The Reporter

September 2002

OFFICE OF THE JUDGE ADVOCATE GENERAL

AIR FORCE RECURRING PERIODICAL 51-1, VOLUME 29 NUMBER 3

The Reporter

FROM THE EDITOR:

This issue contains a follow-up to an earlier article published in the June 2002 issue on the impact of technology on search and seizure law. Major Desmond provides interesting insight to the future of search and seizure law in light of facial recognition and video surveillance technology. Also featured are two very instructive articles: the first, a question-and-answer article on sureties for Contract Law Chiefs from Major Henderson and the second, a perspective on handling household goods claims from a senior paralegal at JACC Master Sergeant Berryhill. For a bit of fun and enlightment, have a look at the FYI article co-written by professional adversaries and confirmed friends Majors Hartsell and Flood.

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The Reporter is published quarterly by the Air Force Judge Advocate General School for the Office of the Judge Advocate General, United States Air Force. Views expressed herein, unless otherwise indicated, are those of the individual author. They do not purport to express the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government.
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Subscriptions: Paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402
Citation: Cite as [Author], [Title], The Reporter, [date], at [page number]
Distribution: Special, Air Force legal offices receive *The Reporter* from AFLSA/CCQ, Bolling AFB, D.C. 20332-6128 (Comm (202) 757-1515/DSN 297-1515).

BIG BROTHER IS WATCHING:
REASONABLE EXPECTATIONS OF PRIVACY IN THE TECHNOLOGICAL AGE
(Part II)

Major Richard D. Desmond

"Virginia Beach is the second city in the nation to approve use of face-recognition technology after the September 11 attacks shifted support toward the security measure. The Virginia City Council Tuesday in a 9-1 vote approved a technology called FaceIt that allows police to match the image of a person's face stored on a database with an image captured by cameras scanning crowds in public places.[1]

The Justice Department today announced that it was awarding $2.15 million in grants for the development of new highly advanced gun detectors that would permit the police to spot people carrying concealed weapons on the street or inside stores....Once in use, however, the new gun detectors are expected to raise novel constitutional questions about police searches for which there exists no exact precedent."[2]

Being watched while we bank, when we shop, and even when we work is considered commonplace. For the sake of security, we tolerate being screened or searched for weapons before boarding an airplane, entering a courthouse, or visiting a school or other public building. But what if the video image of you strolling down the street, using mass transit or entering a public building was digitally matched against a database of wanted felons, sexual predators or known terrorists? What if the police could use a device to conduct the functional equivalent of a strip search on an unsuspecting citizen from a distance of up to 60 feet away?

Such technology raises the most fundamental of constitutional concerns. Have your reasonable expectations of privacy been violated through the use of video surveillance and facial recognition technology? A device that can see through clothing begs the question of whether it would be considered a "search" under the Fourth Amendment. If so, have you been "unreasonably" searched?

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This article, the second of two parts, explores the constitutionality of governmental use of facial recognition software and concealed weapon detectors.[3] First, the capabilities of facial recognition software and concealed weapons detectors will be described. Next, the article will examine these devices in light of the *Katz*[4] test to determine whether their use constitutes a search under the Fourth Amendment. The article also explores the constitutional framework by which courts could consider the admissibility of the evidence revealed by the devices.

Facial Recognition Video Surveillance: A "Search?"

Biometric facial recognition involves the use of a highly automated computerized process to measure angles and distances between geometric points on the face – eye corners, the nostrils, the ends of the mouth – to identify an individual. The facial images recorded by the camera are compared to photographs in stored databases, which could include individuals who are wanted felons, sexual predators, and missing children.[5] Presumably, if a match were made, a law enforcement officer would visually compare the face

scanned with the photograph in the database.[6] Provided the officer's personal scan verifies an accurate match, the officer now has reasonable suspicion that the person is a wanted criminal or missing child and may conduct a temporary stop.[7]

Facial recognition technology is not likely to be used presently by video surveillance implemented pursuant to a "search" warrant. Normally, when law enforcement officers obtain such a warrant, they are aware of the identity of those likely to be under surveillance. There are other times when the use of facial recognition technology would be of possible benefit when used pursuant to a "search" warrant, such as when all of the suspects have not been identified. The question of whether facial recognition technology constitutes a Fourth Amendment "search" is more likely to come up when it is part of a law enforcement video surveillance system used to monitor public areas such as airport terminals, border entry points, and housing projects. Since video surveillance with facial recognition capabilities is a fairly new technological advancement, courts have yet determined the legality of its use.

The test identified in *Katz* v. *United States*[8] for determining a lawful search under the Fourth Amendment consists of two parts. First, a subjective expectation of privacy must be held by the individual and second, this privacy interest must be objectively recognized by society.[9] While in public, most people generally expect to be observed by others to a certain extent. Individuals are aware that they are often being monitored or videotaped while in public, whether they are going to a convenience store or are in the office building in which they work. In private, particularly in the home, there is normally a much more reasonable expectation of privacy.

