



MG (Ret.) William B. Dyer. (Photo courtesy of author)

Pivotal Perspective

What Army Commanders Need from Their Legal Advisors

By Major General (Retired) William B. Dyer III with Brigadier General Michael J. Deegan

The second half of my thirty-nine-year military career was divided between, on one hand, serving as the legal advisor to colonel-, brigadier general-, and major general-level commanders and, on the other, consuming legal advice as a brigadier general- and major general-level commander. It was not until I became a consumer of

legal advice that I fully appreciated the mission-enabling nature of sound legal advice as I navigated complex issues and exercised my best judgment in taking the prudent risk the Army expects of senior leaders.

My experiences on both sides of the fence—lawyer/advisor and commander/advisee—made clear that commanders

need certain attributes and actions from their judge advocates (JAs), which nest well under the U.S. Army Judge Advocate General's (JAG) Corps four constants: principled counsel, mastery of the law, stewardship, and servant leadership.

Principled Counsel

Accountability: Own Legal Actions and Their Outcomes

The number of actions that require legal input has increased dramatically since I became a JA in 1992. Yet the nature of the actions and the JAs available to process those actions largely remain the same. As a new brigade judge advocate, I recall discovering a significant backlog of administrative separation actions in various stages of completion. My commander was not pleased. But rather than ignore or pass off the problem, I owned it. Though identifying a shortcoming in our brigade's legal processes

was painful, the hard work and candid assessment that followed strengthened the unit by executing legitimate actions.

Rigorously Understand and Pursue the Commander's Intent

Most commanders want to operate in the ethical midfield. However, the Army expects commanders—particularly general officer-level commanders—to use their years of experience, proven judgment, and input from key advisors to take prudent risks. A command's legal advisors are among these key advisors.

Commanders expect legal advisors to develop courses of action (COAs), identify each COA's legal and possibly ethical risk, and determine who owns the risk. The objective is never "finding a way to yes" but advancing the commander's intent within the boundaries of law, regulation, and policy. Legal advisors should understand the differences between law, regulation, and policy and the fact that exceptions to regulations and policies may exist.

A few years ago, my legal advisor informed me I was prohibited from taking a certain action because it was contrary to a regulatory provision. I asked the legal advisor for the proponent of the regulation. Luckily, I knew a senior leader in the agency, so I called the person and described the action I wished to take. They shared that they routinely grant exceptions to the regulation and identified the person to staff the request. We received the exception relatively quickly after the agency received it. Of course, I was happy that the action could go forward, but I was disappointed that I had to make inquiries that were more appropriate for my legal advisor to make.

When developing COAs, legal advisors must exhaust all possibilities for accomplishing the commander's intent, and they must not assume that every commander is prepared to turn away from a potentially good COA because of some level of risk. Red team the COAs with fellow JAs before presenting them to the commander, and then let the commander decide. Legal advisors should not substitute their risk tolerance for the commander's risk tolerance.

Mastery of the Law

Professional Competence

Commanders do not expect their legal advisors to be experts in every area of the law. However, they do require their JAs to know enough about each of the core legal functional areas to spot issues. When such instances arise, commanders expect their legal advisor to have the fortitude to inform them of a potential legal issue with a certain COA and that they will conduct research and follow up with additional information and analysis.

In other words, do not shoot from the hip. As the former Deputy Judge Advocate General, Major General Thomas Ayres used to say, "Crap at the speed of light is still crap."

As a senior commander, damage done by acting on incomplete or incorrect legal advice can have far-reaching consequences, impact large numbers of Soldiers, and call into question the commander's judgment. Your commander needs your complete and thoughtful analysis—every time.

Simple, Straightforward Legal Advice

Your commander knows you are intelligent. Your greatest worth is not in reciting black-letter law or providing appellate-level analysis of legal issues. Your greatest skill is the ability to connect the breadcrumbs. Look around the corner. Think deeply about precedents, nuances, and decisions' second- and third-order effects.

This deeper thinking and reliance on instincts honed over years of legal counseling are where the JA earns a place in the commander's inner circle. Though commanders are educated and experienced, JAs bring something very special to their analysis and deliberation. Get comfortable providing that insight and advice clearly and concisely.

Below is a good template for briefing a senior commander either in writing or orally:

1. Identify the legal issue;
2. Provide the recommended COA(s);
3. Analyze the facts;
4. Provide the applicable law(s), policy, and/or regulation(s);

5. List the COA(s) and the risks associated with each; and
6. Conclude with the recommended COA(s).

Use clear and concise language that avoids legal jargon and keep it as short as possible.

