

ATTORNEY AND THE DEFENSE COUNSEL

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AUTHOR'S NOTE: This article is intended to complement "The Commander-Attorney Relationship," by Major Danford F. Carroll and Captain Rita R. Carroll, which appeared in the September-October, 1982 issue of INFANTRY. The opinions and conclusions expressed

herein are those of the author and do not necessarily reflect the views of The Judge Advocate General's School, the Judge Advocate General's Corps, the Department of the Army, or any other government agency.

More than two hundred of them are in the Army today. They routinely question the fairness of commanders and the professionalism of the police while extolling the virtues of convicted murderers, rapists, and thieves. And no one on an Army installation can prevent them from continuing this seemingly disruptive course of conduct.

But it's their job. They are attorneys serving as defense counsels.

To the commander of a unit, a defense counsel frequently appears to be an obstacle to the effective admin-

istration of discipline to one of his chronically deficient soldiers. To a defense counsel, a commander may appear to be a vindictive and uncooperative impediment to the fair disposition of a client's case. But to a large extent, such antagonistic attitudes develop because one of the two fails to understand the duties and responsibilities of the other. Worse yet, both may fail to understand.

To a commander, a defense counsel is often demanding, always inquisitive, and apparently single-minded in his attempts to thwart the swift dispensation of well-deserved discipline to a disruptive soldier. But he should

look at it from the counsel's point of view.

The canons of legal ethics require that a defense counsel zealously represent his client, within the bounds of the law. The welfare of the client is his foremost concern, just as the government's case is the prosecutor's main concern. While a defense counsel is not allowed to advocate a position that is known to be legally foolish or that is designed solely to delay the proceedings at hand, he not merely *may*, but *must*, try to use every available legal strategem for the benefit of his client.

Occasionally, this obligation may require an attorney to do some pretty unpleasant things. The circumstances of a particular case may dictate, for example, that he try to establish bias on the part of his client's commander, or to question the truthfulness of a noncommissioned officer, or to demonstrate that the military police may have acted more like immature adolescents than like professional law enforcement personnel. But however gleeful a defense counsel may appear while doing these things, the commander should realize that *none of it is personal*. That counsel is doing only what he is duty-bound to do, much as a prosecutor must relentlessly question the motives of an alibi witness, expose the bias of a friend of the accused, or highlight the weaknesses in an accused's claim of self-defense.

Moreover, a defense counsel must pursue whatever "legal technicalities" may be available to his client. The rules for trial by a court-martial or action by an administrative board are well documented and well known to both parties to a proceeding. If the government has failed, even technically, to abide by those rules, a defense counsel must decide whether to insist that the government comply, depending upon the advantage to be gained for his client.

DECISIONS

A commander should also recognize that in a legal proceeding the defense counsel does not make all the decisions. While he does make decisions concerning trial tactics, his client makes certain other decisions himself — and frequently against his counsel's advice. For example, the client decides whether to accept nonjudicial punishment or to demand trial by court-martial. In certain administrative actions, the soldier determines whether or not to present his case before a board of officers. In a court-martial proceeding the accused soldier makes *all* the basic decisions — whether to plead guilty or not guilty; whether to elect trial before a military judge alone, a jury of officers, or a jury of officers and enlisted members; whether his defense counsel should be a detailed military attorney, an individually requested military attorney, or a civilian attorney; and whether or not to testify in his own defense. In all of these instances the defense counsel can only advise him.

But a commander, frustrated by the choices of an accused soldier — such as contesting a "cut and dried" case or refusing an Article 15 when it is offered — may

blame the attorney's influence. The commander should realize, though, that the same soldier who is charged with disobeying a half-dozen orders may well also disregard the advice of his counsel concerning those basic trial decisions!

OTHER SIDE

On the other side of the issue, a defense counsel must try to understand a commander's responsibilities, which are quite unlike those of any other occupation or profession. Even in peacetime, a commander must train his troops to attain the degree of proficiency and readiness they will need to perform in wartime. All else must be subordinated to that end, and the military legal system plays only a small part in that process.

A commander, therefore, does not take legal proceedings lightly. He can use counseling and admonitions, both oral and written, extra training, administrative action, and, now, the summarized Article 15 as lesser means of reforming a soldier and achieving the goal of a cohesive and effective fighting force. When he resorts to elimination procedures or to nonjudicial or court-martial action, it is only because these lesser remedies have been exhausted, or because the service member has committed a serious infraction.

