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## An Antidote for Toxic Complaints

By Colonel Terri J. Erisman

*Revenge is a kind of wild justice, which the more man's nature runs to the more ought law to weed it out.*<sup>1</sup>

It is an unfortunate reality that some complaints are filed for wicked reasons. Every Soldier has a powerful voice to correct wrongs, and individuals have multiple tools through which they can raise issues to—or in some cases about—the chain of command. But these processes can be weaponized to deflect allegations of misconduct or to inflict revenge for just discipline. There is no process to screen malicious complaints, particularly when they are not obviously implausible.

A commander who elects not to investigate a complaint bears the risk of future allegations of failure to address wrongdoing. A determined complainant can amplify any allegation with an email, or two, or hundreds, to the most senior leaders. These complaints trigger lengthy processes, during which careers hang in limbo and discipline is ultimately undermined. All of these factors together allow even

deliberately false allegations to have serious disruptions to careers and units.

The underlying objective of these “toxic complaints” is usually the same—to use the system designed to ensure fairness and due process to intimidate and hamstring the command. The most typical example is the deliberate filing of a complaint with the Inspector General’s (IG) office prior to disciplinary action being taken to enable a follow-on reprisal allegation—claiming that the disciplinary action was taken as a result of the complaint. Extreme cases involve the strategic filing of successive complaints, through multiple avenues, in an effort to overwhelm the process and trigger processing errors by the command. A judge advocate plays a crucial role in these cases to protect the command and the process, so that fairness and objectivity leads to a just result.

### Foundational Strategic Principles

The overarching focus for a judge advocate is the truth—objectively and definitively. A judge advocate’s most important objective in a toxic complaint case is to ensure the truth is clearly established in a manner that leaves no room for question or doubt. Toxic complainants try to defeat this objective by using multiple tactics in an attempt to deliberately obscure the truth. There are several key strategies for judge advocates to assist their commands in successfully navigating such a case.

#### Strategy #1—Document Everything

Document all of the facts to the greatest extent possible. While this seems obvious, it is easy to get it wrong or be incomplete. As soon as it is apparent that such a case is starting, judge advocates must start planning systems needed to enable the command’s response. Judge advocates should ensure the command keeps accurate and comprehensive records; nothing should be left to memory or the assumption that later decision-makers will understand what happened. Particularly in dealing with allegations of reprisal, the timing and rationale for decisions are critical facts requiring documentation. The volume of complaints, emails, and corresponding documents can quickly become overwhelming, so it is important to organize and record everything. Stay ahead of complaints, enabling the command to provide documentation and objective explanations for every action taken.

Two key considerations are: (1) How to manage existing documents, and (2) which documents should be created. Look to establish a system for documenting and recording receipt of communications and attachments. Brigade judge advocates and chiefs of administrative law must develop systems that give the staff judge advocate (SJA) and the command the visibility they need through standard and reliable products. Do not build a new product for every investigation, but develop one that judge advocates and paralegals can use each time.

Documents such as email trackers—with dates, recipients, and subjects—and complaint trackers—again with dates, recipients, and subjects—are crucial to keeping accurate records of when communications

occurred, and ensuring that organization and all regulatory requirements are met. Creating documents such as memoranda for record and timelines to record rationales for decisions, subjects of discussions, and dates of key events is important—especially in responding to subsequent complaints of reprisal or toxic leadership.

Moreover, it is important to aggressively investigate complaints, affirmatively working to document the facts. It is tempting to resist initiating an investigation for what is a clearly false allegation. Investigations require resources and that the subject be flagged, so it is natural to want to avoid that process for a toxic complaint. However, it is important to view complaints neutrally and let the process take its course. Significantly, one of the most effective ways to deflate a toxic complaint is to fully investigate every allegation and provide a meaningful opportunity for the complainant to provide specific details to support the accusations.