This lack of reasonable expectation of privacy in the realm of public video surveillance can be based upon the plain view doctrine established by the Supreme Court one year after *Katz* in *Harris v. United States*.[10] The Court stated, "it has long been settled that objects falling in the plain view of an officer who has the right to be in the position to have that view are subject to seizure and may be introduced in evidence."[11] *Harris*' plain view doctrine has often been used to determine that video surveillance of most public areas does not constitute an unreasonable search under the Fourth Amendment.[12] Public video surveillance equates to activity falling within plain view of an officer since such surveillance cameras have been deemed the equivalent of robotic police officers.[13] The video surveillance does not capture any activity that a human police officer could not have seen with his eyes had he been in the public area where the activity was taking place.

Weapons Detector: The Millivision

There are a number of weapon detectors under development and they vary in the type of information they reveal, and the situations in which they would be used. One type is Millimetrix's "Millivision." Millivision uses passive millimeter wave technology to produce an image of all objects found underneath one's clothes and in one's pockets, purses, and briefcases.[14] The passive millimeter wave version of the detector has a range of approximately fifty feet, while the radar version can be used from ninety feet away.[15] The millimeter wave version works by registering the electromagnetic radiation of human flesh, which is very high, and comparing it with that emitted by all other objects on one's person, which is comparatively low.[16] A ten-inch long lens attached to the device transforms these wave images into electrical signals, which are then processed into a video image.[17] A gun, or any other object found underneath one's clothes, appears as a dark shadow against a bright outline of the body.[18] An operator must determine whether the image is that of a gun or other contraband, or an innocent object.[19]

Does The Millivision Constitute A Search?

Millitech is aware of the privacy concerns created by technology that can "see" through clothing.[20] The device has a wide variety of law enforcement applications. Millitech has labeled police remote "frisking" of individuals for con-

cealed weapons as a priority application" of Millivision.[21] Applying the *Katz* analysis to Millivision, a court must determine if an individual is attempting to conceal certain items from public observation. This expectation of privacy is similar to the privacy interest the Supreme Court has recognized in the conduct of a conversation in a telephone booth,[22] or placement of personal items in a container.[23] Thus, a court is likely to conclude that an individual has a reasonable expectation of privacy in items worn underneath clothing.

The second inquiry under *Katz* is whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable.[24] In determining the reasonableness of an intrusion, courts will look at a number of factors. One such factor is the extent to which the technology threatens the safety or health of the individual.[25] Millivision does not threaten health or safety because it does not expose the individual to any outside radiation, but rather measures the radiation that is naturally emitted by the individual's body.[26] "Another factor is the extent of the intrusion upon the individual's ...interests in personal privacy and bodily integrity."[27] A Millivision analysis would suggest that scanning an individual with the passive millimeter wave imager, to expose what an individual is carrying underneath his clothing, greatly damages an individual's sense of personal privacy and security.

The next part of the analysis includes weighing the above factors against the interest of the community in conducting police procedure and obtaining evidence.[28] Although the community has a great interest in the protection of its citizens and law enforcement officials, its interest must yield to the greater interest in protecting an individual's right to privacy.[29] Therefore, a court is likely to find Millivision's intrusion into individual privacy rights sufficient to trigger Fourth Amendment protections.

Would Gun Detectors Be Permitted Under "Special Needs?"

The concept of government officials acting on goals extending beyond criminal prosecution evolved into the doctrine of "special needs." Courts have permitted the use of magnetometers under a "special governmental needs" doctrine to prevent and deter hijacking.[30] The "special needs" doctrine was used by the United States Supreme Court in *New Jersey v. T.L.O.*[31] to enable schoolteachers to search student's purses with neither a warrant nor probable cause.[32] The school officials' need to "maintain order in the schools" allowed the intrusion to be judged simply on a general "reasonableness" standard.[33] In *Skinner v. Railway Labor Executives' Association*,[34] the Court extended the "special needs" doctrine by dispensing with the requirement for any level of suspicion for an intrusion on railroad employees. The government's special needs were seen as so important that all of the traditional Fourth Amendment safeguards were suspended, even for such intrusive searches as the testing of bodily fluids and the observation of excretory functions.[35] Further, suspicionless searches and seizures have been upheld in a variety of contexts, including drug testing of federal customs officers involved in drug interdiction or who carry firearms,[36] and for automobile checkpoints aimed at detecting illegal immigrants[37] and impaired drivers.[38] In investigations for evidence of criminality, the balance is struck by adhering to the traditional Fourth Amendment requirements of a warrant supported by probable cause. However, these specific mandates are not required for situations involving "special needs beyond the normal need for law enforcement."[39]

Certainly, Millivision's search capabilities are comparable to magnetometers used to detect guns and other dangerous objects at points of entry and exit in airports and courthouses.[40] The Millivision device, however, does not meet a special governmental need beyond normal law enforcement.[41] The purpose of Millivision is to apprehend individuals carrying concealed weapons, which is also a regular police function. Absent this function, the device "may be more intrusive than necessary if {it} results in false positives that lead to intrusive searches of people who, absent the gun detectors, would not have attracted any police attention."[42]

Since Millivision violates both the subjective and objective reasonable expectation of privacy test of *Katz* and does not meet the criteria for the special needs doctrine, it should be considered a

search within the meaning of the Fourth Amendment.[43]

Millivision And "Stop And Frisk"

The Fourth Amendment protects all citizens from unreasonable government intrusions into their legitimate expectations of privacy. It does not protect every subjective expectation of privacy, but rather only those that society recognizes as reasonable. Once it is determined that an individual has a legitimate expectation of privacy, an invasion into that privacy interest will be subject to constitutional stricture. Ordinarily, a search under the Amendment must be accompanied by a warrant issued upon probable cause. However, this requirement is "subject only to...a few...well delineated exceptions." Over the years, the Court has permitted police officers to stop individuals in the absence of probable cause under limited circumstances.

