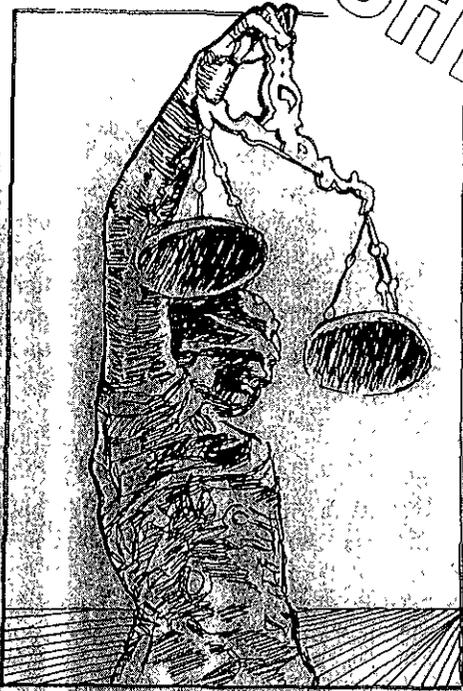


THE COMMANDER- ATTORNEY RELATIONSHIP

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One of the most important things an Infantry company, battalion, or non-separate brigade commander can do is to cultivate a good working relationship with the staff officers at higher headquarters. And nowhere is this sort of relationship more important for him than when he must deal with military criminal law. Because he does not normally have an attorney on his staff, he must turn to the staff of a higher commander for legal advice and for technical assistance in carrying out his criminal law responsibilities.

When he does this, he creates a commander-attorney relationship, which is probably unique among command and staff relationships. For the attorney, the effectiveness of this relationship is central to the accomplishment of his duties. For the commander, the relationship may not be central, but it is critical if he is to carry out his most sensitive responsibilities.

Several aspects of the commander-attorney relationship make it different from other command and staff relationships. One is the unusual extent of the direct, personal contact between the attorney — a subordinate member of a division-level staff — and commanders at all of the subordinate levels. (How often does a company commander, for instance, get to speak with a division's assistant G1?)

Another difference is the nature of the staff work that is provided by the legal officer, for the attorney brings a specialized knowledge to the relationship that is usually outside the commander's training and experience.

LEGAL FRAMEWORK

Understanding the commander-attorney relationship begins with understanding its legal and organizational framework. The legal framework is provided by the Uniform Code of Military Justice (UCMJ) and by the Manual for Courts-Martial, whose provisions set out the commanders' responsibilities as well as those of the attorneys who work for them.

Company commanders must inquire into possible criminal misconduct, administer Article 15 punishment when appropriate, and forward charges when trial by court-martial appears appropriate. They have the authority to apprehend offenders when they have probable cause to believe an offense has been committed; they may order searches of the property of the soldiers who

belong to their commands; they have overall responsibility for maintaining law, order, and discipline within their units.

In addition to these same responsibilities, battalion and brigade commanders can convene summary and special courts-martial and Article 32 investigations. It is their duty also to provide command recommendations to the general court-martial convening authority (usually the division commander) concerning the disposition of bad conduct discharge (BCD) special and general court-martial cases, and discharges under Chapter 10, AR 635-200.

At company through brigade level, the law requires little judge advocate participation in criminal and disciplinary procedure, although a judge advocate has to review certain Article 15 appeals, and to participate in the trial if a special court-martial is convened.

Military justice at these levels, though, has become increasingly technical, and the procedures required tend to change rapidly. For example, commanders often find it useful to obtain the assistance of lawyers in determining whether a search is legally appropriate, in drafting specifications, in preparing the papers necessary for pre-trial confinement, and in deciding whether to offer Article 15 punishment. In addition, an Article 32 investigation, although normally conducted by an officer of the command, involves the participation of two or more attorneys, one as a government representative.

Many of these requirements for a lawyer to assist the commander mirror the right of accused soldiers to have legal counsel represent them. In reality, the commander who is offering Article 15 punishment in a legally or factually complex situation often needs legal advice as much as the accused soldier, who is guaranteed by regulation the right to legal advice.