Vague allegations of toxic or counterproductive leadership, bullying, or discrimination are difficult to disprove in the abstract, so requiring specific details is crucial to getting to the truth. This tactic achieves two goals. When a complaint is spurious, a complainant will likely decline to cooperate or even invoke his right against self-incrimination. Self-incrimination is generally not at issue for the complainant; however, the veracity of the complaint is at issue. Lobbing broad-brush accusations but declining the opportunity to provide detail may be evidence of the allegations' falsehood—doing so maintains the toxic complainant's desired leverage in the power dynamic over the subject of the complaint while also failing to facilitate, if not impeding, the search for the truth. Additionally, a full, documented investigation serves to answer future, repeat complaints which are often made by toxic complainants who refuse to let an issue be closed. The best practice is for judge advocates to advise the command to use all investigative tools necessary. An investigation under Army Regulation 15-6 is one option, but if criminal allegations are made, law enforcement agencies should be notified. Full examination and transparency removes the power of the toxic complaint

and determines the accurate truth, both in the present and the future.

### **Strategy #2: Zealously Protect the Process**

The second key principle is to zealously protect the process, ensuring every requirement is met and every step of due process received. The more attractive shortcuts appear, the more they should be resisted. These cases can become exceptionally frustrating as false accusations continue to accumulate, and disparaging emails continue to be sent. Judge advocates can assist by consistently counseling the need for tactical patience and zealously following every step of required processes. Where a complainant is attempting to weaponize the system, it is essential to get every step of the process right.

Judge advocates must go back to source documents and regulations to verify the correct procedures by actually reading the controlling regulations to ensure every requirement is meticulously followed. For example, commanders must impose required flags when conducting any inquiry or investigation, regardless of whether the allegation appears credible. At times, commanders and judge advocates discuss whether a flag is required, particularly when conducting what is labeled as a "preliminary inquiry." It is the surest course to impose a flag when there is any question, to ensure the correctness and unassailable objectivity of the process. This is especially true in cases dealing with toxic complainants.

This is not the right time to rely on memory or the "usual" procedure. It is the perfect time for systems checks to ensure that the "usual" procedure is correct. For instance, in cases involving Equal Opportunity complaints, there are very specific timelines for completing investigations, providing updates and the results of the investigation to complainant, and offering the opportunity to appeal. A good practice for judge advocates is to review these requirements and assist the Equal Opportunity office in meeting the deadlines. Likewise, review procedures for release of information in these investigations to ensure only the required information is given. In an effort to ensure fairness, commanders or judge

advocates may err on the side of releasing everything in an investigation. However, these documents are official records and require positive authority to be released. This will require judge advocates to know and effectively advise other offices such as Equal Opportunity and Sexual Harassment/Assault Response and Prevention (SHARP).

In some cases, regulations may have conflicting requirements that apply to the same issue—choose the interpretation that gives the maximum due process to the complainant. If the regulation is unclear, interpret it within the spirit of the regulation; this gives the benefit of the doubt to the complainant. In what is likely a long, contentious process, it is tempting to take whatever route is fastest in the short term. However, judge advocates protect the process by reminding commanders that taking shortcuts risks prolonging the entire process by giving rise to appeals or later findings that the process was incorrect or inadequate. It is better to take a few more days to safeguard the process in the short term than to cause an issue that adds months in the long term.

In any process allowing for a submission by the complainant—which includes actions taken against him for which he can submit a rebuttal—the command will likely face repeated requests for delay. The best course is to recommend granting reasonable requests for extensions to ensure there is no doubt that the Soldier was afforded his complete due process. Reasonable extensions, however, do not require the command to allow the process to be held hostage. The analysis should be made through a critical lens and the perspective of what an objective party would view as reasonable. The most useful perspective is to view the question through the eyes of an objective third party who has drawn no conclusion as to the veracity of the complaint.

Once the final deadline is set, with clear notice to the complainant that no more delays will be approved, judge advocates can assist commanders in tracking these deadlines closely and by advising the command to strictly enforce them. Toxic complainants will continue to inject chaos into the process by intentionally submitting matters after clear deadlines in an attempt

to force the command to backtrack on the stated deadline. Well-documented history of approved, reasonable, delays—and clear advance notice of the final deadline—will enable commanders to maintain control of the process.