As a preliminary matter, police can always approach a suspect in response to a tip and ask to speak to him without implicating the Fourth Amendment. No level of suspicion is needed to justify a "consensual" encounter between the lawman and the citizen.[44] "At least as far as the Fourth Amendment is concerned, police do not have to have any degree of reasonable suspicion in order to accost a person and say they want to talk to him."[45]

Under *Terry v. Ohio*,[46] a police officer, after making a legal stop based upon reasonable suspicion that a crime has been or is about to be committed, may conduct a protective search of the suspect if the officer has reasonable suspicion that the suspect is armed and dangerous.[47] The scope of the search must be limited to a pat-down search of outer clothing for weapons that could harm the police officer or others.[48] The Court later expanded the scope of the protective search in *Minnesota v. Dickerson*[49] to allow an officer to discover evidence other than weapons if the incriminating character of the object is immediately apparent to the officer's "plain feel."[50] This extension of the "plain view" doctrine was justified by the idea that recovering non-threatening evidence by "plain feel" requires no invasion of the suspect's privacy beyond that already authorized by the officer's frisk.[51] Additionally, frisks must be based on individualized suspicion.[52] It is unconstitutional for police to conduct a pat-down without a reasonable belief that each person frisked was involved in a crime and is armed and dangerous.

The police could legitimately employ a weapon detector like the Millivision by following *Terry*: officers have reasonable suspicion to believe criminal activity is afoot and that the particular individual(s) involved may be armed and dangerous. In this situation, the officers might use a gun detector to scan the suspect for weapons, rather than conduct a pat-down search of the suspect's outer clothing to find weapons. Since *Terry* would permit a pat-down in these circumstances, *Terry* should allow use of a weapons detector.

The Court in *Terry* limited the justification for any frisk only to those persons reasonably suspected of being "armed and presently dangerous." In the case of a traditional *Terry* stop, the use of a gun detector would not appear to infringe unduly upon any privacy interest that the suspect may have.[53] But what if there are grounds for the stop but not the frisk (i.e., there is no reason to believe the suspect is armed and dangerous)? In that case, it could be argued that notwithstanding the absence of reasonable suspicion of dangerousness, the use of a gun detector is permissible because it "is less intrusive than a traditional frisk; it does not require the suspect to be touched in any way. Given these contradictory arguments, whether courts would admit evidence gathered as a result of such a gun detector scan under current law seems unclear at best."[54] What about suspicionless random searches of persons? When no special governmental needs are involved, some maintain that Supreme Court precedent makes clear that such random searches and seizures "do not comport with constitutional maxims."[55]

Conclusion

Certainly, there are legitimate needs for video surveillance with biometric facial recognition and for weapons detectors. Yet every new government intrusion comes with a cost. There is a common tendency to be impressed and mesmerized by the capabilities of new technology, and not to consider the changes that it brings and what

is given up. When finally faced with the challenge of determining whether video surveillance with facial recognition software or a weapons detector is a violation of one's right to be free from illegal searches and seizures, courts should be prepared to hold that a Fourth Amendment interest is at issue.

[1] The Washington Times, 15 November,2001,Part B, Pg B1.
[2] The New York Times, 10 March 1995, Section A, Pg 22.
[3] Part I of this article was published in *The Reporter*, Vol 29, No. 2, June 2002.
[4] *Katz v. United States*, 389 U.S. 347 (1967)
[5] Lane DeGregory, *Click, BEEP! Face Captured*, St. Petersburg Times, July 19, 2001.
[6] *Id.*
[7] *Id.*
[8] 389 U.S. 347 (1967).
[9] *Katz*, 389 U.S. at 361.
[10] 390 U.S. 234 (1968).
[11] *Id.* at 236.
[12] See *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 180 (1st Cir. 1997); *Int'l Union v. Garner*, 601 F. Supp. 187, 191 (M.D. Tenn. 1995).
[13] Scott Sher, Continuous Video Surveillance and Its Legal Consequences, Public Law Research Institute report, University of California-Hastings College of Law Working Papers Series (Fall 1996).
[14] *See* Sam Kamin, Law and Technology: The Case for a Smart Gun Detector, 59 Law & Contemp. Probs. 221, 243 (1996).
[15] *See* Eric Seigel, See-Through Device Detects Hidden Arms, Baltimore Sun, May 19, 1995, at 1A.
[16] *See* Reducing Gun Violence, 1994: Hearings Before the Subcomm. On Crime of the House Comm. On the Judiciary, July 21, 1994 [hereinafter Gun Violence Hearings](statement of G. Richard Huguenin, President, Millitech [now Millimetrix] Corporation), available in LEXIS, Legis Library, Cngtst File.
[17] *See* Seigel, supra note 15, at 1A.
[18] *Id.*
[19] *Id.*
[20] See Gun Violence Hearings, supra note 16.
[21] *Id.*
[22] *Katz*, 389 U.S. at 352.
[23] *See United States v. Chadwick*, 433 U.S. 1, 11 (1977).
[24] *Katz*, 389 US at 361.
[25] *See Winston v. Lee*, 470 U.S. 753, 761 (1985) (determining that there would be a violation of defendant's Fourth Amendment rights to force him to undergo surgery to remove a bullet lodged in his collarbone).
[26] *See* Gun Violence Hearings, supra note 16.
[27] *See Winston*, 470 U.S. at 761.
[28] *Id.* at 760.
[29] *Id.* at 759.
[30] *See*, e.g., *United States v. Davis*, 482 F.2d 893, 898 (9th Cir. 1973).
[31] 469 U.S. 325 (1985).
[32] *Id.* at 340-41.
[33] *Id.* at 341.
[34] 489 U.S. 602 (1989).
[35] *Id.* at 633.
[36] *See National Treasury Employees-Union v. Von Raab*, 489 U.S. 656 (1989).
[37] *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).
[38] *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1970).
[39] *See Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995).
[40] *See* Gun Violence Hearing, supra at note 16.
[41] *See* David A. Harris, Superman's X-ray Vision and the Fourth Amendment: The New Gun Detection Technology, 69 Temp. L. Rev. 1, 51 (1996).
[42] *Id.*
[43] *See Id.* at 48-51.
[44] *Florida v. Bostick*, 501 U.S. 433 (1991).
[45] *United States v. DeBarry*, 76 F.3d 884, 886 (7th Cir. 1996).
[46] 392 U.S. 1 (1968).
[47] *Id.* at 30-31.
[48] *Id.* at 29-30.
[49] 508 U.S. 366 (1993).
[50] *Id.* at 374-77.
[51] *Id.* at 375-76.
[52] *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).
[53] *Terry*, 392 U.S. at 24.
[54] *See* Harris, supra note 41, at 54 (1996).
[55] *Id.* at 17.