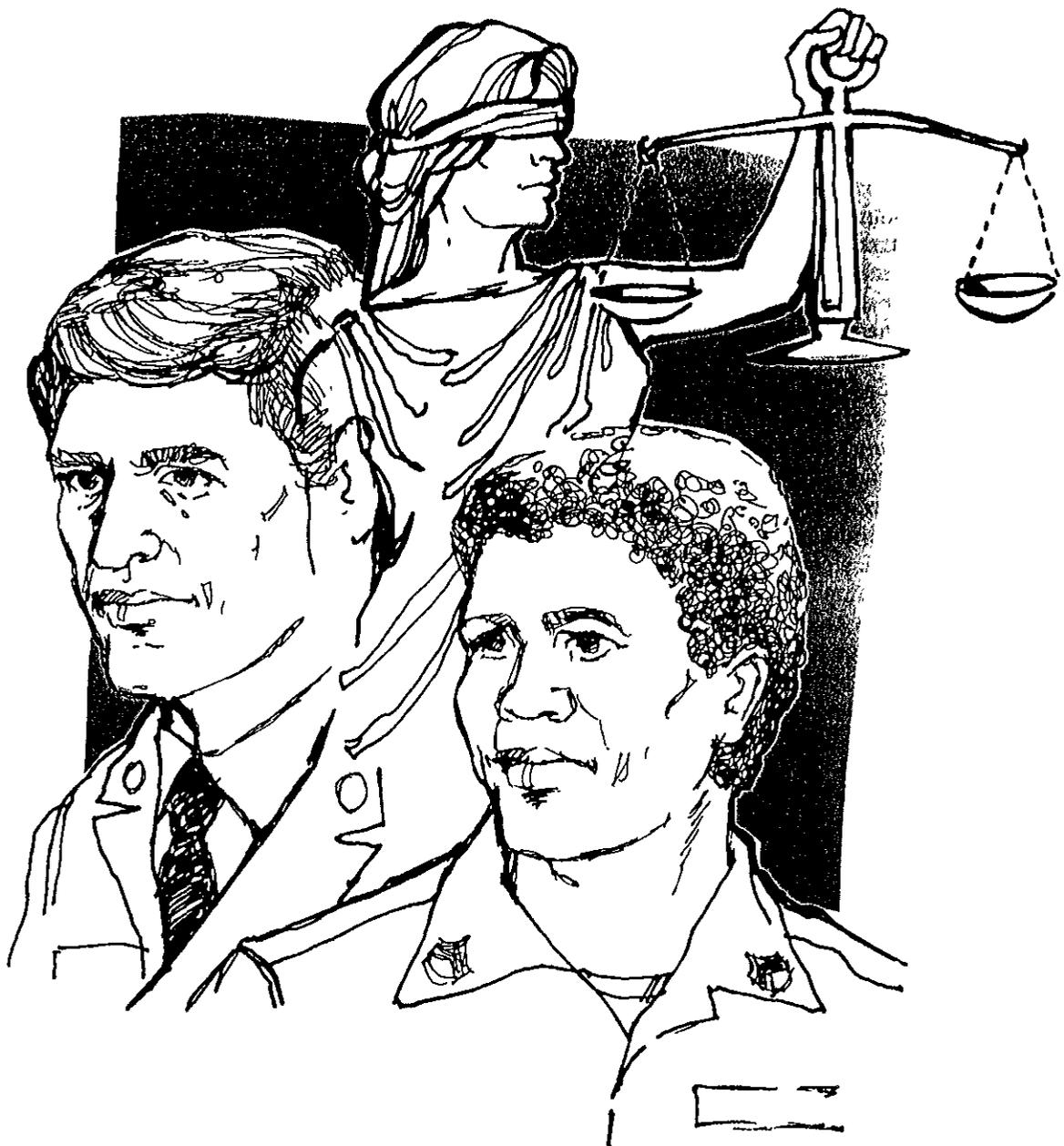
A trial by court-martial, after all, removes the accused from the commander's control and places him either in the hands of a judge, who is a lawyer, or in the hands of a panel of court members who, by law, must be unfamiliar with the accused's case. The commander must trust that the trial counsel, who may have had little or no contact with military matters before attending the Judge Advocate General Corps Officer Basic Course, will present a sufficient and convincing case, first, to convict the accused and, second, to attain an appropriate sentence.

The decision concerning the most appropriate action to take against an offender is never an easy one. There is no right answer, and the parties concerned can only try their best to fashion a solution that will benefit the service and also be fair to the soldier. There may be no other area in which a commander and a defense counsel look at a problem from such markedly different perspectives.

A commander, as always, focuses upon the big picture, his unit's mission. The manner in which the military legal system deals with an accused soldier will probably have an effect on his unit's morale and discipline. This effect is intensified if the victim of the accused's wrongdoing is another member of the unit. For these reasons, the unit, and the victim, will want to see that justice is done.

