



THE COMBAT JAG: A Commander's Guide to Dealing with Lawyers on the Battlefield

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Despite most infantry leaders' fervent wishes, there is simply no way of avoiding lawyers on today's battlefield. The nature of today's battle space, where complex questions of American and international law intersect to create traps for the unwary, means that where Soldiers go, the attorneys will go right along with them. Lawyers have always been critical in Bosnia and Kosovo, and those serving in Afghanistan and Iraq today must turn to Judge Advocate General (JAG) officers for advice on everything from the spending of government funds to rules of engagement and the treatment of detainees. Making the legally correct decision on all of these issues is critical to the success of the mission, and all of them are potential "career-ender" or even "go-to-Leavenworth" issues.



An infantry commander is tactically and technically proficient on all his combat and combat support systems — he knows how to employ the tools the Army gives him. But the Army does not effectively teach him how to use his JAG. That can cost him and his Soldiers dearly. However, while a JAG officer is not a combat multiplier in the sense that an attached tank company is, by understanding a few simple concepts, the nonlawyer commander can effectively employ his attorneys and avoid missteps that can paralyze his unit — or worse.

MIND-SETS: THE LEADER AND THE LAWYER

The fact that attorneys take a good deal of grief from their combat arms officers counterparts demonstrates that there are huge differences in the way combat leaders and attorneys think and approach problems. That is not to say a lawyer cannot serve as a combat arms officer; in fact, the systematic approach to problem solving taught in law school lends itself well to analyzing military problems. It means that a combat leader should keep in mind that the purpose of law school is not so much concerned with the technical aspects of teaching laws and statutes but rather with developing the ability to "think like a lawyer." This line of thinking will allow an attorney to approach each legal problem systematically so as to discover the "right answer."

The concept of the "right answer" demonstrates one of the key disconnects between many combat leaders and attorneys. As combat arms leaders, we respect decisive action and clear guidance in response to *tactical* problems. But when a combat leader asks a complex *legal* question, the JAG's response is almost always something quite different. The lawyer is noncommittal. Instead of saying what will happen, the lawyer might list several possible results ranging from positive to negative. When asked "What is the answer?" the response is often something like "Well, it depends."

The combat leader needs to understand why he is receiving that type of nonanswer. To an attorney, as a practical matter, there rarely is a "right answer." There are only more likely and less likely results. That's because an attorney operates in a world where actions and decisions are not necessarily judged by an *objective* standard but by a *subjective* standard — by an investigator or even by a judge and a jury in the most serious cases — after the fact. In reality, the answer is usually less what is objectively "correct" than the attorney's best estimate of what subsequent fact finders would determine to be legally correct.

Further, no one consults an attorney on the easy questions, the ones that are governed by clearly defined rules. (Lawyers call the rare unambiguous rules "black letter law.") No one ever asks the local JAG if it is acceptable to shoot a detainee; everyone knows that it is illegal. But Soldiers might ask whether they can pressure a detainee to cooperate by denying him sleep for a period. As the recent debates and controversies have demonstrated, the answer to that question was less clear cut early in the Global War on Terrorism.

With this in mind, a commander must realize that the ultimate decision is his responsibility alone. In the final analysis, a JAG is only an advisor — one with specialized knowledge, but an advisor nonetheless. The commander will bear the consequences of a mistake, not the JAG. But by understanding the way his JAG thinks, he can better evaluate the JAG's advice.

MAKING THE MOST OF YOUR JAG

While some commanders treat their JAGs like a sort of pagan

priesthood, where the lawyers are the only ones with access to a secret font of legal wisdom, the effective commander will treat his JAGs as Soldiers first.

Many JAGs were prior service before attending law school so they may understand how a combat unit works in a way a JAG who began his career with the JAG Basic Course cannot. Regardless, JAG Soldiers need to participate in all facets of training and operations; putting them in a corner and telling them to focus on the law would bear little resemblance to the reality in the field.

One deploying brigade commander assigned a JAG to the planning cell. The JAG officer found himself immersed in all aspects of combat operations as well as support tasks. All the while, he was able to add his legal perspective even as he did the same things “regular” Soldiers did — “honchoed” the military decision-making process, wrote orders, and briefed the command. His success won him the trust of his leaders and improved the quality of his advice.

There is nothing that says that a JAG cannot road march, learn to operate an armored vehicle, fire heavy weapons or

participate in battle drills. If the Global War on Terrorism has taught us anything, it is that every Soldier can find him or herself under fire. You do that young officer — and yourself — no favors by excusing him from the training that could save his life.

EMPLOYING YOUR JAG

A JAG provides the commander with legal advice based upon his or her legal knowledge and research combined with his or her military experience. As discussed above, sometimes that military experience is limited. As for legal knowledge, JAGs will have a basic understanding of the law as it applies to common questions. On some issues, however, the JAG will need to do research — either by using legal references (including regulations, statutes and even court cases) or by contacting subject matter experts (often other JAGs).