Coordinate Certain Legal Advice with Your Technical Chain

Just like JAs pitch ideas about bettering the Regiment to JAG Corps senior leaders, commanders do the same to their senior leaders. Prudent commanders ensure that their recommendation is legally sound and within the bounds of the decision-maker's authority before offering it to their senior leader.

When a commander asks their legal advisor to "run the traps" or vet an idea for legal obstacles, they want you to perform the necessary legal research. But, that's just the first step. Once you believe you have the answer, impliedly, the commander also wants you to present your conclusions to the senior leader's legal advisor for their input.

If that legal advisor agrees with your determination, you can inform your commander that they have a sound legal basis for recommending this to their senior leader.

Stewardship

Be a Team Player: Play Well with Others, Not Just the Boss

A commander sees a legal advisor as primarily their counsel. However, the commander knows that other staff sections need and expect your legal advice. They do not expect you to act as an internal auditor or an extension of the Inspector General, but they do need you to identify potential issues. They also want you to help fix problems in other staff sections, not just fix the blame. Other staff officers will be more willing to bring you issues in a nascent stage if they feel you are a team player.

Prevent Mission Creep: Being a Team Player Doesn't Mean Taking on Other Staff Sections' Work

Commanders should see you and your team as critical thinkers who adeptly fix



BG Michael J. Deegan. (Photo courtesy of author)

problems. This could easily translate to your legal office compensating for another, weaker staff section. As a legal advisor to a unit criticized by higher headquarters for responding beyond the deadline to Freedom of Information Act (FOIA) requests, I faced this issue. One frustrated requester brought a lawsuit to compel the release of the information requested and for attorney's fees and court costs. My commander put me in charge of fixing the tardy FOIA response time, even though FOIAs fall under the G-1's authority.

I complied and worked on the problem with the help of the G-1. We identified the appropriate personnel to work on FOIA requests and formalized procedures to streamline response time. I then back-briefed the commander. To my surprise, he shifted the responsibility for FOIAs to the Office of the Staff Judge Advocate (OSJA). Instead of refusing, I informed him that we could do it. Still, I explained to him the ramifications of such—less attention to command discipline issues and, thus, slower processing times for those actions (e.g., administrative boards, letters of reprimand, 15-6 investigations). Correctly, the commander decided to keep FOIA processing within the G-1.

Of course, you need to be the team player your commander and staff colleagues need you to be, but you must also be on guard when performing other staff's duties. Mission creep can last for years and strain your office's limited resources and time. It can also produce overburdened subordinates, which can lower morale quickly.

Servant Leadership

Develop Your Subordinates: It Is Not All About You

Some senior legal advisors presume their commander only wants to receive legal advice directly from them. That's a false presumption. While some issues certainly demand input directly from the senior legal advisor, those are generally infrequent.

Commanders are in the business of developing subordinates, and the best commanders enable subordinates to engage in the fray. They expect the same from you.

This lesson hit home when I was in my first job advising a 2-star commander; I knew my chief of justice was better prepared than I was to answer the flurry of questions we would face. In our office call with the commanding general (CG), my young major began briefing actions.

Throughout the meeting, the CG gave me occasional glances as I sat, mostly silent and uncomfortable, and allowed the major to field the questions.

As we left the CG's office, he motioned for me to stay behind. Halfway expecting to be fired or at least scolded, he nodded in the direction of the departed major and whispered, "That was good leadership." Not only did that lesson never leave me, but it also inspired me to find opportunities for those who would benefit from them and who, in many cases, knew the issues or the subject matter better than I did. It was a powerful and productive lesson that benefitted me greatly as a senior legal advisor and commander.

With the tables turned, I understood that my SJA colonel was not the only one on my team with a voice, a keen intellect, and an ability to convey complex issues and recommendations. I was delighted to hear from his deputy, section heads, and especially junior captains. I also ensured my SJA knew that I viewed that as good leadership.

Conclusion

We live in exciting but dangerous and complicated times. Commanders need their legal advisor to provide sound, timely advice to make informed decisions. Legal advisors can best serve their commander and subordinates by following the Corps's four constants and the principles outlined above. Doing so ensures that the JAG Corps will retain its reputation as a group of trusted professionals willing to provide premier legal services to defend the U.S. Constitution and keep America safe. **TAL**

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