

# The Art of Trial Advocacy

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

## Effective Motions Practice

You are the trial counsel on your first contested case, a barracks larceny. You are confident of victory because you have an eyewitness who saw the accused taking the stereo equipment out of the victim's room. The day before trial you are looking over the latest defense witness list (given to you last week) and you notice a name you do not recognize, "Dr. Forize." A quick call to Dr. Forize reveals that he is a self-styled expert in eyewitness identification, and he is prepared to testify that your star witness's identification of the accused is severely flawed. It is panic time. You do some cursory research and quickly realize that you must somehow prevent Dr. Forize from testifying. The next morning, as the members are assembling, you tell the judge and opposing counsel that you have a motion to prevent Dr. Forize from testifying. The judge does not look pleased as he calls the Article 39(a)<sup>1</sup> session to order and asks you for the basis of your motion.

Now is your chance. You launch into a long oration about how it is not fair for the defense to spring this witness on you at the last minute, how your research shows that these experts are really defense "hired guns," and how Dr. Forize will become a human lie detector for the defense. After you get all of that off your chest you feel pleased with your performance, until the judge starts asking you some questions. First he asks you exactly what relief you want because it sounds to him like you want a delay (something you definitely do not want because the unit is deploying next week). Next he asks you which party has the burden of persuasion and what the standard of proof is (something you had not thought about). He also asks you if you have any witnesses to call on the motion (you were hoping that your brilliant argument would be enough to sway the judge and you have no witnesses). Finally, the judge asks you when you gave the notice of your motion to the defense counsel and if it was in compliance with the local rules (you never even knew there were any local rules). Instead of responding to these tough questions, you decide to run through your argument one more time, hoping that if you argue forcefully enough, the judge will decide in your favor. After a few minutes the judge stops you and says that your motion is denied. Needless to say, the trial heads down hill from there.

Hopefully, no one has experienced this scenario other than in a nightmare. This vignette, however, does point out some of the most common errors that trial attorneys make when raising and arguing motions before military judges. This article discusses the components of a proper motion, how to avoid some

of the common errors, and how to effectively prepare and present a motion to the military judge.

## Components of a Proper Motion

In order to present an effective motion, we first need to understand the components of a proper motion. A motion, either written or oral, has three primary parts. First, it should be a request for *particular relief* from the military judge. Second, the motion should state the specific legal basis for the relief sought. Third, the motion should set forth an offer of proof summarizing the pertinent facts that you are relying on in support of the motion. Each of these components is addressed in more detail below.

## Request for Relief

Rule For Courts-Martial (RCM) 905(a) states that a motion is an application to the military judge for particular relief.<sup>2</sup> That seems simple and obvious enough, yet counsel often struggle with this in practice. In our vignette, the trial counsel seemed to be concerned with the defense witness because of the substance of the witness's testimony and because of the late notification by the defense. These two complaints, however, may warrant different remedies. One remedy would be to exclude the witness's testimony altogether. If the real problem, however, is late notification, a different remedy may be to grant a delay. It is not clear from the trial counsel what particular relief he wants. This kind of confusion is not uncommon when counsel include several complaints in the same motion and fail to clarify what relief they are really requesting.

To avoid this problem, begin your motion by telling the judge exactly what you want. For example: "The defense respectfully requests that you suppress the knife seized from Sergeant Jones's wall locker because the commander conducted a search without probable cause." Put your bottom line up front so everyone knows why you are bringing this motion and what you hope to achieve. This will keep the litigation focused and keep everyone on track. This should not, however, prevent you from arguing for alternative remedies. For example, if you are litigating the admissibility of an expert witness, your first requested remedy might be to exclude the witness's testimony all together. You may also want to tell the judge that if he does not grant that request, you would at least ask that he place certain limitations on the expert's testimony, coupled with appropriate limiting instructions to the panel. By making the

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1. UCMJ art. 39(a) (2000).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(a) (2000) [hereinafter MCM].

requested relief clear, and placing it at the beginning of your motion, you are much more likely to include only the information that is really relevant to the issues you are litigating. You will also be complying with the rules and helping the judge determine exactly what you want.

### Legal Authority

After setting forth the request for particular relief, a proper motion next needs to tell the judge the legal authority the party is relying on to support the request. Research the rules, statutory authority, and relevant case law on the issue you are litigating and explain how the law supports your position. Consider a few pointers. First, include not only the case cites to relevant cases, but also copies of the actual cases for your military judge and opposing counsel. Many judges will appreciate the time you save everyone by having copies available of the cases and other materials you are relying on. Also, do not ignore the unfavorable cases. If those cases are controlling authority, you may have an ethical obligation to disclose them.<sup>3</sup> Even if the unfavorable cases are not controlling, you should be aware of them and be able to distinguish them from your case. This will prevent you from being blind-sided, and your ability to deal with and distinguish unfavorable opinions will enhance your credibility and your persuasiveness.

