THE CARE AND FEEDING OF *YOUR* CIVILIAN DEFENSE COUNSEL

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I tell my students, if you ever become comfortable with your role as a criminal defense lawyer, it's time to quit. It should be a constant source of discomfort, because you're dealing with incredible moral ambiguity, and you've been cast into a role which is not enviable.

~ Alan Dershowitz

PROLOGUE

When I was the Air Force SDC in Korea, I had my first encounter with a Civilian Defense Counsel [CDC]. I was lucky. He was well-versed in the UCMJ and military justice, was a superb trial lawyer and dedicated mentor. Three years later, not wanting to either leave Germany nor become a Regional Claims Attorney, I left the sanctity and security of active duty–stayed in Germany and became a CDC. So with the hindsight (and hopefully wisdom) of many years of CDC experience, I am honored to offer some insights, suggestions and thoughts on the topic. To paraphrase Charles Dickens, "It has been the best of times, it has been the worst of times."[1] My goal here is to assist you in dealing with that phenomenon–the *Civilian Defense Counsel*–to ensure that it is indeed, "the best of times."

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[1] "It was the best of times, it was the worst of times . . . ." Opening line from *A Tale of Two Cities*. I am also indebted to my friend and colleague, Phil Cave, who (back in the day when CAAF allowed *and* encouraged counsel for *amici curiae* to participate in oral arguments), opened his argument in *United States v. King,* 53 M.J. 424 (CAAF 2000)[interlocutory order], with Dickens' classic line. It was a "tough act to follow."

I. GENERALITIES.

We have to start somewhere and that is the Sixth Amendment's "right to counsel" clause. But, that is the *basic* right. "[C]ongress intended to bestow on servicemembers a right to counsel unparalleled in civilian criminal trials,"[2] when it enacted Article 38(b), UCMJ, implemented by RCM 506.

> To some extent, this broad right to counsel is grounded in history; but there may be additional reasons for the legislative generosity. Congress may have concluded that servicemembers, who risk their lives for their country, should be granted a right to counsel greater than that which would be minimally required by the Constitution.[3]

CAVEAT: While RCM 502(d)(6)'s *Discussion* at ¶ (F) presumptively provides that CDC will be *lead counsel* – which of course is true in 99% of cases with CDC's, be aware of (and be careful of) CDC's who enter a case for a ***limited*** and ***specific*** purpose. For example, I have been retained for *limited purposes* in the following scenarios:[4]

- Post-Article 32 Investigation – pre-referral, to seek a non-capital referral;
- To address a FISA warrant issue in a military espionage case;
- To seek a *State* court dismissal *on the merits* when concurrent State and military jurisdiction exists;[5]
- Where a foreign jurisdiction has the right to *primary* jurisdiction to negotiate

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[2] *United States v. Johnson,* 21 M.J. 211, 213 (CMA 1986).

[3] *Id.*

[4] Don't be afraid to discuss the driving force here, money. Some clients (generally their families) may want to retain a CDC, but the finances simply are not there. But, they may retain a CDC for a limited purpose.

[5] This would help – but not necessarily guarantee – if the State sought to resurrect charges in the future, under a waiver theory or otherwise, preclusion of such. Or, as in one of my cases where the State was dissatisfied with the results of a client's GCM, they attempted to prosecute him as well – only to be barred by the State's "double jeopardy" provisions. *Northrup v. Relin,* 613 N.Y.S.2d 506 (App. Div., 4th Dept.), *lv. denied,* 84 N.Y.2d 803, 641 N.E.2d 158, 617 N.Y.S.2d 137 (1994).

a more favorable disposition than likely under the UCMJ;[6]

- In a case involving a JAG accused, to advise a different CDC, Detailed Counsel and the Accused whether (and if so, how) a proposed disposition would affect the Accused's New York law license;

- In a military Academy Cadet court-martial, to advise Detailed Counsel and the Accused on what the collateral consequences and *civil disabilities* would be in New York for a conviction of a "crime of moral turpitude;"[7]

- In a "sex" case, whether or not a proposed disposition would (a) *mandate* S.O. registration; and (b) if so, the nature and extent of such under New York law.[8]

The bottom-line here is this: you are *not* a traitor to the JAG Corps if you suggest to a client that a specific or particular issue merits the advice and counsel of a CDC. You, your SDC and RDC may have never handled, for example, a FISA warrant issue; or you may be precluded from negotiating with foreign prosecutors without the approval of the State Department, or simply not know how New York classifies sex offenders, which brings us to "ethics."

