The Art of War 145 (Thomas Cleary trans., Shambhala Publications 1988).

2. U.S. Dep't of Defense, Form 458, Charge Sheet (Aug. 1984) (copy found at Manual for Courts-Martial, United States app. 4, at A4-1 (2000) [hereinafter MCM]).

3. *See generally* Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, Army Law., Oct. 1994, at 15; Colonel Gary J. Holland, *Tips and Observations from the Trial Bench: The Sequel*, Army Law., Nov. 1995, at 3; Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, Army Law., Oct. 1997, at 4.

4. Morris, *supra* note 3, at 17.

5. *Id.* at 17-18 (providing an excellent set of guidelines and practical tips regarding the mechanics of drafting charges). Additional resources provide extensive guidance on the mechanics of charging. *See generally* MCM, *supra* note 2, R.C.M. 307(c) discussion; Francis A. Gilligan & Fredric I. Lederer, Court-Martial Procedure § 6 (2d ed. 1999); David A. Schlueter, Military Criminal Justice: Practice and Procedure § 6-1 (5th ed. 1999).

6. Morris, *supra* note 3, at 18.

7. Steven Lubet, Modern Trial Advocacy: Analysis and Practice 8 (National Institute for Trial Advocacy 2d ed. 1997).

8. Thomas A. Mauet, Fundamentals of Trial Techniques 380 (Little, Brown & Co. 3d ed. 1992).

dence and with the jury's perception of how life works."[9] The facts supporting an effective and persuasive theory will reinforce each other.[10] Second, a successful theory speaks to the legal aspects of the case. Trial counsel must direct the theory to prove every element of the charged offenses. Third, a good theory is simple and easy to believe. The theory should rely on undisputed evidence, and trial counsel should strive to eliminate all implausible or questionable aspects of the theory.[11]

Theory development often begins far too late in the trial process. In fact, most junior counsel start to consider their theory in the final stages of trial preparation when writing their opening statements or outlining their closing arguments. Trial counsel must develop a logical, comprehensive, and reasonable theory before drafting charges. The charges should then accurately reflect the theory and not contradict it in any way.

Because the government is not always privy to the complete story at the outset of a case, "it often makes sense to err on the side of over-charging and then to reassess the case after the Article 32 investigation is complete. Chiefs of military justice should be liberal in recommending that charges be dropped after the Article 32 and before referral."[12] Also, the government may need to charge cases in the alternative to present plausible explanations to the fact-finder. However, if trial counsel wish to present the strongest case possible on the most important charges, then they must never force themselves to prove charges that require inconsistent theories.

A common example of inattentive charging that causes the government to present inconsistent theories arises in the context of a barroom brawl. An intoxicated soldier picks up a beer bottle and smashes it over another soldier's head. In an effort to charge the soldier with all possible offenses, an overzealous trial counsel charges both intentional infliction of grievous bodily harm under Article 128, Uniform Code of Military Justice (UCMJ),[13] and drunk and disorderly under Article 134, UCMJ.[14]

To prove both offenses, the government must present inconsistent theories. To prove drunkenness, the government must show that the soldier was intoxicated sufficiently "to impair the rational and full exercise of [his] mental or physical faculties."[15] The aggravated assault offense requires "that the accused, at the time, had the specific intent to inflict grievous bodily harm."[16] Although voluntary intoxication is not a complete defense, it may be introduced to raise reasonable doubt on a specific intent element.[17] By proving drunkenness, the trial counsel undermines his effort to prove the specific intent element required for intentional infliction of grievous bodily harm. The fact-finder may convict the accused of a lesser-included offense under Article 128, but the absence of tactical charging will likely cost the government a conviction on the most serious offense.

By going forward on both the drunk and disorderly and intentional infliction of grievous bodily harm charges, the trial counsel loses the initiative. Instead of picking the terrain to fight on and making the defense respond to him, he allows the defense to seize the initiative by pointing to the inconsistent theories. The facts supporting a persuasive theory should not contradict each other. They should effectively communicate to the panel or military judge what actually occurred. Tactical

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9. *Id.* at 380.

10. LUBET, s*upra* note 7, at 8.

11. *Id.* at 11.