PERFORMANCE/PAYMENT BONDS AND TAKE OVER AGREEMENTS

MAJOR GRAEME S. HENDERSON

The following scenario is developed from an accumulation of contract bond/surety issues that can face a government contracts attorney. This article is not intended to be exhaustive, but provides some examples of how to handle the most common questions.

Introduction

As with a thousand other issues a JAG office must resolve, this issue begins with a phone call:

> "Captain Indefatigable, I am the contracting officer on the base housing renovation contract being performed by Undercapitalized Builders, Inc. (UBI or Principal) and I have a question. We at the contracting section have heard that UBI may file for bankruptcy. UBI appears to have walked off the jobsite and we just received a letter from the Surety, Preferred Insurance Guarantors, Inc. (Surety), on the housing renovation contract stating that they have already paid several of UBI's subcontractors. What steps should I take now?"

This fact scenario involves a number of areas of law. However, having heard the magic word "surety" you should immediately realize that the issues here arise in the area of performance and payment bonds. That means FAR Part 28[1] will provide your guidance and Clauses 52.228-1 through 52.228-16 of the contract are the clauses with which you will be working. In this field of law the prime contractor is called the Principal and the entity that issued the performance and payment bonds is called the Surety. The Government is the recipient of the benefit of the Surety's bond obligation, so it is called the Obligee. The following are questions and answers that may arise in the context of the above scenario and cover issues arising in nearly all surety bond situations.

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1. Is The Principal Bankrupt?

You can find this out by contacting the Principal, contacting the Surety or calling AFLSA/JACN Bankruptcy Branch. The phone numbers and E-mail addresses are on the AFLSA/JACN website.[2] A bankruptcy makes handling this Principal and Surety more difficult because when a Principal has gone bankrupt, the Government must request that the Bankruptcy Trustee lift the automatic stay in order to terminate the contract. If you discover that the Principal is bankrupt, you should report it to AFLSA/JACN Bankruptcy Branch as soon as possible. Assume, however, for the purposes of this article, that the Principal is still solvent but is only in danger of declaring bankruptcy.

2. What Should The CO Do About The Disappearance Of The Principal's Workers?

If the Principal has pulled its workers from the jobsite for no good reason, the CO should immediately consider termination for default in accordance with FAR 49.402[3] and Clause 52.249-10[4] of the contract. The actions to take depend on how far along the Principal is in contract performance with regard to the completion date. If the walkout happened prior to the contract completion date, the CO should issue a Cure Notice consistent with FAR 49.402-3(d) and give the Principal 10 days to cure prior to terminating the

contract for default. If the performance date has passed, the CO should issue a notice that the CO is contemplating a termination for default per FAR 49.402-3(e)(1). In the absence of the Principal's return to work or submission of satisfactory reasons for its cessation, the CO should promptly terminate for default.

3. *Why Terminate For Default?*

In the construction context a termination for default has several important results: 1) the termination creates a record of non-performance by the contractor that can be considered by future COs; 2) the termination for default puts the Surety on notice (if it is not already aware) that the Government may require Surety to meet is bond obligations; 3) the termination severs the performance obligation of the Principal and the contractual relationship; 4) the termination for default triggers the Surety's obligation to perform its bonded obligations.[5]

4. *What Notice Do We Have to Give the Surety about the Principal's Non-Performance?*

In the process of notifying the Principal about the termination for default, the CO should have notified the Surety about the impending termination pursuant to FAR 49.402-3(c)(2). This notification makes the Surety aware that it may be given an opportunity to find a contractor to complete performance. In addition to notice from the Government, the Surety should already know about the Principal's non-performance by virtue of having made payments to subcontractors pursuant to its obligation under the payment bond One thing about notification is clear, though: Beyond the FAR requirements, the Government does not have an obligation to make the Surety aware of the Principal's deficient contract performance.[6]

5. *What Is The Reason For The Letter The Surety Sends Requesting The Government To Refrain From Making Final Payment To The Principal?*

The letter is based upon case law which has been incorporated into FAR 28.106-7, Withholding contract payments.[7] After the date of receipt of the letter warning the Government that the Surety has begun paying subcontractors, the Government may be liable for a final payment made to the Principal that the Surety later cannot recover. The CO's response to such a letter from the Surety should be to hold payments to the Principal pending the Surety's consent.