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[6] *E.g.,* I had a client who had arrived in Germany 3 days before his 18th birthday. For it, his platoon took him to a local Gasthaus, got him drunk and arranged for the "services" of a local hooker. He was too drunk to "perform," and she left him passed-out in the rear parking lot of the establishment with his pants and underpants down to his ankles, where the local polizei found him. While the investigation was on-going, the prosecutor discovered that she had not renewed her "prostitute's license" (or paid taxes on that income) and so was more interested in her. Before the German's "released" jurisdiction, the Army served him with a lengthy charge sheet. The parents couldn't afford to retain me for the Article 32, and trial, but did retain me and one of the German lawyers I worked with to negotiate a deal with the Germans. Showing the German Prosecutor the Army's charges offended that career prosecutor's sensibilities, so we negotiated a "juvenile offender" disposition as he was under age 19, and more importantly sealed the police and juvenile court records. Not to be thwarted when the court-martial charges were withdrawn, the SJA decided to institute an AdSep proceeding for "civilian misconduct," not realizing he couldn't get access to any of the German records. Client was honorably discharged shortly thereafter.

[7] *See, e.g., United States v. Riley,* 72 M.J. 115 (CAAF 2013); *Padilla v. Kentucky,* 559 U.S. 356 (2010); and *United States v. Denedo,* 556 U.S. 904 (2009). This is something that needs greater attention within the military justice system.

[8] **BEWARE** of the *ethics* issues here – are you practicing law without a license if you attempt to advise a client about the specifics of Sex Offender registration laws in a jurisdiction that you are not licensed in – not to mention IAC? Indeed, in most jurisdictions you have an ethical *duty* to advise the client that s/he should consult a qualified criminal defense counsel in the jurisdiction applicable.

II. ETHICS, YOU AND YOUR CDC.

CDC, unless a former JAG with defense experience or an experienced military justice practitioner, in all likelihood will have no clue that there are *military* ethics rules as well. It is your *duty* to alert them to this imbroglio. It is also your ethical duty to ensure that *your* client is ethically and competently represented – even if you are "junior counsel" to use the British Barrister's designation.[9] It may be more than prudent to email them a link to AR 27-26, early on in the case.

A Tale of Two Miseries

"What we've got here is . . . failure to communicate."[10]

You know it's going to be a long RoT to read when at a pretrial Article 39(a), UCMJ, session litigating a suppression issue, the CDC kept referring to the "Manual for Rules." It went downhill from there. After the officer-client was convicted of one of the four specifications, at a subsequent Article 39(a), session, the CDC asked the MJ how long it would be before the "Pre-Sentence Report" would be done and when sentencing would occur. One can only smile envisioning the terror on the face of the MJ at that moment. The transcript was enlightening:

> MJ: Captain X, did you discuss sentencing procedures with Mr. Smith?
>
> DC: No, Your Honor. He didn't return my phone calls, so I sent him a letter about four weeks ago saying that we needed to get together to prepare for trial after your rulings on the Motions. He then called me and said that he "was fine" and for me "not to worry about it."

The client, it turns out, went to the "Yellow Pages" and under the Attorneys' listings for "criminal defense," called a DWI attorney (for a larceny of a used, government briefcase charge). The client was out the $5,000.00 he paid the CDC and the 23 days he spent in confinement. The

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[9] It is, after all, *your* professional reputation that is involved.

[10] From the 1967 Movie, *Cool Hand Luke,* http://www.imdb.com/title/tt0061512/quotes (9 May 2013).