You also need to know and set forth which party has the burden of persuasion. In our vignette, the trial counsel had not given this any thought. You cannot ignore this important point. Generally the burden of persuasion on any factual issue is on the moving party.<sup>4</sup> However, there are a number of situations where the burden may shift from one party to another. For example, if the defense alleges unlawful command influence and introduces some evidence sufficient to render a reasonable conclusion in favor of the allegation, the burden shifts to the government to prove beyond a reasonable doubt that either the unlawful command influence did not occur or, if it did occur, it will not impact on the findings or sentence.<sup>5</sup> It is vital that you know and clearly set forth who has the burden of persuasion so that the judge and all parties will know what their responsibilities are during the litigation. You simply cannot effectively present or argue a motion without this understanding.

### Offer of Proof

The third component of a proper motion is an offer of proof summarizing the pertinent facts that you are relying on in support of the motion. Once you know what relief you want, have a good understanding of the law, and know who has the burden of persuasion, presenting an offer of proof should be much easier. Armed with this understanding, you need to marshal all of the facts relevant to your issue and show how the law and the facts merge together to support the relief you are seeking. There are some additional pointers you need to understand about the offer of proof.

Just as it is important to know who has the burden of persuasion, it is also critical that you understand and set forth what the standard of proof is for your particular motion. Generally the standard of proof is a preponderance of the evidence.<sup>6</sup> There are some motions, however, where the standard is higher. For example, if the defense claims that an inspection conducted by the government was really a subterfuge for a search without probable cause, the government must prove by clear and convincing evidence that the examination was an inspection.<sup>7</sup> You must know the standard in order to know how much evidence is needed to support the motion. As with the other components of a proper motion, you should clearly set out the standard of proof.

Another important point that you must understand is that your offer of proof is not evidence, and is not sufficient standing alone to meet the factual standard of proof. In our vignette, the trial counsel had not planned to call any witnesses to support his claim that Dr. Forize was not qualified to testify. If you do not call witnesses, use stipulations, or introduce relevant documents or other physical evidence, you have not given the military judge a factual basis on which to decide the issue. As one appellate court put it, litigants should not lapse into a procedure where the moving party will state the motion and then launch right into argument without presenting any proof. Trial judges must force counsel to call witnesses, provide valid real and documentary evidence, or provide a stipulation. This procedure will save time and grief and provide a solid record.<sup>8</sup>

It is true that the rules of evidence do not generally apply at the motions stage of the trial.<sup>9</sup> This, however, does not relieve counsel of the responsibility to put on evidence and develop a

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3. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, para. 3.3(a)(3) (1 May 1992).

4. MCM, *supra* note 2, R.C.M. 905(c)(2).

5. United States v. Biagase, 50 M.J. 143, 150-51 (1999).

6. MCM, *supra* note 2, R.C.M. 905(c)(1).

7. MCM, *supra* note 2, MIL. R. EVID. 313(b).

8. United States v. Stubbs, 23 M.J. 188, 195 (C.M.A. 1987).

9. MCM, *supra* note 2, MIL. R. EVID. 104(a).

record. Most motions involve factual disputes, and the mere claim as to what the facts are, is insufficient. The military judge has the responsibility to determine preliminary questions and he needs facts in order to do this and to develop a complete record. If you are unprepared to call witnesses or introduce other necessary facts, this is an almost certain guarantee that you will fail to meet the standard of proof.

### **Other Tips for Success**

Along with understanding the proper components of a motion, there are some other basic pointers that you should keep in mind in your motions practice. First, when litigating a motion before the military judge, listen carefully to the judge's questions and do your best to answer them head on. If the question calls for a yes or no answer, first answer the question and then provide any explanation that you think is necessary. Do not do what the trial counsel did in our vignette, and ignore the tough questions in the mistaken belief that the force of your argument will somehow convince the judge. Questions from the judge provide you an important insight into what the judge is thinking and what issues are most important to him. Look at these questions as opportunities to focus your argument and address these important issues. If it is important to the judge, it better be important to you. Good oral argument requires thorough preparation and an ability to think on your feet. One way to better prepare yourself is to get other lawyers in your office to help you conduct a mock argument. This will give you an opportunity to think on your feet and to practice answering questions.

The other aspect of motions practice that you must be sensitive to are issues of timeliness and waiver. Rules for Courts-

Martial 905, 906, and 907 set forth the timeliness requirements of the most common motions. The rules state that if a party fails to make the motion before the established deadline, the motion is waived unless the military judge grants relief from waiver for good cause. You must also be sensitive to the requirements of the local rules. The local rules cannot conflict with the *Manual for Courts-Martial*, but they often establish other requirements and procedures that you should comply with.

There are, of course, times when you are unable to raise the motion in a timely manner due to circumstances beyond your control. These circumstances should be the exception, not the rule. A failure by the trial counsel to look at the defense witness list until the day before trial, in most cases will not constitute good cause for a late motion. A successful motion will take some preparation and if it involves complex factual and legal issues, it will require a great deal of preparation. Habitually throwing together motions at the last minute after the deadlines have passed will probably only win you the anger and frustration of the military judge.

Understanding the key components and including them in your motion will make you a more effective trial attorney. If you put time and effort into your preparation you will be a more successful litigator, and you will avoid the pitfalls of the trial counsel in our vignette. In some instances, the case may be won or lost depending on the outcome of the motion. In any case where motions are litigated, they can have a significant impact on your case. Developing the skills to effectively litigate motions is an important component of your success as a trial attorney. Major Hansen.