

# The Art of Trial Advocacy

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## “Advocacy” Outside of the Courtroom: Dispelling Common Misperceptions Held by Commanders

### The Problem: Commanders' Common Misperceptions

*After falling victim to the legal system by trying to make it work for the command . . .<sup>1</sup>*

*First and foremost, commanders must realize the military justice system is a system to protect the rights of the individual and, in my opinion, does not necessarily address the rights of the unit.<sup>2</sup>*

Unfortunately, the comments above are not uncommon of commanders who have been “touched” by the military justice system. Commanders often perceive the military justice system as a roadblock instead of an effective leadership tool. In many cases, this misperception is understandable. When military justice problems arise, commanders often either do not know who to go to for legal advice or do not feel they will receive competent advice. Regardless of why commanders fail to seek legal advice when they should, judge advocates must understand they (judge advocates) play an important role for commanders in the military justice system, not just in the courtroom. This note provides judge advocates with a few ideas on how to serve their commanders better by dispelling some common misperceptions of the military justice system held by commanders.

The initial challenge for any judge advocate is to figure out their role. From there, judge advocates must step out of their offices and get to know their commanders and the units they support. The third and most critical step for judge advocates is getting into their commanders' decision loop on military justice matters. Although becoming “relevant” to their commanders is not always easy, it is a prerequisite for any judge advocate to be successful. Finally, judge advocates must learn and use their commanders' language, and explain any unique legal terms used. Commanders may not be familiar with many legal terms, and they may use acronyms and terms that are foreign to judge advocates.

## The Solution

*Understand Your Role: Find a Mentor*

Courtroom advocacy is just a small part of a judge advocate's role in the military justice system. Trial counsel advise commanders on a wide variety of military justice and administrative law issues outside of the courtroom. Unfortunately, most trial counsel feel they should either spend their tours entirely in the courtroom or in their offices preparing for trial. This is because judge advocates are expected to be ready to serve as trial counsel after completing their service's judge advocate basic course. Regardless of the extent of their prior military service, every new judge advocate needs time to be indoctrinated properly into the judge advocate culture. Whether taking the initiative to learn their job or the legal office providing training, each judge advocate needs mentoring, guidance, and advice to do their jobs effectively.

So how does this happen? How does a new judge advocate turn into an effective military attorney? The best way is by following the path of others. In other words, new judge advocates should find a mentor (or mentors). In his remarks to the 1999 Judge Advocate General's Worldwide Continuing Legal Education program, Brigadier General Cooke told the audience of staff judge advocates that “[f]irst, you must be a mentor and trainer. Ensure that counsel not only know the mechanics and techniques of trying cases, but that they understand the history and purpose of the system.”<sup>3</sup> This responsibility to mentor and train, however, should not fall entirely on supervising attorneys or staff judge advocates.<sup>4</sup> Individual judge advocates must also actively seek out suitable mentors. Ultimately it is each counsel's responsibility to understand their role in the military justice system and seek out the right person to get them headed in the right direction.

*Know Your Commanders*

Commanders focus on mission accomplishment. Judge advocates provide support for commanders to accomplish the mission. Unfortunately, many young (and older) judge advocates provide advice without considering their commanders'

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1. Captain Patrick T. Lavigne, *Does the Legal System Support Leadership? A Commander's View*, MARINE CORPS GAZETTE, Oct. 2001, at 50 (written in response to Captain Paul H. Atterbury, *A Marine in Trouble Is Never Abandoned*, MARINE CORPS GAZETTE, Aug. 2000, at 34).

2. *Id.* Interestingly, Captain Lavigne's article was published in the “Legal” section of the *Gazette* and Captain Atterbury's article was published in the “Leadership” section. Captain Lavigne is an infantry officer (and a former commander) and Captain Atterbury is a judge advocate.

3. Brigadier General (Retired) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, Address at the 1999 Judge Advocate General's World Wide Continuing Legal Education Program (Oct. 8, 1999) [hereinafter *Cooke Address*], in *ARMY LAW*, Mar. 2000, at 5.