Detailed Counsel received a Letter of Reprimand from his Rater for "neglecting a client" after the MJ sent a scathing letter to the Air Force RDC, asking how a retirement-eligible officer could be advised to turn down an Article 15, Non-judicial punishment, four weeks before his retirement.[11]

More recently as vetted in an Army *DuBay* hearing,[12] a former Army TDS attorney got to testify about *inter alia* why *no one* noticed the Accused's alibi in a remote part of Afghanistan for Specifications alleging misconduct at Ft. Bragg during the exact same time frame . . . . He also testified that when the client retained a CDC for his GCM, that he *assumed* that the CDC both knew what he was doing and would ask if he needed anything, and that he was "just second chair." The CDC testified that he *assumed* that since it was a military court-martial, that Detailed Counsel would remain lead counsel, and that his role was only to cross-examine the complainant and give the closing argument. That didn't go well either.

The bottom line here is simple – protect your law license – do not blindly defer to a CDC who may or may not know what they are doing (that's their problem). The client is still your client as well – never forget that either.

III. REHKOPF'S 30 RULES FOR HANDLING CDC's.

Unless you know the CDC personally *and* have worked with him / her in the past, I suggest that you use a "check-list" approach to CYA. Your initial contact with a CDC will usually be a telephone call or email. Two things are of initial importance. First, resist the knee-jerk reaction to respond by saying, "I can't discuss the case with you until I have a release and authorization signed by the

[11] The Detailed Counsel conducted the sentencing portion and avoided the Dismissal.

[12] I was retained solely to conduct the *DuBay* hearing.

client." Unless your client has instructed you to *not* discuss the case with anyone,[13] that is not the law nor prohibited by any canon of ethics. It will however, cause competent CDC to question your ability. You *may* properly discuss any non-privileged information that is in the public domain, *e.g.,* the Charge Sheet, witness statements, physical evidence in the possession of the government, and pending scheduling matters. Many times when making such a call, the CDC has not yet been retained and is simply trying to obtain basic information about the case – is it looking like a GCM or SpCM – in order to *ethically* set his or her fees.[14]

Second, if your initial contact with the CDC is indeed the "I've been retained . . . ." spiel, tell (not ask) him / her to confirm that in writing. *Then* have the Accused sign a Release and Authorization form before you copy your file and send it to the CDC.

That foundation being laid, let's get to the meat of things.

REHKOPF'S 30 CDC RULES

1. "Google" the CDC and verify that s/he is active in the criminal defense bar and is not the family's real estate or "civil" attorney;[15]

2. Ascertain what (if any) military justice experience the CDC has. If the CDC is an active criminal practitioner, but one with little or no military justice experience, do the following:

    a. Advise the CDC that the MRE's are basically analogues of the FRE's;

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[13] Be careful here – talking to another TDS attorney could get you into a jam, as one of my client's and I found out. *See United States v. Smith,* 26 M.J. 152 (CMA 1988) [Detailed DC talked to fellow TDS attorney about having the Accused take a polygraph, who later ended up as the *Trial Counsel.*] This was the *rare* case where I represented *both* co-accuseds in separate trials with separately detailed counsel with the Court's permission after a detailed and specific inquiry and on-the-record waivers.

[14] Conversely, if your first contact with a CDC is, "I've been retained by PFC Spice's parents . . . ." go on "Full Alert."

[15] If the CDC is not a former JAG or does not practice regularly in the criminal defense arena, I suggest that you have an *ethical* duty to point this out to your client – don't ignore it because in 9 times out of 10, it will come back to haunt you.

b. Provide them the citation to the UCMJ in civilian format, *i.e.,* 10 U.S.C. §§ 801 *et seq.;*

c. Provide them with links to the MCM (2019) and current *Benchbook* and document the above;

3. If they are not active criminal defense or military justice practitioners, I suggest that you slip in something to the effect: "by the way, you should probably check with your malpractice carrier, just in case;"[16]

4. If *you* (not the client) are satisfied that the CDC is competent to defend a criminal case in general – considering the nature and extent of the charges[17] – then drag the client in to sign the Release and Authorization form.

