INSIDE THE MINDS

Strategies for Military Criminal Defense

Leading Lawyers on Understanding the Military Justice System, Constructing Effective Defense Strategies, and Navigating Complex Cases

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Effective Defense Strategies

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Using Economics to the Benefit of the Defense

In typical (non-high profile) military cases, one of the most successful defense strategies can be a focus on economics. Every commander who refers charges against an accused to a court-martial has to first weigh the costs of the trial. Every cost for the trial is borne by that command and every command in today's day and age pays particular attention to how much a prosecution and defense of a case will cost. In the military, unlike civilian courts, all costs to defend a case are paid for by the US government—i.e., the command.

The command pays for every expert witness the defense requests and is granted: every private investigator, every consultant, and every witness's travel cost. In a large felony trial, these costs can add up very quickly. A good defense attorney will use these economic factors to the client's advantage. Making the prosecution of your client or the accused as costly and expensive as possible for the government is a formidable sword for the defense. Locating and requesting relevant witnesses from all over the globe, including theaters of combat, is also a valid defense strategy. Sometimes the only tactic the defense has in a case is the enormous costs to the government of fully prosecuting the charges. These strategies can be used to gain reasonable negotiated resolutions where none existed before.

I recently defended a solider in Kuwait/Iraq at an Article 32 hearing for allegations of sexual assault. One of the lead defense strategies was to locate and request relevant key witnesses who were located all over Iraq and who were involved in combat operations. After significant investigation, I was able to make a case to the investigating officer about how important, relevant, and necessary all of these witnesses were to his ultimate decision in investigating the allegations against my client. The government had a very difficult time in first locating all of my requested witnesses and then obtaining all of those witnesses and getting them released from their respective commands and then, in addition, getting all of the necessary logistics in place so that the witnesses could actually attend the hearing.

On the day of the scheduled Article 32 hearing, numerous witnesses were not present, due to combat operational necessities, and some witnesses were not released from their commands to attend the hearing. Due to all of

these logistical difficulties and the enormous costs to the command in the witnesses' travel, the government conceded at the hearing and offered an exceptional negotiated resolution for my client, when previously they had been unwilling to offer any plea offers due to the nature of the allegations.

Increased Scrutiny for Sexual Assault Cases

A recent trend in military criminal defense cases is that the Department of Defense has begun spending increased funds and resources on the successful prosecution of sexual assault cases. Additionally, the atmosphere inside the Department of Defense has made it clear to command staff judge advocates that sexual assault cases should be aggressively and successfully prosecuted. Considerable resources are being used in the armed forces to educate service men and women about how to report allegations of sexual assault. Also, the Department of Defense is focusing efforts to better train Judge Advocate General (JAG) prosecutors (referred to as trial counsel in the military) so that they can better prosecute sexual assault cases and obtain better conviction rates.

One of the fallouts from this type of increased scrutiny is that convening authorities are much less likely to not refer weak cases to a court-martial. It is very unlikely in today's political climate that a convening authority would put their career on the line by not referring a sexual assault allegation to a trial. The result is that poorly founded or investigated sexual assault cases end up in trial instead of being dismissed or plea bargained like the civilian district attorney's office would. What this means for the defense strategy is that preparations for an ultimate trial should start at the very beginning of a case. A defense counsel who goes into a sexual assault case hoping for a quick and reasonable negotiated resolution can find himself or herself unprepared for trial when the reasonable plea bargain from the convening authority fails to materialize. In my practice, when allegations of sexual assault are preferred against my client, all defense strategies and tactics are focused from the very onset toward prevailing at the trial level.

International Strategies for the Defense

International considerations are an important strategy for the military defense counsel. With the current operational tempo of the US military, a

court-martial is difficult to conduct without considering international implications. Many times, by the time a case gets to trial, witnesses have been spread throughout the world and transferred to different and various commands. Additionally, many times the alleged crimes take place in foreign countries and involve civilian witnesses from these foreign jurisdictions. A sound defense strategy will factor in these international considerations and exploit them to the accused's advantage.

For example, if foreign civilian witnesses are involved, interpreters may be required and local native speaking private investigators may be required in order to properly interview these witnesses pretrial. Civilian native witnesses may be difficult to locate and it may be difficult to obtain their cooperation. Passing these burdens onto the prosecutor in an international case is an effective strategy. If nothing else, the prosecutor will be forced to spend his or her time chasing down difficult to obtain witnesses instead of preparing their case against you.