6. *Now That We Have Terminated For Default, How Can We Get This Completed As Soon As Possible?*

Per FAR 49.402-3(e)(2), the CO should have notified the Surety when termination was contemplated and again when the termination was complete. At this point, the Surety should have informed the CO what actions it is planning to take to discharge its bond obligations. The Surety has three courses of action:

1. Surety *plans to do nothing.*
2. Surety *plans to retain the original contractor* to finish the job.
3. Surety plans to *substitute another contractor* to finish the job.

7. *What If The Surety Plans To Do Nothing?*

In the event that Surety plans to do nothing, the CO should begin efforts to reprocure the remaining work.[8] When the Government later demands payment pursuant to the Surety's performance bond obligation, the demand will include reprocurement costs, liquidated damages assessed against the Principal and other costs.[9] Those costs can total, but not exceed the penal sum of the bond, which is usually 100% of the original contract price.[10]

8. *What If The Surety Plans To Complete The Contract?*

In the case of the last two options, retaining the original contractor or substituting a new contractor, remember that despite the default of the

Principal, the Surety still has no privity with the Government. Since the right and obligations of the Principal cannot be assigned to the Surety contractually,[11] the Surety must execute a completion contract with the Government. The new contract for completion of the original construction is called a Takeover Agreement (TOA) and its requirements and parameters are set by FAR 49.404(d), Surety-takeover agreements:

> There may be conflicting demands for the defaulting contractor's assets, including unpaid prior earnings (retained percentages and unpaid progress estimates). Therefore, the surety may include a "takeover" agreement in its proposal, fixing the surety's rights to payment from those funds. The contracting officer should consider using a tripartite agreement among the Government, the surety, and the defaulting contractor to resolve the defaulting contractor's residual rights, including assertions to unpaid prior earnings.

9. What If The Surety Plans To Use The Original Contractor To Finish The Job?

If the Surety plans to retain the original contractor to finish the job, you should make sure the CO realizes the Principal is now a subcontractor and the Surety is the prime contractor. That means that unless representatives of the Principal are made agents of the Surety in writing, the CO should not agree to contract modifications with the Principal. Another important rule pertains to payment. Because the Assignment of Claims Act does not allow assignment of a contractual claim to any entity other than a financial institution, contract payments can only be payable to the Principal unless the Principal has been terminated or there is a takeover agreement creating an obligation to pay the Surety and terminating the obligation to pay the Principal.

10. What About The Surety Using Another Contractor To Complete The Contract?

In the event that the Surety plans to substitute another contractor to finish the job, such substitution, by terms of the takeover agreement, is subject to approval by the CO. Remember, the same rule about contract modifications applies: Though the Surety may wish to leave the new contractor solely in charge of completing the contract, the new "completion contractor" does not have the authority to execute modifications unless specifically given the authority by the Surety.

11. The Surety Has Forwarded A Takeover Agreement For The CO's Signature And The CO Has Asked Me To Review It. What Am I Looking For?

The general requirements of a TOA are set out in FAR 49.404(e). The following is a summary list of requirements:

1. Surety must complete the contract.
2. The Government will pay Surety's costs and expenses up to the balance of the contract price unpaid at time of default.
3. Unpaid earnings of the Principal will be subject to debts owed to the Government except to the extent used to pay Surety its actual costs for work under the performance bond. FAR 49.404(e)(1).
4. Surety is bound by the same liquidated damages as the original contract. FAR 49.404(e)(2).
5. If contract proceeds were assigned by Principal to financing institution, Surety may not be paid from unpaid earnings unless permitted by financing institution. FAR 49.404(e)(3).
6. The Government may not pay the Surety more than it expended in completing the contract. If the amount expended is less than the remaining con tract proceeds, the Government may pay the remaining proceeds, if any, for amounts expended on the payment bond if: 1) there is a mutual agreement be-

tween the Principal, Surety and Government; 2) there is a determination of the Comptroller General; 3) there is an order of a court of competent jurisdiction. FAR 49.404(e)(4).

In addition to these requirements, AFLSA/JACN Surety Branch recommends that TOA reviewers look for these items:

1. Any clause the purports to give Surety the right to assert claims that predate the default or TOA. These are usually phrased as "the Government conveys any and all claims of any kind that Principal could have brought against the Obligee pursuant to the contract . . . ."

   Remember that the Surety had no privity with the Government at that time, so they have no standing to assert contract claims and the Principal is not permitted to assign such claims.[12] The Principal may be able to assert the claims on its own behalf, but the Surety cannot assert them unless the government agrees to it.