12. Morris, *supra* note 3, at 18.

13. UCMJ art. 128 (2000). The elements of intentional infliction of grievous bodily harm under Article 128, UCMJ, are as follows:

> [1] That the accused assaulted a certain person;
> [2] That grievous bodily harm was thereby inflicted upon such person;
> [3] That the grievous bodily harm was done with unlawful force or violence; and
> [4] That the accused, at the time, had the specific intent to inflict grievous bodily harm.

MCM, *supra* note 2, pt. IV, ¶ 54b(4)(b).

14. UCMJ art. 134. The elements of drunk and disorderly under Article 134, UCMJ are as follows:

> (1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and
> (2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 2, pt. IV, ¶ 73b.

15. MCM, *supra* note 2, pt. IV, ¶ 35c(6).

16. *Id.* pt. IV, ¶ 54b(4)(b)(iv).

17. *Id.* R.C.M. 916*l*(2).

charging requires clear theory development before preferral and ensuring that all charges flow from that theory in a logical manner.

Enhancing the Government's Presentation of Evidence

Another way that tactical charging enhances a trial counsel's ability to succeed involves advance consideration of how particular charges will affect the presentation of evidence at trial. When the government has an evidentiary advantage or possesses the ability to "force" the accused to testify to tell his side of the story, it needs to ensure that adding or deleting particular charges will not shift the initiative to the defense. Two common examples in which trial counsel often let the defense "off the hook" involve uncharged misconduct[18] and false official statements.[19]

The easiest way to avoid defense motions regarding suppression of uncharged misconduct under Military Rule of Evidence 404(b) is to charge the misconduct. Counsel must have credible evidence before charging the actions, and some "misconduct" may not rise to the level of a criminal offense. However, trial counsel often forfeit the advantage in cases by fighting evidence battles rather than exercising tactical charging. By clearly developing the theory of the case prior to preferral and working through an extensive proof analysis worksheet,[20] trial counsel will discover their best methods of proof. Those methods will translate into success if the defense cannot suppress helpful evidence. Adding relevant misconduct to the charge sheet that is consistent with and supports the government's theory will enhance a trial counsel's ability to advocate in the courtroom.

Another tactical mistake is charging a false official statement in cases where the alleged false statement provides the accused's version of events regarding a more serious offense on the charge sheet. A common scenario involves a male soldier accused of indecently assaulting[21] a female soldier in the barracks. When questioned by investigators or his commander, the accused tells his side of the story. As the investigation continues, the trial counsel becomes convinced that the soldier lied on the sworn statement made during the initial interview. The trial counsel then charges both the indecent assault and a false official statement.

To prove that the accused "made a certain official statement,"[22] the trial counsel must introduce the exculpatory statement. The accused then has a choice whether or not to testify because his version of the events is already in front of the fact-finder. Rather than seizing the tactical advantage by "forcing" the defense counsel to put the accused on the stand, the trial counsel allows the defense to fight the battle on terrain of his own choosing. By winning a small battle on a relatively inconsequential charge, the government relinquishes the initiative regarding the indecent assault offense.

Although trial counsel may at times need a false official statement charge to fully explain the theory behind a case, exploring how each specification on the charge sheet benefits the prosecution will assist in maintaining control of the government's initial courtroom advantage. Tactical charging allows the trial counsel to shape the battlefield in a way that enhances his presentation of the case.

Unreasonable Multiplication of Charges

Although trial counsel should consider and perhaps draft all possible offenses in a given scenario, the charges should "adequately reflect the accused's conduct without under-representing the seriousness of the conduct or, at the other extreme, appearing to unreasonably multiply charges."[23] An increased focus on avoiding unreasonable multiplication of charges has resulted in the wake of the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Quiroz*.[24] The

18. *Id.* MIL. R. EVID. 404(b).

19. UCMJ art. 107. The elements of false official statement under Article 107 are as follows:

(1) That the accused signed a certain official document or made a certain official statement;
(2) That the document or statement was false in certain particulars;
(3) That the accused knew it to be false at the time of signing it or making it; and
(4) That the false document or statement was made with the intent to deceive.

MCM, *supra* note 2, pt. IV, ¶ 31b. Trial counsel should note that by executive order in 2002, the President amended the 2000 edition of the *MCM* to remove paragraph 31c(6). Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,777 (Apr. 17, 2002). This change reflects the Court of Appeals for the Armed Forces' opinion in *United States v. Solis*, 46 M.J. 31 (1997). Therefore, false statements made by an accused during an investigation may be charged as false official statements under Article 107, UCMJ, as well as false swearing under Article 134, UCMJ.