ORGANIZATION

To meet the increased need for legal services, legal staffs have been expanded. A division's Office of the Staff Judge Advocate (SJA), for instance, once consisted of five attorneys and support personnel, but it now commonly consists of 15 to 25 judge advocates, depending on local augmentation.

Recently, the defense counsel system has been reorganized as the Army Trial Defense Service, an organization outside the local chain of command and responsible directly to Department of the Army. By custom and regulation, the division's SJA is the legal advisor to the commander on whose staff he serves, and to the command. Because he usually does not give legal advice directly to subordinate commanders, this task falls to his own subordinates within his office.

In Europe, for example, most general court-martial jurisdictions have decentralized branch offices, in effect providing mini-SJA offices at the brigade and military community levels. The officers-in-charge (OIC) of these offices, judge advocate captains or majors, are responsi-

ble for advising the commanders within their areas. Subunits within an area may be the responsibility of particular attorneys in an office — if it is large enough to have more than one — or the OIC may retain the "advice" function.

At military installations in the United States, branch legal offices are rare, but the job of advising subordinate commanders is commonly delegated to particular judge advocates within a post or division SJA office.

PROBLEMS

If advice to commanders were the only service required of military attorneys, the commander-attorney relationship might be a simple one. But a significant amount of authority sometimes is delegated to attorneys by higher commanders, and unit regulations as well may require commanders to consult with an attorney. An example of this is the authority to approve pre-trial confinement, which in some organizations is delegated to the SJA. Another is the requirement that a commander inform his servicing legal center when he places an individual on restriction. Such a rule is actually useful in avoiding later problems in court, even though it may seem an unwarranted intrusion upon a command prerogative.

Much of this day-to-day involvement with the processing of military justice actions takes place before a case is referred to court and before the attorney enters the case as a duly appointed trial counsel. Sometimes this involvement gives the attorney the ego-satisfying feeling of having total responsibility for his cases and can bring him into conflict with the commander. He may feel like a prosecutor, a military version of a civilian district attorney, and often will actively seek to take control of the processing of court-martial cases at the earliest possible stage. To the extent that his freedom of action is limited by the commander's authority, he may chafe under the restrictions. At the same time, the commander may resent the intrusion of yet another staff section into his business. (On the other hand, he may feel glad to have one less worry.)

Sometimes there is an underlying tension between the commander and the attorney simply because each has a different orientation. It may be no more than a suspicion on the part of one that the other does not really understand the ramifications of certain courses of action, but occasionally it may erupt into open disagreement.

For example, the appropriate disposition of a criminal matter may evoke conflicting opinions. There will be no problem with a case in which a soldier who has been a source of trouble in the unit is caught committing an offense, and the case is clearcut. The commander and the attorney will probably agree to take the case to trial at a level appropriate to the seriousness of the offense. Problems arise, though, when a commander wants a case prosecuted but the judge advocate feels that there are serious problems with it. There may be an important civilian witness in the United States, for example, who is unwill-



ing to travel to a trial in Europe or Korea. Or perhaps the judge advocate believes some of the critical evidence will be suppressed because it was the fruit of an illegal search or an improperly taken confession.

From the commander's point of view, it is important to the discipline and morale of his unit that the offender be punished. At the very least, he feels the offender should go to trial. The judge advocate, on the other hand, may have difficulty understanding how unit discipline can be reinforced by taking a case to trial that is likely to result in an acquittal. (He also usually feels a strong personal stake in not "losing" prosecutions in court.)

Another example of possible conflict between an attorney and a commander is the case in which a soldier who, accused of a serious offense, is not a troublemaker but has a good record and the esteem of his supervisors. He may have participated in a larceny while drunk, or he may have "invested" in a drug-dealing scheme. If his commander sees him as a valuable member of the unit, he may not want to see him punished severely. The judge advocate, meanwhile, sees that an offense has been committed and that the case merits trial. (It is not unusual, by the way, in this sort of case for different commanders in the chain of command to disagree among themselves as to the appropriate disposition of the case.)