2. Any clause obligating the Government to concede liability for a contract claim.

3. Any clause agreeing that the Surety has a priority interest in the contract proceeds superior to any claim the Government may have to those proceeds. Remember that the Government retains the right to set off against the contract proceeds for taxes and other valid obligations.

4. A distinct completion date that is satisfactory to the Government.

5. A clause that reminds the Surety that it is subject to the same amount of liquidated damages should it fail to complete on time.

12. Is There An Example Of A TOA That The Government Can Use?

The FAR does not contain a sample TOA, however, AFLSA/JACN Surety Branch has crafted a sample TOA that will soon be posted on the Resources Page of the JACN website.[13]

13. What Do We Need To Know If The Surety Wants To Negotiate The TOA?

First, though a Surety may feel that it has an absolute right to complete the contract, it does not. FAR 49.404(c) says that the CO "should" permit Surety to complete the contract, not "must" permit the Surety to complete the contract. A CO who feels that the Surety is proposing incompetent or unqualified contractors or the proposal is not in the best interest of the Government, can decline to allow the Surety to complete. The CO certainly can determine that having a Surety complete the contract is not in the best interest of the Government if the TOA is unfavorable to the Government (for example, if the Surety refuses to sign the TOA unless the Government allows it to raise preexisting contract claims).

Second, a Government attorney should realize that no TOA = no privity = no pay. Since the payments under the contract cannot be assigned to the Surety, the only non-TOA way to pay the Surety for completing the work is for the Surety to file litigation and pursue its equitable subrogation rights. This can be time consuming and expensive for a Surety and makes a TOA far more appealing.

Third, taking over is more of a benefit to Surety. It prevents assessment of reprocurement costs, which are invariably higher than Surety completion costs. It also allows the Surety to control its own costs by managing the completion contractor itself. Finally, taking over allows the Surety to discharge its bond obligation sooner, because there is no lag time associated with a executing a reprocurement contract.

Fourth, no matter how hard Surety argues that it should be able to assert preexisting contract claims on behalf of the defaulted contractor, the caselaw does not support a Surety's right to bring such claims.

14. The CO Says The Principal Assigned Payments To A Bank In Return For A

Construction Loan. What Are The Bank's Rights?

This is a difficult situation requiring coordination with AFLSA/JACN Surety Branch. The potential hazard is that unless the assignee's right to collect contract payments is extinguished, it may still have a right to the same money that the Surety seeks. If the Government pays either the assignee or the Surety, a court may require the Government to pay the other party. Most often an interpleader is appropriate to protect the Government from double payment. Thus, the best way to handle this situation is to contact the AFLSA/JACN Surety Branch.

15. Are There Any Suggestions About How To Get The Work Completed ASAP?

The only barrier to completing this process quickly is the amount of time the CO has available to spend on the process. There are no mandatory time periods for the completion of a termination for default and negotiation of the TOA except, of course, the time period between notice of intention to terminate (Cure Notice or Show Cause) and termination. Thus, to get the work completed ASAP the CO should terminate expeditiously and move immediately on to negotiation of the TOA. If the contracts attorney is not familiar with surety law, he or she should skim FAR Part 28 for applicable topics and read thoroughly FAR 49.404.

16. Are There Any Other Important Issues To Be Aware Of In This Situation?

Yes. Although it is rare, in some cases the CO and/or the contracts attorney are not familiar with surety law and/or never get around to asserting claims against the Surety. If the base determines it wants to take action to recover the reprocurement costs from the Surety, it needs to do so within six years after the Government's claim accrues.

Summary

If the reader retains anything from this article, it should be this — In dealing with surety law issues, the CO needs to terminate the Principal's rights (T4D), and establish the Surety's rights (TOA) before the Surety or another contractor can step in and complete the job. Failing to perform either of these steps can result in litigation, thereby slowing the entire process down and leaving the construction incomplete for long periods of time.

[1] http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/28.htm

[2] https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacn/Bankruptcy.htm

[3] http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/49.htm#P404_77034

[4] http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/52_246.htm#P1961_310407

[5] For detail on the reasons for a termination for default, see the outline Contract Bonds and Suretyship, by Lt Col Blane Lewis and Maj Graeme Henderson available on the Resources Page of the JACN Website.
For a more detailed explanation of equitable subrogation, go to the Contract Bonds and Suretyship Outline.

[6] *Westchester Fire Ins. Co. v. United States*, No. 98-440C, 2002 U. S. Claims LEXIS 125, May 22, 2002.

[7] *See* also Priority of Payment Between Payment Bond Surety and Contractor, B-238695, September 13, 1991.

[8] *See* FAR 49.405

[9] *See* FAR ¶¶ 49.402-7, 49.406

[10] *See* FAR 28.102-2

[11] An assignment is a voluntary relinquishment of a right, and for government contracts, is restricted by the Assignment of Claims Act, 31 U.S.C. § 3727 and the Assignment of Contracts Act, 41 U.S.C. § 15. FAR 32.802 sets out the prerequisites to a valid assignment, among which is a requirement that the assignee be a bank, trust company, or other financing institution. FAR 32.802(b).

[12] *See* FAR 32.802.