5. If you are ***not*** satisfied with the CDC's qualifications or experience, I suggest that you have three *ethical* obligations:

a. To *orally* advise your client (remember, you are still co-counsel) of your concerns and reason(s), while noting that the ultimate *choice* of counsel is for them – not you – to make;

b. Document the discussion with a MFR and alert your supervisor; and

c. Make and *document* all efforts to get the CDC "up-to-speed."[18]

6. If the CDC is not an experienced military justice practitioner, send them copies of all office handouts that you provide clients about the court-martial process.

7. If they have little or no military experience to include military justice experience, send the CDC a link to a current *rank / insignia* chart.[19]

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[16] "Civil" practitioners will be astounded to learn that they probably are not covered unless they've declared to their Carrier that they do "criminal defense" (which includes courts-martial), or are going to have to pay a supplemental premium (which may wipe out their fee and *cannot* ethically be passed on to the client in most jurisdictions).

[17] I currently have another post-conviction client, convicted of premeditated murder, whose CDC was the local DWI "guru." In a case where guilt was dubious, proof was all circumstantial, and another viable suspect was known, the LWOP sentence was not shocking to me as I read the RoT. It was however, shocking in the context of what evidence the members were *not* given as to the Accused's actual innocence.

[18] To include suggesting that they look at Prof. David Schleuter's *Military Criminal Justice: Practice and Procedure* (10th ed), or some similar treatise.

[19] In an Army appeal I did some time back, the following appeared in the record during *voir dire*:

(continued...)

8. If they have little or no military justice experience, *explain* the sentencing process to the CDC – to include the timing and adversarial nature of it – and *you* start preparing for it because inexperienced CDC's won't have a clue about "Good Soldier Books," etc. You should also explain:

   a. RILO's [Air Force], RFGOS [Army] for officer clients; and

   b. *Discharge* in lieu of a court-martial for enlisted clients, to include timing considerations.

9. Formulate an *investigative* strategy.[20] Explain the *de minimis* Article 32, process to CDC's with no military justice experience – a concept alien to civilian practice, and decide if you are going to take an active or passive approach to it:

   - Is the CDC going to retain an investigator or not?

   - If not, does the case merit a request for "investigative assistance?"[21]

10. Explain the premise of "equal access" for discovery under Article 46, UCMJ – again an alien concept in most civilian (and certainly federal) jurisdictions.

11. Prepare for the Article 32 and your witnesses if you are going that route. This may mean

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[19] (...continued)

CDC: Now, Sergeant Smith, you indicated that . . . .
MJ: Counsel, there are no "sergeants" on this panel. If you're going to address Sergeant-Major Smith, you will address him by his proper rank.
CDC: Oh, sorry Your Honor, I apologize. Now, *Major* Smith . . . .
MJ: We are in recess! Counsel - in my chambers now.

I'm sure that the ensuing 802 session was more entertaining than the subsequent summary. But, the trial didn't get much better for the Accused.

[20] This is not the same as a *discovery* strategy.

[21] Remember, *Strickland v. Washington*, 466 U.S. 668, 690 (1984), which held:

> These standards require no special amplification in order to define counsel's ***duty to investigate***, the duty at issue in this case. . . . In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. [Emphasis added]

See also, Wiggins v. Smith, 539 U.S. 510, 523 (2003) ["In assessing counsel's investigation, we must conduct an objective review of their performance . . . ."]; *Rompilla v. Beard*, 545 U.S. 374, 388 (2005); and *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009):

> [quoting] "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." 1 ABA *Standards for Criminal Justice* 4–4.1, p. 4–53 (2d ed.1980).

that you have to kick the CDC in the butt far enough in advance of the "32" so that *you* don't get caught with your pants down.[22]

12. Email the CDC a copy of your standard "Discovery" and *Brady* demands and ask him / her for specific instructions on tailoring them to your case;

13. If the CDC has no military justice experience, explain "Section III" materials and issues to him / her;

14. Email the inexperienced CDC a copy of the Congressional Research Service's publication, *Military Courts-Martial Under the Military Justice Act of 2016* (2020).[23] If the case involves either sex offenses or domestic violence issues, explain the current policies on "victims' rights;"