The difference in orientation also often becomes evident when a commander and the judge advocate evaluate a soldier's request for discharge for the good of the ser-

vice under the provisions of Chapter 10, AR 635-200. From the judge advocate's perspective, it is often in the interest of the government to approve such a request when the case has serious problems with proof or when there are difficult motions that can be made by the defense. But a commander, and particularly a unit commander, tends to view the soldier who is given such a discharge as someone who has "gotten over." He may forget that the soldier will be separated as a Private (E-1), probably with an other than honorable discharge, which will cost him most of his military and veteran's benefits. He may also overlook the fact that if the soldier is tried and acquitted he can return to the unit with no punishment at all.

If a commander believes that a Chapter 10 discharge constitutes little or no punishment, he may consider it an appropriate disposition for the previously good soldier who is now in serious trouble, because it avoids the possibility of a court-martial conviction. But the attorney, giving more weight to the consequences of such a discharge, may disagree. The genius of the system is that both of these viewpoints must be considered in reaching an appropriate decision.

The different duties judge advocate officers perform also create confusion. Not all judge advocates serve the same function. Furthermore, the judge advocate who ordinarily serves as the commander's legal advisor and trial counsel may on occasion be placed in a role in which he

cannot advise the commander. He may be handling a legal assistance problem (such as indebtedness) for a member of the command, for example, and as such he must pursue his client's interest without regard to the commander's position.

A commander ordinarily will be well aware that he should not seek criminal law advice from a judge advocate who is serving as a defense counsel. But when a defense counsel, acting as an advocate for his client, contacts a commander, the commander may not fully appreciate that the defense counsel is not acting as his advisor. Since the defense counsel's role is that of an advocate advancing the interest of his client, a commander should carefully evaluate matters submitted by the counsel and seek help from his own legal advisor.

Another type of difficulty arises because an attorney must rely on support from persons under the commander for tasks that make up a large part of the military criminal law process. The battalion legal clerk's performance, for example, can be critical to the outcome of a case. If he does not properly prepare the charge sheet, it will have to be redone, and time itself is a factor that might result in the dismissal of a case. The battalion legal clerk is sometimes responsible for transcribing the Article 32b investigation. If the transcription is unduly delayed, the case may be dismissed.

The conflict arises when the legal clerk's time is taken up with other duties. He is in the uncomfortable position of having the judge advocate tell him that one action takes priority while the adjutant or his commander directs him to do some other task. Accordingly, if he is to perform the functions required by military criminal law procedures, the battalion legal clerk must have the full support of his commander.

The same is true of the Article 32 investigating officer: The commander needs to impress upon him the importance of his assignment, and also must allow him the time he needs to perform the investigation properly.

Important improvements in the commander-attorney working relationship are coming about. Because of some changes in personnel policies for JAG officers, more experienced JAGC personnel are available to fill the important slots in the field. This should mean they will be more familiar with commanders and their problems, which, in turn, should improve their ability to assist the commanders.

Even with these changes, the responsibility still rests with commanders and judge advocates in the field to make the most of the commander-attorney relationship. Much has been made of the need for good personal interaction. New judge advocates in training at The Judge Advocate General's School, or in orientations given by more experienced attorneys, are often encouraged to join in the activities of the command — to attend social functions, to be present at field training, and to visit major training areas. These are important steps that judge advocates should take. Commanders can help by providing them with the opportunities.

Probably more important than this "getting to know you" activity, is the direct, personal interaction between commander and attorney concerning the business at hand. The reason for his mutual orientation and arrangement of priorities is simple: the commander-attorney relationship is *ad hoc*, and is less structured than the more traditional relations of commander-staff officer.

The judge advocate can do more to assist a commander than just process his cases and advise him concerning their disposition. They can help train his NCOs and officers in such subjects as search and seizure and apprehensions. The judge advocate and his staff can also be helpful in training the commander's legal clerks, especially in the common situation where the unit legal clerk lacks formal training in his MOS.

Whether bringing an attorney into the administration of criminal law at the unit level is desired, the system requires that commanders exercise their responsibilities knowledgeably and with a strong sense of the needs of their command. An understanding of their respective roles in the system, and a respect for the responsibilities and knowledge of the other participants in the military justice system, will create a stronger system.

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