An important tool in protecting the process is the use of independent actors to supply objective review. First, ensure that no reasonable person would question the neutrality of any investigating officer. Obviously, an investigating officer should have no prior knowledge of any events. In some particularly toxic cases, there may be multiple complaints and multiple investigations. It will seem easier to use the same investigating officer where facts will clearly overlap, but this could allow an investigation to ultimately be questioned. Multiple independent investigating officers arriving at the same conclusion, while more cumbersome, only lend additional credibility to the investigations. In some cases, it may be necessary to go outside the command entirely to prevent even the appearance of bias. If a legal office is heavily involved in advising the investigating officer throughout the investigation, the best practice is to have a separate legal office, such as that of the higher command, provide an independent legal review to ensure there is no question as to its objectivity.

In a particularly toxic case, judge advocates should advise the command to consider independent review for any action involving the complainant. For example, while the suspension of a security clearance or command-directed mental health examination may be warranted—or even demanded—by the circumstances, these are also actions that may be alleged to be additional reprisal. An independent review by objective actors can protect the integrity of the process and the command. The ultimate guiding perspective must be the route that insulates the process from any doubt as to fairness.

### **Critical Roles for Judge Advocates**

In addition to the two foundational strategic principles of documenting the facts and protecting the process, judge advocate leaders should be aware of the unique position they have to take a holistic view of the issue. Staff judge advocates and other

leaders should see themselves as both a coach for their team and a coordinator of the investigation process, in order to ensure there is an integrated, thoughtful command processing of toxic complaint cases.

#### **Critical Role #1: Coach**

Toxic complaint cases are typically too cumbersome and too complex for one person; such cases are best handled through a team approach. Leaders must build the team carefully, selecting each member and ensuring they are in the right position. Once selected, the best course is to ensure each member of the team is fully knowledgeable about the case and empowered in strategizing how to proceed in the volatile and unpredictable situation. Paralegals play a critical role, especially if they are made integral team members from the beginning. Their technical and organizational skills are vital to the documentation necessary to be successful in this case. It will also enable them to seamlessly prepare documents and provide legal support for any follow-on disciplinary procedures.

Leaders must think strategically, helping their team understand the second- and third-order effects of any command action. They should impress upon legal advisors that providing advice for investigations is not a spectator sport; they must zealously ensure that all questions are answered and the facts fully documented, with all relevant context provided. Investigative documents should be thoroughly reviewed by all team members, including the questions investigating officers are directed to answer. Cutting and pasting from previous appointment memorandums or drafting questions that sound conclusory can lead to mis-framing the investigation from the start. The appointment memorandum can set the tone for any investigation and raise questions which are not at all relevant to the subject of the investigation. While a judge advocate should draft the appointment memorandum, the commander appointing the investigation must also thoroughly review and shape the scope through a command lens. Investigations are not purely a legal or a command function, so judge advocates must be able to see them from both perspectives.

Leaders should oversee all products and results. Always read the complete investigation before it becomes final to confirm that there are no outstanding questions and no ambiguity which would allow someone to obscure the truth. The most effective perspective is that of an audience who is looking to find something negative. The review should include a determination of whether all facts, good and bad, have been presented accurately. The judge advocate's role is to ensure a complete and accurate investigation, always remembering that the investigation will likely be scrutinized multiple times.

#### **Critical Role #2: Coordinator**

Judge advocate leaders also serve as the coordinator for the case. The SJA, or brigade judge advocate, is usually the one person on the staff who knows every aspect of the case and therefore is in the best position to advise on how to proceed. Leaders must view the big picture and how every decision fits within it. Other staff sections should still manage their portions: G1 controls Officer Evaluation Reports, the Provost Marshal controls force protection, and G2 controls security clearances. However, the judge advocate should advise on the practical way forward, such as when to bring in independent review, when to appoint additional investigations, drafting important documents, and when and how to respond to communications.

At the same time, judge advocates must be careful to distinguish between legal advice and command decisions. Provide the range of options to the commander, with corresponding risk, and ensure the commander makes the decision. In extreme cases, even decisions unrelated to the case can be the subject of additional complaints, so the legal office should be alert to any possible vulnerabilities. Command decisions are almost always judgment calls based on assumption of risk. This is a time to be particularly conservative, not creative, in “getting to yes.”