The commander needs to know this because he needs to be able to test the validity of the JAG’s legal opinion. The commander should, as standard operating procedure, expect the JAG to explain the basis of his or her opinion when providing it. For example:

JAG: “Sir, I believe that the rules of

engagement should limit our Soldiers to using deadly force only when they are personally under direct fire.”

Commander: “So you are saying you do not believe that our troops can open fire if they believe they are about to come under fire or if civilians are being fired upon. That seems very restrictive. All right, why do you believe that?”

At that point, the commander should expect the JAG to walk him step-by-step through the legal analysis process that led to this conclusion. In such a case, the JAG should, at a minimum, show how the higher command’s rules of engagement provide that limitation as well. If the commander is still unsure, he should direct the JAG to contact the higher headquarters for clarification.

It is important to also understand that lawyers, particularly litigators (“Litigators” are the minority of attorneys who generally argue cases in court; most attorneys are not litigators and rarely argue cases), will tend to advocate for the view they embrace. This can be a problem when giving advice, as the commander needs an objective analysis of all sides of the issue, not just the side the attorney subscribes to. A commander needs to be wary when he senses the JAG has morphed from being an impartial advisor into being an advocate for one point of view. Of course, there may be a good reason the JAG is so



dead-set on his conclusion; the commander simply needs to keep the lack of objectivity in mind when coming to a decision.

For more complex issues, particularly ones concerning decisions that might come under legal review, the commander should require a written legal opinion. A legal opinion is usually in memorandum form and typically follows the “IRAC” format.

(I) Issue: The “issue” is the precise legal question being discussed. Clearly setting forth the legal issue helps the JAG focus. If the commander sees that the issue is wrong, he can immediately send the memo back to the JAG for another try.

(R) Rule: This is the particular legal rule or rules applicable to the issue. The rule can come from many sources — a policy letter, a regulation, a section of the Uniform Code of Military Justice or even the text of a treaty. In Kosovo, for example, United Nations Security Council Resolution 1244 provides the legal basis for American military operations, and Kosovo Force JAGs frequently refer to it for guidance. Regardless, the “Rule” section should clearly state the rule and how it is to be applied. A good practice is to require that the author attach a copy of the verbatim rule as an exhibit to the memorandum.

(A) Analysis: The analysis is the heart of the memorandum. In this section, the JAG will set out the material facts of the situation then apply the rule to those facts. A good analysis, however, will be objective. The JAG should state the arguments for all possible sides. This is not the place for advocating. If the analysis is weak or incomplete, the commander should send it back.

(C) Conclusion: This is where the lawyer gives his advice. The commander should not attempt to force a rock-solid answer to a tough legal question, but he has a right to the best advice the JAG can give — *i.e.*, the JAG should state clearly what decision he thinks the commander should make.

Of course, there may be several different issues in any particular situation; the JAG should use a separate “IRAC” analysis for each one. Further, the “IRAC” format is not just for written opinions. The JAG should explain his or her reasoning by setting out the “IRAC” points even when verbally discussing his or her advice.

This way of preparing and providing legal advice will be very familiar to anyone with experience in the corporate world. In the business world, nonlawyer businesspeople demand that their attorneys explain their reasoning fully and clearly — an expectation

justified by the hundreds of dollars an hour top attorneys charge. An Army commander should expect no less, especially where the stakes are higher than mere money.

LAWYERS AS PROBLEM SOLVERS, NOT OBSTACLES

As with any groups of Soldiers, some JAGs will choose the path of least resistance. With regular Soldiers, that means they will eschew initiative and not act until expressly directed. With lawyers, the path of least resistance is often to simply say “No.”

A JAG’s job is to give advice, and sometimes “No” is good advice.

But the best combat commanders do not foster an environment where staff members create obstacles — the best commanders demand solutions.

For example, one senior combat arms officer made it clear to his subordinates that whenever they brought him a problem, they must also bring a solution. He refused to allow them to shift their challenge to him by leaving it to him to complete their mission. That technique is equally applicable to JAGs. If the JAG determines a certain course of action does *not* comply with the law, he should be expected to offer some other way to satisfy the commander’s intent that *does* comply. Incidentally, that senior officer was himself a civilian attorney.

CONCLUSION

Today’s commanders face more and more difficult legal challenges than ever before. Whether we like it or not, for the foreseeable future, lawyers will be as much a part of a commander’s “toolkit” as the chaplain and the sergeant major. For that reason, a commander must know how to effectively employ his JAGs so that he receives the very best possible advice. His career, his mission, and sometimes even lives, can depend on it.

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