Another example for the civilian defense counsel to consider in an international case is the visa requirements for access to a foreign country. When I was defending a solider recently in Kuwait/Iraq, there were enormous visa requirements and hurdles in order for me to be allowed into Iraq to attend the trial and pretrial hearings for my client. Obviously, the government has the burden of ensuring that the accused's counsel is present at the trial. If the government is unable to obtain a visa into Iraq or Afghanistan for civilian counsel to attend the hearing, the prosecution of that case and client will have great difficulty proceeding and the appellate issues will grow exponentially. A savvy civilian defense counsel can take advantage of these international visa difficulties to his or her client's advantage.

Political considerations should also be used to the client's advantage when handling cases in the international arena. In many cases, the very nature of the allegations and the government's desire to not publicize those allegations to the host country can be of value to the defense. For instance, any allegations that contain facts surrounding the use or abuse of alcohol can be used to a client's advantage in a Muslim country where alcohol use is banned and strictly forbidden to be used or possessed by US armed forces. Exploiting the allegations of the use of alcohol, in a case that really has

nothing to do with alcohol, can potentially lead to a better resolution of the charges and a better resolution of the case, if these political considerations are used properly.

Military Juries

An enormous difference between military and civilian criminal cases is the jury. From the lack of *voir dire* in the military to the actual members that sit on a jury, the differences between a civilian and military jury panel and the *voir dire* process is significant and requires considerable thought and preparation in order to successfully represent an accused in a military jury system.

Many military courts throughout the differing branches of the armed forces do not allow defense counsel to conduct any *voir dire*. Some military courts require defense counsel to submit all *voir dire* questions to the military judge in advance; the trial judge then asks all of the approved previously submitted questions by both the prosecution and the defense. Some military courts use a hybrid—counsel submits all questions to the trial judge in advance for approval, the judge asks some general questions, and then the defense counsel may speak with the prospective jury members *en banc* and individually. Still other military courts allow a more traditional civilian type *voir dire* experience, where the defense counsel asks all questions at the time of jury selection. These courts are the exception though. The reason for the military judge's strict control over the *voir dire* process is that unlike the civilian system where hundreds of potential jurors are called to eventually sit on a twelve-member jury panel, in the military twelve service members will be selected to sit on a jury panel in which the minimum requirement for a valid jury is five members. Military judges are very cautious about attorneys polluting an entire potential jury panel with a bad or improper question since so few members are appointed to participate in the process.

The actual members of military juries are far different from their civilian counterparts. In military courts, the command that has referred charges against the accused to a court-martial appoints specific members to that very same court-martial. Many times, these members have served on numerous juries—in effect serving a tour of duty as a professional jury

member. In military courts, if the accused is enlisted, then he or she will have three options for their jury: 1) military judge alone (bench trial); 2) mixed members – meaning both enlisted and officers will serve on the jury; and 3) officers only. Defendants who are officers may only select a bench trial (military judge alone) or a jury made up entirely of officers.

Considerable thought and preparation must go into the selection of these three options when representing the enlisted client. For example, in a past sexual assault case where I was defending an enlisted client, we chose an all-officer jury panel due to the junior rank of my client. Our thought process was that senior enlisted members would have been appointed to serve on the jury and they would not have been sympathetic to the plight of my junior enlisted client. On the other hand, junior officers recently out of college and new to the military were much more sympathetic to our defense themes.

In officer client cases, the decision on jury format is much easier, as a jury, no matter who it is made up of, is almost always better for the accused than a military judge. The exception to this general rule, for me, has been when my defense will be a very technical defense or legally based defense, such as a trespass case in a jointly inhabited residence, or a possession of child pornography case, where the defense is lack of knowledge due to the functioning of computer software sharing files with other computers. Other times when a military judge alone trial might be better than military jury trial is when the allegations, the defense theme or the accused will inflame a panel of senior military members. I recently tried an officer jury case where the allegation was the wrongful use of cocaine. In that case, a military judge selection was the better choice due to the inherit bias in the system where senior military members would be so inflamed and prejudiced against an officer client who was accused of using cocaine while on duty.

I have also found military juries to be far more educated and conservative when compared to their civilian counterparts. Typically, this favors the prosecution in most military courts-martial, but I have found that in weak sexual assault cases, military juries are much more favorable to the accused and hold the government to a high burden before finding an accused guilty of sexual assault crimes.