20. A proof analysis worksheet requires the trial counsel to list the elements of each offense and state what evidence the counsel intends to offer at trial to prove each element.

21. UCMJ art. 134.

22. MCM, *supra* note 2, ¶ 31b(1).

23. Morris, *supra* note 3, at 18.

Double Jeopardy Clause of the Constitution and the unreasonable multiplication of charges doctrine place limitations on the charging decision. From an advocacy standpoint, however, the tactical reasons for limiting charges are far more practical. Unreasonably multiplying charges "risks (1) evoking unwarranted sympathy for the accused, (2) burdening the government with proving relatively minor charges, and (3) confusing or distracting a panel."[25]

Trial counsel must learn that overcharging rarely achieves better results for the government. Occasionally, intentional multiplicity serves a legitimate purpose;[26] however, piling on charges to make sure that "as much as possible sticks" runs the risk of shifting the initiative to the defense. Tactical charging always asks whether multiple charges for the same underlying misconduct actually gain any recognizable advantage for the government. Rather than allowing the defense to construct its own theory regarding prosecutorial overreaching, trial counsel should simplify the charge sheet by preferring only those charges that most accurately describe the misconduct and directly contribute to the theory of the case.

An all too common scenario illustrates how overcharging can shift the tactical advantage to the defense. Two soldiers decide to go to Mexico to buy about five grams of marijuana. They cross the border and one soldier buys the marijuana. After returning to post, the buyer divides the marijuana with his friend, and they use it together. The government charges the buyer with conspiracy to possess marijuana, conspiracy to distribute marijuana, conspiracy to introduce marijuana onto post, conspiracy to import marijuana into the customs territory of the United States, conspiracy to use marijuana, possession of marijuana, possession with the intent to distribute marijuana, introduction of marijuana, importation of marijuana, distribution of marijuana, use of marijuana, and violating various regulations.[27]

Aside from having to deal with losing a number of the charges if the defense elects to make a multiplicity and unreasonable multiplication of charges motion, the government has also lost the tactical advantage. The trial counsel has turned a simple five-gram charge sheet into one in which the maximum punishment for offenses on the charge sheet totals at least 115 years. The excessive charges would not warrant additional punishment. Yet, the trial counsel has opened the door to defense attacks aimed at evoking sympathy from the military judge and panel regarding overzealous prosecution. Furthermore, the lengthy charge sheet burdens the trial counsel with unnecessary proof challenges and runs the risk of distracting, boring, or confusing the panel. The government has lost the initiative and will have to advocate its position from terrain of the defense's choosing.

Conclusion

This article has only scratched the surface of potential tactical considerations for trial counsel when making the charging decision. Good trial counsel must survey the eventual courtroom battlefield and select where they want to focus the fight. Selecting charges tactically, consistent with an established theory of the case, will allow counsel to shape the courtroom battlefield. Choosing the best terrain on which to fight through the charging process is the first step toward effective advocacy and success in the courtroom. Major Velloney.

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24. 55 M.J. 334 (2001).

> The majority opined that the concept of multiplicity is founded on the Double Jeopardy Clause of the Constitution. Multiplicity focuses on the elements of criminal statutes themselves and congressional intent. The concept of unreasonable multiplication of charges only comes into play when charges do not already violate constitutional prohibitions against multiplicity. "[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." The CAAF pointed specifically to the discussion accompanying Rule for Courts-Martial 307(c)(4) to support the proposition that unreasonable multiplication of charges exists in military practice separate and apart from the concept of multiplicity. The discussion states, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Major David D. Velloney, *Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions*, ARMY LAW., Apr. 2002, at 60 (quoting *Quiroz*, 55 M.J. at 337; MCM, *supra* note 2, R.C.M 307(c)(4) discussion).

25. Morris, *supra* note 3, at 18.

26. *Id.* at 19. "Intentional multiplicity has the benefit of avoiding squabbles over uncharged misconduct and the confusing, dense instructions over lesser included offenses." *Id*.

27. UCMJ arts. 81, 92, 112a (2000).