4. See Captain Michael P. Dillinger, *Mentoring the Young JAG*, THE REPORTER, June 2001, at 30 (commenting on the need for mentoring and that it is a “win-win” situation for both parties).

concerns. The only way to advise commanders properly is to become familiar with their world. The most effective way for judge advocates to do this is by getting out and meeting their commanders and spending time considering their commanders' perspective. In other words, judge advocates need to look through the eyes of their commanders when providing support.

How do judge advocates get to know their commanders? Before giving advice, new trial counsel should have an initial, face-to-face meeting with their commanders. Judge advocates should not rely solely on e-mail or telephone contact. There is no substitute for face-to-face contact with commanders. Incumbent trial counsel should have introduced their replacements to all the commanders the new trial counsel will support. Otherwise, new trial counsel should get their mentor, or the Chief, Criminal Law, the DSJA, or the SJA to help, or make their command visits alone.

Judge advocates must not stop there. They should periodically "check in" with their commanders. Although trial counsel should have a reason before dropping in on their brigade or battalion commanders, they should stop by their company commanders regularly. Judge advocates should offer their services to their commanders, and let their commanders know they are there to assist. New trial counsel should get their commanders to tell them about what their commanders do. Learning how commanders think and finding out what's important to them helps judge advocates give legal advice tailored to their commanders' specific needs.

Aside from gaining their trust and confidence, an additional benefit is that today's company commanders are tomorrow's battalion and brigade commanders. Providing good, competent legal advice not only helps judge advocates, because their commanders will recognize their value and make them an integral part of the command staff, but also helps the judge advocates who will work with these commanders in later assignments.

Captain Lavigne's article highlights some common points to learn from. For example, he states that commanders should be able to use "confessions" of Marines who break the law to teach other Marines that "wrongdoing will be punished."<sup>5</sup> Commanders can and should use the wrongdoing of others to teach and lead members of the command. The difficulty lies with doing it correctly. One wrong way to teach subordinates is by reading a copy of an accused's confession to the rest of the unit,

as Captain Lavigne appears to suggest. One recent example of this mistake is *United States v. Biagase*,<sup>6</sup> a Marine Corps case. In *Biagase*, the accused confessed to several robberies and, before trial, his company commander received a copy of his confession. Ultimately, a redacted copy of the confession was read at several formations. At trial, although the military judge found no unlawful command influence, he ordered a variety of remedial measures to ensure that the accused received a fair trial.<sup>7</sup>

Why is *Biagase* relevant to judge advocates knowing their commanders? Because the trial counsel in the case, on his first assignment as a judge advocate, did not know what the command had done with the confession. Even worse, neither the trial counsel nor the commander ever attempted to contact each other before trial. Why did the commander fail to contact the trial counsel? Because he did not know he should talk to someone about reading the confession to his unit, largely because he had never seen or heard from his trial counsel before.<sup>8</sup> Had the commander known to contact the trial counsel, this problem could have been resolved, and the problems that became evident at trial could have been averted. Furthermore, had the accused's commander contacted his trial counsel, or had the trial counsel been in contact with the commander, he would have learned how to properly use the accused's wrongdoing as an opportunity to "teach" his subordinates.<sup>9</sup>

#### *Be "Relevant" to Commanders*

Judge advocates should be force-multipliers, not excess baggage. Unfortunately, because of their prior experiences with judge advocates, many commanders see them as necessary nuisances. Although knowing their commanders is critical for judge advocates, it is not enough. All judge advocates must become integral parts of their supported commands. This means judge advocates must learn about weapon systems, equipment, operational commitments, upcoming training exercises, and myriad other important aspects of their supported commands.

More importantly, judge advocates must know what their commands are doing, operationally and in the training environment, and participate as much as possible. Commanders want regular legal training. Being involved ultimately leads judge advocates to a better understanding of their commanders' con-

5. LAVIGNE, *supra* note 1, at 51.

6. 50 M.J. 143 (1999).