Military criminal cases—similar to civilian federal criminal cases—move very quickly when compared to their civilian counterparts. Military rules have very short speedy trial mandates and the government is generally held to very strict guidelines in making sure the milestones in a criminal case, such as preferral, referral, arraignment, and the beginning of trial, all take place within the speedy trial requirements. Managing this quick pace is a must for the defense counsel. My personal practice is to always delay the proceedings as long as possible. Almost always, the government's case never gets any better after the initial allegations against the accused are made. It has been my experience that the defense generally gets better with time. Many times witnesses from a single command are scattered to the far reaches of the earth while a case is pending. Victims can have a tendency to lose interest in a case when significant periods of time past. Combat operations can also have an impact on the availability of witnesses during lengthy proceedings. In many cases, the defense can have significant impact on the timing of the proceedings. The defense can request delays in the calculation of the speedy trial timelines and can attribute delays in the proceedings to the defense, thereby tolling the speedy trial clock. Additionally, the defense can create strategies to delay and lengthen the proceedings by requesting and using experts, investigators, interviewing witnesses, requesting depositions, viewing crime scenes, and filing significant pretrial motions.

Military Members

I think one of the biggest differences between military and civilian courts arises with the members of a jury. Military personnel are generally well educated, conservative, and prone to following the rules. These types of juries are not easily induced to follow a strategy of jury nullification. Most people who the convening authority selects for a court-martial jury will be prone to undue command influence to convict. Not that all members simply vote guilty regardless of the evidence or the particularities of a case, but they are more inclined toward the prosecution's case at the beginning and it takes effort and solid preparation to move their opinions.

In my experience, even when there is a properly and thoroughly prepared case for reasonable doubt or a case in which the government has not produced enough evidence to convict, military men and women will

sometimes do the job for the prosecutor and reach a finding of guilt in a case where overwhelming reasonable doubt would have prevailed with a civilian jury. However, with a well thought-out defense theme, military members will have no difficulties in deciding against the same government they work for every day on the right case. Every member of the military has experienced some form of disappointment with government services and many have experienced significant setbacks in their careers due to the bureaucracy of the US military system. Properly presented, these themes of government ineptitude, lack of attention to the details, and just plain getting it wrong can resonate with military juries' past personal experiences.

Another significant difference between civilian and military courts is the sentencing scheme for those found guilty at a court-martial. Unlike in civilian courts where the jury is explicitly instructed not to consider the potential punishment for an accused they find culpable, military juries carry the extra duty of determining the sentence of an accused they have just found guilty. This system can be a real challenge for the practitioner practicing inside the military justice system. Careful thought must go into a defense strategy when electing a military jury forum, as defense tactics must include the presentation of a sentencing case to the very same jury who just concluded that your defense themes were without merit. This careful consideration is best demonstrated in the decision to have the accused testify or not testify.

A valid strategy is to not have the accused testify under any circumstances with a military jury. Then in the event there is a guilty finding, the accused can make either a sworn or unsworn statement to the jury and retain some credibility and options for taking responsibility and acknowledging the jury's decision of guilt. The more difficult scenario is where the accused takes the stand during the trial on the merits and adamantly denies beyond all possibility his or her guilt and then is faced with making a statement during the sentencing phase of the court-martial to the very same jury who disbelieved the prior testimony. In this situation, the practitioner must focus the sentencing case on the potential for rehabilitation of the client and stay away from arguing or disagreeing with the jury's verdict. It is a very awkward and uncomfortable position to be in for both the client and his or her defense counsel.

Another significant difference between civilian and military courts is the immediate sentencing after a guilty verdict. In civilian courts, it is quite common and the norm to have a lengthy continuance between the verdict and the sentencing hearing. This delay between the two proceedings is very necessary in complex cases, as the entire defense strategy must shift from "my client did not do it" to "I'm sorry my client did it." Significant time needs to be spent preparing the client to either make a modified or partial admission at sentencing to honor the jury's verdict of guilt, or to stick to a firm absolute denial and risk the judge's sentencing wrath.

However, in the military system, if a verdict of guilt is rendered at 10 a.m., the sentencing phase of the court-martial begins at 10:15 a.m. The obvious difficulty for practitioners is that they must not only prepare their case on its merits for the trial, but also prepare the exact opposite case in the event they find themselves in a sentencing phase of the court-martial.

Practical aspects to consider are whether the accused will make a sworn statement or an unsworn statement. The general favorite of military practitioners is the unsworn statement, as less preparation is required and no cross-examination or follow-up questions are allowed. Additional concerns will be with potential good military character witnesses. The thoroughly prepared practitioner will have these good military character witnesses prepared to testify at both the merit and sentencing phase of the trial. A determination will have to be made as to which witnesses will still be able to testify favorably for the accused after a military jury has just found that same accused guilty of some or all of the specifications. Some witnesses will stand beside their original opinions, regardless of the jury's verdict, and others will not.