Even if the accused's offense was a "victimless crime," such as involvement with drugs, that unit's commander will want the outcome of the case to have a deterrent effect on any of his other soldiers who may be inclined to engage in the same activity.

The perspective of a defense counsel is considerably narrower. His sole concern is his client's best interests. What those best interests are and how much the counsel



can do to advance those interests will vary from case to case. It is the occasional incompatibility of a commander's broad concern and a defense counsel's limited concern that can lead to friction between the two parties.

For instance, if a soldier has been a chronic and visible troublemaker, his commander, desiring a deterrent effect, will probably prefer court-martial charges for a transgression and will recommend disapproval of a request for discharge for the good of the service under Chapter 10, AR 635-200, if such a request is submitted. On the other hand, a defense counsel, if the accused soldier has shown a desire to leave the service, would see the Chapter 10 route as a quick and guaranteed means by which the commander could rid his unit of a problem. After all, a trial by court-martial does not guarantee conviction, and conviction itself does not guarantee a discharge or even confinement.

As to the charge that the lack of a trial would make it appear that the accused had "gotten over" on the system,

a defense counsel would respond that the lifelong stigma of an "other than honorable discharge" — the worst administrative discharge the Army can give — is hardly a free ride home.

But a defense counsel may not fully realize how the workings of the military justice system can affect a unit. The same accused who may appear contrite and reticent in the defense counsel's office or in the courtroom ("I'm sorry, sir, I've learned my lesson and will never do it again") and on whose behalf the defense counsel is attempting to preach "reason" to the soldier's commander, may loudly taunt the chain of command upon returning to the unit ("You didn't get me this time, did you, Sarge?"). Although this blindness is mutual — the commander doesn't always see the potentially reformable side of an accused, either — the greater danger to military discipline may stem from the defense counsel's myopia. For this reason, a defense counsel must find out *everything* about his client, both good and

bad, and, if necessary, he should read his client the riot act.

PROCEEDINGS

When a case does get to the point of legal proceedings, though, the defense counsel should remember that, no matter what the commander does, he is not a lawyer. He does not have the specialized knowledge of fine legal points, such as search and seizure, punishment versus training, pretrial confinement, or the proper preparation of a charge sheet and allied papers. Thus, any impropriety in such matters is likely to stem as much from innocent ignorance as from intentional ill-will. But the suspicious defense counsel, often armed only with the accused's tale of woe, may too readily believe that the commander's ill-will is responsible.

A defense counsel should remember, too, that while the trial is an all-consuming concern to him, it is only one of the many matters a commander must deal with at any given time. Training must go on, deployments must take place, and IG inspections must be weathered. A commander is concerned, certainly, with a proceeding in which one of his soldiers might be sent to jail, but he is more concerned with keeping his unit in an appropriate state of readiness for war.

For these reasons, the most irritating part of the court-martial process for a commander may be the numerous requests by both trial and defense counsels to speak with witnesses before the trial. And the most strident and seemingly unreasonable demands for these interviews normally come from the defense counsel: "I need to see Sergeant X *today!*" The sheer number, not to mention the tone, of such "requests" may tend to raise the hackles of a commander who has a good many other things to do and who probably needs those witnesses to help him do those things.

But a commander should understand that such requests for interviews are not unreasonable. One of the fundamental rules of witness examination is that an attorney should never ask a question in court unless he already knows the answer to it; and the only way he is going to know the answer is to speak with *all* the witnesses in the case in advance.

A defense counsel, especially, has good reason for his repeated and urgent requests. First, no one investigates a case for the defense. In fact, a defense attorney must wait while military investigators virtually hand the government's case to the trial counsel. Additionally, the government picks the place for the trial, and a military judge sets a trial date with which all parties, except for good cause, must comply.

SUSPENSE DATE

At this point, with the clock already ticking toward a trial date, a defense counsel has to start from scratch.

After hearing the accused soldier's tale, he must locate and speak to each potential defense witness the accused soldier has revealed. Each of these witnesses in turn may lead to other potential witnesses. And all of them must be interviewed by the suspense date the military judge has set. (These time pressures are greatly increased in jurisdictions that have no permanent judge and in which a judge has to travel from somewhere else. In such cases the judge's time is especially precious, and requests for delays by defense counsel are particularly ill-received.)

When this necessary preparation is multiplied by the defense counsel's case load, which may be substantial, it is easy to see why he considers time so valuable and why scheduling interviews becomes an occupational obsession. But there are ways in which the commander and the defense counsel can cooperate to resolve this problem.