7. *Id.* at 148. The military judge also brought the company commander and other members of the command element into the courtroom to admonish them concerning their actions, which came close to compromising the integrity of the proceedings against LCpl Biagase. *Id.*

8. The author of this note was the trial counsel.

9. The specifics of how the commander could have used LCpl Biagase's wrongdoing are beyond the scope and purpose of this article. The commander could have generally expressed to his command the requirement to follow the law, emphasizing the importance of the military justice system to be fair and impartial to the accused. In other words, to follow the advice of Captain Atterbury in *A Marine in Trouble Is Never Abandoned*, MARINE CORPS GAZETTE, Aug. 2000, at 34-35.

cerns, allowing judge advocates to provide legal advice tempered to each commander's unique needs. Moreover, getting involved will enable commanders to understand why judge advocates are needed and relevant as a force-multiplier. Finally, judge advocates should socialize with their peers in other occupational specialties or branches. The connections made by counsel outside the judge advocate community help them better understand the big picture.

*Talk Straight to Commanders and Don't Sound  
Like a "Lawyer"*

Commanders, like most people, do not like "legalese." Counsel must remember their audience—they are not advising other lawyers—judge advocates are advising individuals who use legal advice as a factor in their decision-making process. It is the job of judge advocates to make sure they are understood. The acronyms and legal terms judge advocates use daily are often alien to commanders. Likewise, commanders have their own unique acronyms and terms usually common within a particular type of command. Trial counsel must understand their commanders and, conversely, commanders must understand their legal advisors. Although avoiding legalese may be relatively easy, learning a particular commander's language takes considerable time and effort; however, the dividends, such as becoming a trusted member of the staff and being informed of critical issues, are well worth it. Getting involved with their commands and learning their commanders' language will help judge advocates reap those dividends.

Another problem is that commanders view judge advocates as people who just tell them they are wrong or they cannot do something "legally." Although sometimes "No" is the only answer, before going that route, judge advocates must explore all options and couch their advice in terms of how it can be done, but differently.<sup>100</sup> The alternate approach might be the complete opposite of what the commander thought; however, if counsel proposes it as another way to satisfy the commander's "intent," the commander will view the judge advocate as a problem-solver, instead of a barricade to mission completion.

Judge advocates must provide solutions whenever possible, not reasons why a particular course of action cannot be taken.

### Conclusion

True discipline is doing the right thing even when the right thing is very hard to do and no one else is looking. That discipline is the product of a military system of training and education, standards and customs, ethics and values. Military justice is central to that system. Military justice inculcates and reinforces morale and discipline.<sup>111</sup>

For military justice to work, commanders must have confidence in the military justice system and their legal advisors. Confidence in the system comes with time and experience. Confidence in their legal advisors occurs when a judge advocate becomes an integral part of the commanders' decision-making process. Unfortunately, many commanders have negative perceptions of the system because of bad experiences. The best way for judge advocates to correct these perceptions is to become the answer. They must get out of their offices and talk to their commanders face-to-face. Judge advocates should see their commanders regularly; counsel should not rely on their e-mail and phone to talk to their commanders. Judge advocates must learn their commanders' language and not sound like a lawyer.

Finally, counsel must be accountable. Judge advocates must never use the military justice system as a scapegoat. When the defense wins a motion or case, trial counsel must not blame the defense counsel or military judge. Commanders will not have confidence in the military justice system if their trial counsel say or imply that the system does not work. Judge advocates must dispel the common misperceptions that commanders have—not initiate or perpetuate them. Lieutenant Colonel Michael R. Stahlman (USMC).

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10. See, e.g., Lieutenant Colonel (Lt.Col.) Gary E. Lambert, *The Customer Is Always Right: The Commander, the SJA, and the Law of Military Operations*, MARINE CORPS GAZETTE, Oct. 2001, at 51. Although a quick glance at Lt.Col. Lambert's article seems to suggest that judge advocates should always say "yes," a more thorough look at his article shows otherwise. Obviously, commanders must be told when they are wrong and they expect it. The advice in this note and Lt.Col. Lambert's article is for judge advocates to try to find a way to satisfy their commander's intent. In other words, counsel must look for other ways to accomplish the mission. If none exist, judge advocates must tell their commanders that it cannot be done.

11. See Cooke Address, *supra* note 3, at 6.