The analytical foundation must always be grounded in doing what is right, while playing the long game and understanding the long-term objective. Regardless of how provocative a complainant becomes, it is important to counsel the command to

consistently follow the primary principles of documenting the facts and protecting the process. Judge advocates can assist the command by advising on how to control the narrative, not letting an emotional, toxic complainant provoke deviation from the process or any response which could be spun as unprofessional. All communication should be thoughtful, viewed as though it will be widely publicized. Likewise, it is important to have a thorough understanding of the optics of any decision—even if the command can take a particular action, should they? Will it cause an objective observer to have any question about the command's motives, even if the action itself is legal?

Another function of the judge advocate as coordinator is to know when to use the resources of other offices. The legal technical chain is an indispensable sounding board and source of perspective. Brigade judge advocates should never feel that they advise the command on an island; rather, they should stay plugged in with the division chief of administrative law, the deputy SJA, and the SJA. Likewise, SJAs can benefit greatly from the objective sounding board of higher level SJAs. While in the middle of what can seem like an extremely adversarial process, it is not always easy to maintain objectivity. The leaders and peers in the technical chain can provide a dispassionate view of how decisions can be perceived and practical advice on how to proceed. Other offices such as the IG, Criminal Investigation Command, U.S. Army Medical Command, Human Resources Command, the Office of the Judge Advocate General, and Trial Defense Service can all bring needed expertise or services to ensure that the process is complete and fair. It is always important to remember to adhere to the process and not focus on the individual; it should never be personal, regardless of how personal it may feel. Resist being distracted by the noise of all the words and provocation; focus on ensuring the process is protected and the truth is documented.

Some final thoughts for leaders who are advising the command in these cases. Be unemotional regarding complaints about you or your team. If you or your command receive anything that can be perceived as an allegation of professional misconduct or

mismanagement about anyone in the legal team, forward it to your technical supervisor and move on; be completely transparent and trust the process. Also, and even more importantly, force protection should be paramount; so be sure to follow normal safety procedures. The more prolonged an extreme situation becomes, the more “normal” it seems and the more likely that regular procedures will not be followed. Just because a disruptive procedure—like leaving unsolicited packages—is repeated does not mean it should be considered harmless. Do not let chaos become normalized and assume nothing will happen; heighten, rather than lower, safety precautions.

Various administrative processes enable Soldiers to complain to their chain of command—such as the IG, the Equal Opportunity and SHARP systems—as well as multiple law enforcement agencies—such as the Military Police or the Criminal Investigation Command, or their congressional representatives. These mechanisms are crucial to uncovering injustices that may have otherwise remained secret, hurting Soldiers and undermining the strength of the military. To ensure Soldiers are freely able to use these avenues, the Whistleblower Reprisal Act prohibits restricting this communication or taking of any adverse personnel action in response to a Soldier filing a complaint through any of these avenues. All of these processes lead to transparency, which enables the Command to identify and correct issues, while also ensuring Soldiers receive the leadership they deserve.

Judge advocates always have a unique role in ensuring justice is done and due process is followed. This role is just as important when an individual uses the processes designed to protect to inflict harm. The key to managing toxic complaint cases is just that—management. Put together a team of talented folks to work out the details of the legal issues. The best focus for a judge advocate is strategic: counseling tactical patience to the command to ensure the process is vigorously complied with and the facts are fully documented. In the end, what you are creating is your command's and, in many cases, the Army's record of what happened. Document the facts to provide

evidence of the truth and zealously protect the process to ensure a just result. **TAL**

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*At the time this article was written, COL Terri Erisman was the Staff Judge Advocate in the 25th Infantry Division at Schofield Barracks, Hawaii. She is currently the Deputy Chief of the Plans, Programs, and Training Office at the Pentagon.*

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*The author is grateful for the contributions of Colonel George Smawley, whose mantra is “protect the process” and who helped develop these principles while serving as an invaluable sounding board for many difficult issues. Also, the development of these ideas was a collaborative effort between myself, Lieutenant Colonel (LTC) Kristy Radio, and Major (MAJ) Scott Goble. LTC Radio and MAJ Goble provided invaluable input to this article.*

## Notes

1. FRANCIS BACON, OF REVENGE (1625), <http://people.brandeis.edu/~teuber/bacon.html>.