If the witnesses are in the field and it would be impractical to bring them back, for example, the defense counsel should go to the field to interview them. As he has no vehicle of his own, the commander or the supporting staff section should provide transportation for him. The commander should also make sure the witnesses are on hand at the scheduled time and that some kind of private meeting place is available.

Even in garrison, if several witnesses are in the same unit, the defense counsel should go to the unit area to interview them. (The commander should provide office space for the attorney and see that the witnesses are within hailing distance.) The attorney will find this convenient because, if the name of another potential witness should come up during the interview, chances are that witness will be nearby also. A commander can benefit from this arrangement, too, because his soldiers can stay at their jobs until called upon, instead of wasting time sitting in a waiting room miles away.

NEW ARTICLE 15

The new summarized Article 15 procedure has given a commander an additional disciplinary tool to use in dealing with minor infractions of military law. The new procedure entirely eliminates the defense counsel, a perceived interloper, from the process; the accused has no right to see a lawyer before deciding whether to accept the Article 15.

The new procedure, however, does give an accused soldier the option of demanding trial by court-martial. Some defense counsels fear that this may cause an accused soldier to consult the ever-ready substitute for legal counsel — the barracks lawyer — for advice. The accused may then refuse the Article 15, using such popular but hollow defenses as "I knew another guy who did it and nothing happened to him," or "They're out to burn me," or "We have a personality conflict." Time will tell whether this is a problem.

In the traditional, formal Article 15, an accused soldier has a right to consult with a defense counsel before

making any decisions. A defense counsel sees this right as important because it gives him an opportunity to dispel any misinformation the accused soldier may have picked up in his billets. Many an unnecessary court-martial is thereby avoided, for only in the most exceptional case is an accused soldier advised to refuse the Article 15 and demand a court-martial. After all, a court-martial is played for pretty high stakes.

But before a defense counsel can render any advice in such cases, he has to be informed about the circumstances of the charge. Many defense counsels require that an accused soldier be given copies of all statements relevant to the case when he is sent for legal advice. If the paperwork is not provided, the accused soldier is sent back to the unit to get it.

This requirement is not designed to harass a unit commander. Rather, the purpose is to give a defense counsel a source of information about the case other than the accused, who is perhaps the most unreliable source involved. If a commander fears that an accused soldier may destroy the paperwork, then he can give it to an escort to take to the defense counsel's office. An accused who is considered so untrustworthy will probably have an escort anyway to lead him to the defense counsel. A commander should realize that, in the vast majority of Article 15 cases, a defense counsel's informed advice to an accused soldier will be to accept the nonjudicial punishment and avoid a court-martial.

UNDERSTANDING

In any given case, the commander and the defense counsel can avoid conflict if they both understand the situation a little better from the start.

For the defense counsel, a good beginning is to visit the commander early to find out about his client. Together, they may be able to work out options other than court-martial before the case has escalated to a test of the commander's authority in the eyes of both his superiors and his subordinates.

For the commander's part, he is encouraged to be open about the case. He should not withhold information from the defense counsel pending clearance from the prosecutor. The tactic of the "surprise witness" remains only in *Perry Mason* reruns. If the commander tells the

defense counsel what he knows about the accused and the unit and why he is taking a particular action, then the defense counsel, although he may still not agree, will at least be comforted to know that he is dealing with a rational person.

Another way to improve his rapport with commanders is for a defense counsel to attend such functions as officer calls so they can meet the commanders of the units they support. But they should not socialize with those commanders in places like theaters, bowling alleys, or snack bars where a number of troops are likely to be.

The Army has, in fact, gone to a good deal of trouble in recent years to eliminate the appearance that a defense counsel can be obligated to or influenced by anyone associated with the prosecution. In fact, the implementation of the U.S. Army Trial Defense Service in 1979 severed the supervisory tie between the defense counsel and the local staff judge advocate and the chain of command. When this is explained to an accused soldier, it usually increases his confidence that his defense counsel is working only for him.

But if a soldier sees his commander and his defense counsel in a social setting, he might well wonder whether his commander is in a position to influence his counsel. He might find it hard to see how, after bowling with his commander, his counsel could then effectively cross-examine that commander concerning a charge of disobedience or disrespect, or impugn the commander's motives on a search and seizure issue. Just as the evil of fraternization lies in the appearance of influence, so, too, must a commander and a defense counsel keep a respectable distance in highly visible social settings.

The commander-defense counsel relationship is a difficult one; novel situations arise every day that pit the interests of one against the interests of the other. It is only through a mutual understanding and appreciation of the duties, responsibilities, and limitations on compromise inherent in each position that the entire military legal system can function fairly and effectively.

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