[13] https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacn/Resources.htm

PRACTICUM

• DISQUALIFICATION OF THE SJA, CONVENING AUTHORITY

Most military justice practitioners know that the trial counsel cannot sign the Staff Judge Advocate Recommendation (SJAR). The reason is spelled out in RCM 1106(b), which lists the trial counsel as being disqualified from acting as a staff judge advocate to the convening authority in the same case. Others who are disqualified include a member, military judge, assistant trial counsel, defense counsel or investigating officer. The Discussion to RCM 1106(b) notes the staff judge advocate may also be ineligible to advise the convening authority under certain circumstances.

Recently, the Court of Appeals for the Armed Forces (CAAF) addressed this issue. In *U.S. v. Gutierrez*, ___ M.J. ___ (2002), CAAF set aside the convening authority's action and returned the case for a new post-trial recommendation because the judge advocate who acted as the staff judge advocate in preparing the SJAR had previously testified as a witness in the same court-martial. Because the new SJA had earlier testified on a contested speedy trial issue, CAAF held that when she acted as the SJA, she placed herself in a position of evaluating her own testimony and was thereby disqualified. Also, the Court found she was disqualified because she assumed a prosecutorial role in the case when she orchestrated the timing of the Article 32 investigation. It is worth noting the new SJA found herself in this position because the incumbent was deploying. If you find yourself in this position, consider whether your previous involvement in the case may disqualify you from acting as the SJA for the SJAR and other related events.

Most military justice practitioners also know that an accuser cannot act as convening authority. This prohibition is found is Articles 22(b) and 23 (b), UCMJ. The definition of "accuser" is in Article 1(9) and includes a person "who has an interest other than an official interest in the prosecution of the accused." The most recent CAAF opinion on this issue, *U.S. v. Dinges*, 55 M.J. 308 (2001), sheds some light on when a person is considered an accuser. Because of his position as wing commander, Col M agreed to be the District Chairman of a Boy Scout division and a member of the Board of Directors for a local Boy Scout council. Another member of the council told Col M that the accused allegedly had sexual relations with several boy scouts.

The accused was an assistant scout master in another district. Col M consulted his SJA before providing this information to AFOSI, which in turn opened an investigation resulting in the accused's general court-martial. The Court, in a split decision, held that, under the facts of the case, Col M did not have an interest other than an official interest in the case and, therefore, was not disqualified when he acted as special court-martial convening authority. If you have a concern that a special or general court-martial convening authority in a particular case may be disqualified, the discussion and cases cited in the *Dinges* majority, concurring and dissenting opinions are good places to start.

• UCMJ ACTION FOR UNPROFESSIONAL RELATIONSHIPS

Hypothetical: A master sergeant and a senior airman work in the same office and have daily contact with each other. The pair hit it off right away. They go to lunch together almost everyday, play golf most sunny Saturdays, and car pool to work occasionally. Other airmen in the office have noticed this close friendship. They are angry, for example, when the MSgt scolds them for taking more than one hour for lunch, but comes in laughing and joking after taking a two hour lunch with the SrA. Finally, word gets to the commander, who needs advice on how to discipline the pair.

The commander has a theory. He knows about AFI 36-2909, *Professional and Unprofessional Relationships*. He reads the words at the top of the AFI: "COMPLIANCE WITH THIS PUBLICATION IS MANDATORY." He is familiar with Article 92, UCMJ, titled "Failure to Obey Order or Regulation." Therefore, he concludes that both the MSgt and the SrA can be

punished for violation of a lawful general regulation. When he presents this theory to his local Chief of Military Justice, he learns his theory doesn't work.

To understand why, it is necessary to know what it means for an instruction to be "punitive," i.e., that a violation of a particular provision of the instruction is a violation of a lawful general regulation. Not all instructions are punitive; in fact, most are not. The explanation of Article 92 (MCM, Part IV, paragraph 16c(1)(e)) states that "regulations which only supply general guidelines or advice for conducting military functions" may not be punitive. Additionally, the Drafters' Analysis of Article 92 states: "The general order or regulation violated must, when examined as a whole, demonstrate that it is intended to regulate the conduct of individual servicemembers, and the direct application of sanctions for violations of the regulation must be self-evident."

The best way to identify a punitive instruction is to look at the summary on the first page of the AFI, as well as the particular paragraph you think was violated. If it mentions Article 92, it's probably a punitive instruction. For a detailed analysis of punitive instructions, see *U.S. v. Shavrnoch*, 49 M.J. 334 (1998) (holding AFR 205-7 and its successor, AFI 34-119, which made the minimum age for drinking alcohol the same as the state law, are not punitive general regulations).

To determine whether AFI 36-2909 is a punitive instruction, begin on the first page. It states:

> "Officers, including Reserve officers on active duty or inactive duty for training and ANG officers in Federal service, who violate the custom of the service against fraternization or the specific prohibitions contained in paragraph 5.1 of this instruction can be prosecuted under either Article 92 or Article 134 of the Uniform Code of Military Justice (UCMJ), or both, as well as any other applicable article of the UCMJ, as appropriate."

Note that this sentence makes no mention of enlisted personnel. Next, look at the rest of the instruction. The only other paragraph which mentions Article 92 is in paragraph 5.1. Therefore, the only provisions in AFI 36-3209 which can be charged as violations of a lawful general regulation are located in paragraph 5.1, and those provisions only apply to officers. An enlisted member whose conduct violates AFI 36-2909 cannot be charged with violating a lawful general regulation.

