

Representing Military COs: Best Practices for the Application, the Hearing, and Beyond

Deborah H. Karpatkin

Deborah.karpatkin@karpatkinlaw.com

GIRN Zoom Conference

May 1, 2020

Agenda:

1. The Application
2. The Hearing, and Rebuttal
3. During the Process
4. Preparation for Bad Outcomes

The Application

- What is the story?
- How can you help your client tell their story?
- Communication goals
 - Clear narrative
 - Clear timeline
 - Depth
 - Sincerity
 - Authenticity

How to Learn Your Client's Story?

- Listen to the client
- Talk to people who know them
 - Friends – in and out of military
 - Family
 - Authority figures: coach, teacher, clergy
- What does your client do with their personal time?
 - Games – video and otherwise
 - Sports
 - Books
- Social media posts
- Diary? Emails to friends?

Elicit the “Before and After” of Daily Life

- “Before they were like this, and now they are like that”
- Apply this question to everything:
 - Books read
 - Games played
 - Social media
 - Social activities
 - Food and alcohol
 - Sport
- What has changed in your life, now that you consider yourself a CO?
What are you doing differently? (AR 600-43 Appendix B-1, training and belief)

Elicit the “Before and After” on Physical/Mental/Emotional/Spiritual State

- Mood
- Socialness
- Grooming and dress
- Weight
- Health
- Intimacy
- Spiritual habits (going, or not going, to religious services)
- Etc.

Religious Training and Belief: Maybe, or Maybe Not

- Client's upbringing?
- Parents and family?
- Pastoral relationship?
- Current beliefs?
- Current rituals?
- Biggest challenge for ethical/moral: what is "comparable rigor and dedication?"
- Can childhood religious training, etc. be the foundation for current CO ethical/moral convictions
- Consider a clergy expert witness to validate client's beliefs as consistent w/ religious training and belief – esp if Chaplain not helpful.

Application: the Client's Words

- The tools:
 - Timeline to identify crystallization, evolution of beliefs
 - Data points (from info solicited) to show changes
 - Documents
 - Information from witnesses
- The process:
 - The questions
 - “You talk, I type” may help an applicant who is a hesitant writer
 - The client's words and patterns of speech
 - Guided interview
 - Prepare client for questions about this in hearing
 - “Yes, writing is hard for me, so my counselor asked me questions, and wrote down my answers as I spoke to them – like dictation. Then I read it carefully and made sure everything in it was right.”

Application: Witness Statements

- Goals?
 - Amplify Client's story
 - Add credibility to Client's story
- Who?
 - Parents and other family members
 - Teachers, coaches, advisors
 - Military personnel – including esp. retired military personnel
 - Clergy, health care providers
 - Friends
 - Adult figures of knowledge, leadership and authority
- Focus?
 - Before vs. after
 - Details, anecdotes, stories

Application: Other Evidence

- Goals:
 - support your client's claims
 - Build a record
 - Make it easy for the Chaplain and the Investigating Officer
 - Prepare for a bad outcome
- What to include? Anything persuasive or illustrative
 - Copies of readings
 - Pictures
 - Timeline

After Submitting the Application

- Lead the life of a CO: continue to demonstrate depth and sincerity of belief
 - Activities
 - Journal
 - Internal and external support
 - What “most conspicuously demonstrates the consistency and depth of beliefs”?
 - How has daily life changed?
- Prepare for the IO and Medical

The Hearing

- Client should know their application
- Client may not have fluency in speaking about their beliefs
- Client may need help in overcoming hesitancy about speaking in person to authority figure
- Witnesses should know their statements
- Preparation questions – take the time to do this for client and witnesses
- Support the IO
 - You (the counselor) probably know more than the IO
 - Support and deference
 - Be helpful – make it easy
 - Respect for IO, witnesses, process
 - Respect for military and those who serve

Military Witnesses: Some Helpful Questions

- Would you want to serve with this person in a war zone?
- Have you always experienced this person as truthful and sincere?
- Examples of sincerity, depth, consistency
- Social isolation
- Depression
- Before/after
 - Evidence in service record
 - Performance issues, before and after

Hostile Witnesses and Unhelpful Evidence

- Anticipate, prepare to rebut
- Ask IO for witnesses (IO may tell you)
- Topics to prepare for:
 - Political views, esp Trump
 - Poor military conduct
- Expediency – esp if upcoming deployment

During the Administrative Process

- Support the Client
 - Connect to outside groups
 - Live the life of a CO: continue to demonstrate and document depth, sincerity, consistency of beliefs
 - Request non-conflicting duty
 - Supporting friends, family, clergy, community
 - Keep a diary or journal
- Client's mental and physical health
 - Monitor
 - Document
 - Support
 - Get help – military and external

Rebuttal

- Use it whether IO recommendation is favorable or unfavorable
- Goal: to make a good record – add material, statements from unavailable witnesses
- Deadline, or extension
- Summary of hearing (dueling or otherwise)
- Plan for the worst – this is your record for post-administrative legal action

Reducing Snags: What Makes this Urgent for Your Client ? For the Command?

- Polite inquiries
- Email paper trail
- Be a nice nuisance
- A lawyer can help if deadlines aren't being met
- Client's status may help – command may want them gone.
- If client's mental/physical health is declining due to stress, point that out.
- Nonconflicting duty and imminent deployment

Hope for the Best, Plan for the Worst

- Anticipate a negative recommendation from the Chaplain – and be prepared to rebut (expert witness or client's own clergy).
- Anticipate a negative recommendation from the IO – and be prepared to rebut.
- Maintain CO beliefs: demonstrable consistency, depth, sincerity.
- Document maintenance and development of CO beliefs
- Support your client's physical, mental, spiritual health.
- Lawyer waiting in the wings?

Options for a Bad Outcome

- Second CO application:
 - must not be based on the “substantially the same grounds” or supported by “substantially the same evidence”
 - Preserves legal right to nonconflicting duty
- Habeas
- Article 138, UCMJ – exhaustion, documentation
- Your client’s mental and physical health
- Alternatives to a CO discharge

When is a Lawyer Helpful?

- When counselor/client think it would affect the outcome
- When command is being resistant – e.g., nonconflicting duty
- High visibility
- Potential legal issues that should be developed and framed –e.g., nontraditional religious beliefs
- When there is risk of a bad outcome
- Visible vs. behind the scenes

Questions? Discussion?

My contact info:

Deborah.karpatkin@karpatkinlaw.com

(917) 940-8981 (mobile)