Another difficulty to consider and prepare for is the closing sentencing argument. Practitioners can find themselves having just made a passionate closing argument to the military jury in a sexual assault case, completely denigrating the alleged victim's character, version of events, and morality, only to find themselves a few hours later in front of that very same jury, trying to make an argument for leniency to the jury who found their client guilty of everything the victim testified to. This "dance" is very difficult to do with credibility and great care must be taken to passionately make both closing arguments in an effective manner.

As described above, my preference at sentencing is to focus on the accused's ability to be rehabilitated, his or her humanity, and their ability to still be a productive member of the defendant's command. I generally stay away from the merits or my disagreement with the jury's verdict.

The Challenges of Complex Cases

Sexual Assault Cases

I have found that sexual assault cases are some of the most complex and complicated cases to defend in the military. Not only has the law drastically changed with these crimes and with new statutes and legislation from Congress that are vague and conflicting and going through the appellate review process, but I have found that the collateral consequences to sexual assault cases in the military—that being sex offender registration back in the state where the accused is released to—is not understood by military counsel, military judges, or military prosecutors. I have spent considerable time in researching the various state's statutes and laws as they relate to sex offender registration, and almost every state is different from their neighbors. Every state has different criteria to evaluate a sex assault case, and these varying criteria impact different provisions and requirements in the sex offender registration requirements for that particular state.

To make matters even more complicated, the military has its own criteria for determining what sex assault crimes require the military to report an accused to a federal database as a sex offender. These criteria many times do not match the state requirements or treatment, and many times a legal battle ensues back in the local state jurisdiction as to whether a military conviction meets the state criteria for a sex offender registration. There is no current or pending attempt by either the states or the federal government to unify this process.

For example, I had a male sexual assault client who was charged with slapping a female victim across the buttocks with his hand and was charged with a low-level military sexual assault charge. The client's primary goal was not to be treated as a sex offender and to not have to register as a sex offender post-military service. After considerable work, the military command was willing to reduce the charge to a non-sexual offense and

allow the accused to plead guilty to simple assault. Additionally, the military was willing to stipulate that this was not a sexual offense and the military would not report or require the accused to register with the federal sex offender registration database. Most military counsel would have ended the case there—believing that they had successfully accomplished their client's goal. However, upon more research, it was determined that the state in which the accused was to be discharged to and in which the accused intended to reside after his discharge from the military, focused their sex offender registration requirements on the underlying factual basis for the original compliant by the victim. What this meant was that because the original allegations by the victim involved an assault to the "buttocks," that state would not pay any attention to the ultimate disposition of the charges by the military or the lack of federal sexual assault registration by the military. The end conclusion was that if any conviction occurred or any plea of guilty was entered (even changing the charge to something as different as unauthorized absence), that particular state would require sex offender registration once the accused was discharged from the military, due to the original allegations and facts of an assault to the buttocks.

A good practitioner will develop a defense strategy that has greater depth than the typical and much expected sword duel between the victim and the accused. For example, spending significant efforts to research and uncover the alleged victim's potential motives: hidden boyfriend, needing attention as a victim for their family or from the system, pregnancy, hurt feelings for the way they were treated by the accused, desiring to get out of deployment, and seeking to distract attention away from recent poor performance by being a victim. If the trial counsel (prosecutor) is doing their job, they will make it very difficult for a defense attorney to get any quality time with the alleged victim prior to that witness taking the stand. An aggressive defense attorney must push hard and be creative in attempting to gain access to the alleged victim prior to the cross-examination on the witness stand at trial.

Some practical aspects to this advice are to request a deposition of the alleged victim prior to the Article 32 hearing if the victim refuses to attend the hearing or submit to an interview prior to the hearing. A good compelling case can be made to the investigating officer and to the convening authority as to why sworn testimony from the alleged victim is crucial and mandatory for a proper Article 32 hearing. In those cases where

the alleged victim is hesitant to testify at the pretrial Article 32 hearing, the practitioner must aggressively demand and litigate to obtain sworn testimony. These demands can come in the form of a deposition request, request for interview pre-hearing, request for a video deposition, and requests that the investigating officer make formal written invitations to the alleged victim, explaining the necessity of the testimony, the fact the government will cover all expenses, and the potential that the case will be dismissed without their testimony.