15. Explain the concept of *enlisted* members to the inexperienced CDC and the pros and cons if the Accused is enlisted;

16. Explain the "numbers game" in the context of panel size to the inexperienced CDC for pre-January 2019, offenses;[24]

17. Ensure that the inexperienced CDC understands that there is only *one* peremptory challenge in court-martial practice;

18. Explain the subpoena process to inexperienced CDC's, *i.e.,* going through the Trial Counsel – in most civilian jurisdictions, this is an *ex parte* process;

19. If you anticipate defenses listed in RCM 701(b)(2), ensure that the inexperienced CDC knows about its requirements;[25]

20. If the CDC is inexperienced in criminal law as well, explain the purposes of RCM 906, *Motions for Appropriate Relief,* and RCM 907, *Motions to Dismiss;*

21. If the CDC is inexperienced with military justice, explain the fact that:

    a. "Jurors" are referred to as members;

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[22] Once while serving as an Air Force Article 32, I.O., the CDC didn't show up because the Accused had not paid the balance of his retainer. An embarrassed (and unprepared) DC got a one day adjournment.

[23] Available at: https://fas.org/sgp/crs/natsec/R46503.pdf (Last accessed: 12 JAN 2020).

[24] Counsel should also consider where favorable to the accused, arguing the "Rule of Lenity" as a basis for seeking that the number of members comply with RCM 501(a), MCM (2019).

[25] This should include noting that the "innocent ingestion" notice requirements are facially unconstitutional and in violation of Article 31, UCMJ.

b. That the members can (and generally do) take notes during the proceedings; and

c. That the members can (and generally do) ask questions of any witnesses – something that may come as a shock to many civilian practitioners;

22. Explain the military Pretrial Agreement process to an inexperienced CDC and how such is effectuated in practice, *i.e.,* Part 1 and Part 2 of the PTA;

23. Ensure that any CDC except those who regularly practice in the court understands that military court reporters are *not* stenographers and unless the CDC hires one, that:

a. Hearings generally will not be transcribed prior to the conclusion of the court-martial;

b. "Daily copy" is an alien concept in the military justice system, something that many civilian attorneys totally depend upon.

24. Explain to the inexperienced CDC that if there are any findings of guilty, the concept as well as the pros and cons of the Accused providing an *unsworn* statement;

25. Explain to the CDC without military justice experience, that if there is a sentence to confinement, that deferment is *rarely* granted and that there is no such thing as "bail" pending appeals;

26. Explain automatic reductions in rank and forfeitures to include deferments for dependents to the inexperienced CDC;

27. Make sure that inexperienced CDC understand the distinctions among DD's, BCD's and Dismissals and their effects on benefits, etc. *before* trial starts;

28. Explain the concept of "mixed pleas" (to include LIO's) and how it works before members and judge alone cases;[26]

29. Ensure that inexperienced CDC understand that a conviction by a GCM or SpCM is a *federal* conviction to include potential collateral consequences;[27]

[26] This is another area alien to most civilian practices.

[27] Unless the CDC is an experienced criminal defense practitioner, they may have no clue about deportation, sex-offender registration, etc.

30. If the CDC is inexperienced in military justice matters, explain to them:

a. The post-trial clemency process and what that all entails;[28]

b. The RoT "authentication" process;[29]

c. The parameters of post-trial Article 39(a), UCMJ, sessions; and

d. The concept and purpose of Article 38(c), UCMJ, "briefs."

CONCLUSION

This is not football. Unlike a quarterback who hands the football off to his running back and scampers out of the way, your role and responsibilities are not over just because the Accused retains a CDC. You may be "second chair," but like a co-pilot on an airliner, client's lives are in the hands of you and the CDC. A CDC does not take a case off of your docket, nor does it mean that all you have to do is show up with your Class A's looking good. The Accused is still *your* client as well.

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[28] Anticipate hearing, "I wasn't retained for that."

[29] Do not count on many CDCs to participate in the "proof-reading" process. Isn't that what we pay Court Reporters to do and isn't it the Military Judge's responsibility to authenticate the Record?