Video depositions can be excellent tools on international cases where the alleged victim, witnesses, and the court proceedings may all be on different continents. With modern video conferencing in many law firms and offered by private service providers, it is extremely routine and easy for the practitioner to set up a video conference for the witness near their residence or place of employment while the entire court proceeding or pretrial Article 32 hearing is being conducted thousands of miles away. Facilitating these alternate forms of testimony will go a long way in ensuring that the witness or alleged victim's final cross-examination at trial is a successful one.

Meeting the challenges of these complex cases requires creativity, creativity, and more creativity. It is important for defense practitioners to always be thinking of new and creative ways to present their case. Too many seasoned practitioners fall into a rut and use the same closing arguments, the same themes, and the same questions and drama throughout a trial. Practitioners must remember that every trial and case is unique and different, regardless of whether it involves a positive urinalysis or a substantially incapacitated sexual assault case. The facts, the witnesses, and the court are always different, and a keen defense attorney will spend considerable time in creating new and creative defense themes and presentations to the members tailored to that exact case.

Take, for example, the innocent ingestion defense in a positive urinalysis case. Being creative means leaving no stone unturned when it comes to the potential source of the illegal substance entering your client's system. A creative defense will not simply stop at a three-day window when the accused could have mistakenly ingested the substance. Rather, the creative defense will trace the exact location, the exact time, and will corroborate every fact of the accused's testimony. This is not easy to do and requires

determination and willingness to not take "no" for an answer. Actually visiting the bar where the accused may have ingested the substance and talking to the bartenders, security, and any other patrons who are sympathetic may lead to helpful facts and sources of potential testimony. Visiting the potential witnesses who were with the accused over the three-day period of potential ingestion in their homes or at their place of employment may provide better facts and openness than a simple telephone interview.

Conclusion

In my experience one of the most important things to keep in mind when handling a defense case in the military justice system is to never underestimate the military jury. Military juries are very unique creatures and their makeup and operation is very different from civilian courts. The military defense attorney must have a keen insight into what motivates them, what impassions them, and what gives them strong negative reactions. As a defense counsel, I have found military juries to be both receptive to persuasion and absolutely unmovable in their opinions. I have found them to be both open to new ideas and biased to the point of being closed-minded. I have found military juries to respect the rule of law and to completely discount the idea of beyond a reasonable doubt. Military juries are in my experience very difficult to master as a defense counsel. They typically do not like outsiders, and if you do not speak their language or have not served in the military, they can be very unforgiving and uninviting. The military justice system is one that is built to ensure the good order and discipline of the unit as a whole and it is not built around the individual needs or rights of the one service member/client. A savvy defense counsel will appreciate these differences and find creative ways around their shortcomings and will exploit the jury's uniqueness to their client's advantage.

Key Takeaways

- In typical (non-high profile) military cases, one of the most successful defense strategies can be economics. Every commander who refers charges against an accused to a court-martial has to first weigh the costs of the trial. Every cost for the trial is borne by that command and every

command in today's day and age pays particular attention to how much a prosecution and defense of a case will cost. In the military, unlike civilian courts, all costs to defend a case are paid for by the US government—i.e., the command.

- International considerations are an important strategy for the military defense counsel. With the current operational tempo of the US military, a court-martial is difficult to conduct without considering international implications. Many times, by the time a case gets to trial, witnesses have been spread throughout the world and transferred to different and various commands.
- The civilian defense counsel in an international case should consider the visa requirements for access to the country. The government has the burden of ensuring that the accused's counsel is present at the trial. If the government is unable to obtain a visa for civilian counsel to attend the hearing, the prosecution of that case and client is unlikely to proceed.
- An enormous difference between military and civilian criminal cases is the jury. From the lack of *voir dire* in the military to the actual members that sit on a jury, the differences between a civilian and military jury panel and processes are significant and require considerable thought and preparation in order to successfully represent an accused.
- Military juries are not easily induced to follow a strategy of jury nullification. Most people who the convening authority selects for a court-martial jury will be prone to undue command influence to convict. Not that all members simply vote guilty regardless of the evidence or the particularities of a case, but they are more inclined toward the prosecution's case at the beginning and it takes effort and solid preparation to move their opinions.
- Unlike in civilian courts where the jury is explicitly instructed not to consider the potential punishment for an accused they find culpable, military juries carry the extra duty of determining the sentence of an accused they have just found guilty.
- Careful thought must go into a defense strategy when electing a military jury, as defense tactics must include the presentation of a sentencing case to the very same jury who just concluded that your defense themes were without merit.

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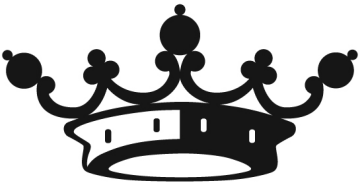

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