That is not to say that enlisted members cannot be charged with violating Article 92. That article prohibits not only violating a lawful general regulation (Article 92(1)), but also failure to obey an order (Article 92(2)) and dereliction of duty (Article 92(3)). For example, if the SrA and MSgt continued the unprofessional relationship after the commander ordered them to end it, both have failed to obey an order. Also, if the MSgt knew or should have known that the close friendship with the SrA was unprofessional, dereliction of duty can be alleged.

Change the hypothetical: substitute a first lieutenant for the master sergeant. Because AFI 36-2909 is punitive with regard to officers, the 1Lt can be charged with violating a lawful general regulation (Article 92(1)), specifically paragraph 5.1 of AFI 36-2909. The same conduct is also fraternization (Article 134). Moreover, depending on the facts, the 1Lt's actions could amount to failure to obey an order (Article 92(2)), dereliction of duty (Article 92(3)), or conduct unbecoming an officer (Article 133).

As a final point, pay attention to fact patterns which include violations of other UCMJ articles. For example, both officers and enlisted members can be guilty of adultery (Article 134). Recently, the analysis to the adultery paragraph in the MCM was amended. As with any alleged offense, it urges commanders to dispose of adultery allegations at the lowest appropriate level and to consider a variety of factors, with the goal of a disposition that is warranted, appropriate and fair.

TRIAL BRIEF

Major Christopher C. vanNatta

A Question of Control

'Been there, done that,' thought the young defense counsel as he sat at counsel table listening to the direct. He had prepared hard for this witness. And, he had done cross-examinations before. In fact, the young captain regarded himself as pretty darn good at cross. Truth be told, he was the best in the office, even if he did say so himself. So, how hard could this be? The witness did look a little cagey and seemed pretty sure of himself. But, the young captain figured he would still be able to get in, get what he needed, and get out. The witness, unfortunately, had no intention of cooperating . . . they never do.

The examination began well. The defense counsel started strong and the witness was answering all the questions the right way. Then came the most important part of the examination. The defense counsel was confident he was going to get the witness to admit he could not be sure it was the accused he saw in the hallway and later going in the victim's room. The defense counsel just knew he had this witness eating out of the palm of his hand and that he was about to get the testimony that would result in an acquittal.

Then, it happened. The witness did not give the answer the defense counsel expected. The counsel tried again with a different question. Again, the witness did not give the right answer. The defense counsel ignored the warning signs and pressed forward. "Isn't it true that you were at one end of the hall, several feet away, and that the neon lights at the other end of the hall were blinking on and off and that it was too hard to see the person standing at the end of the hall by Airmen Jones' door?" The captain's exasperation was evident in the question.

"Well, . . . " the witness began.

'Oh no,' the captain thought, 'the witness is not going to answer the question with a yes or no.' The captain's mind raced. He stopped listening to the witness. Images started to become distorted. The room began to spin. He felt like he was in a bad Alfred Hitchcock knockoff. He tried to regain control. "Please just answer with a yes or no," the defense counsel said feebly.

"Well, I can't," said the witness.

The captain, woozy from the exchange, tried to remain strong. "The question was a yes or no question. It does not . . . ." Even as he was talking, he could hear the disembodied voice. Could it be? Could the judge be coming to his rescue?

"Counsel, it was not a yes or no question," intoned the judge. "It was really a very convoluted question. You asked it. You are going to have to live with the answer."

The defense counsel could feel the blood drain from his entire body. The witness started yammering on about something or another, but by then the damage was done. The defense counsel had lost control of the witness, the witness was now giving testimony that was killing the defense's case, and the defense counsel was powerless to stop it.

What happened? How did the counsel lose control? The answer is simple. He asked the wrong question. Or, more accurately, he asked the question the wrong way.

The key to controlling witnesses on cross-examination is asking the questions the right way. Really, it is that simple. If you can control the witness with your questions, you will get the information you are looking for, you minimize your risk of getting a harmful answer, and you project the image of an attorney in control of her case and the courtroom. To be sure, there are other ways to try and control a witness, but they are not nearly as effective and they each come with their own set of special problems.

One way, for example, is telling the witness to answer 'yes' or 'no.' This is probably the least effective way to attempt to control a witness. First of all, it rarely works. The witness will almost certainly ignore you – after all, it is not as if you can take the witness out back and teach him a lesson for giving a multi-word answer. Or, the witness might start arguing with you about answering the question. Of course, neither one

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makes you look particularly good or helps your case. Second, you will draw an objection from opposing counsel who, with as much indignation as he can muster, will accuse you of trying to hide facts from the panel by preventing the witness from answering a question you asked. Even if your opponent is overruled, the point will have been made. Third, the judge could stop you in the same manner as the doomed counsel above. Finally, it makes you look like you are not in control and makes the witness look like he is. Once this happens, the panel begins to view you and your case with skepticism or worse yet distrust.

Another tactic counsel often resort to is a direct appeal to the judge. It goes something like this; "Your Honor, please instruct the witness to answer 'yes' or 'no' to the question." This approach also does not work well. First, the judge is likely to say, "No." Or worse yet, "Counsel, I am not going to instruct the witness to answer your questions the way you think she should. If you want a better answer, ask a better question." Of course, the effect on your case of this kind of judicial participation is obvious. Worst of all, whining to the judge for help with a witness only reminds a panel you are not in control of the courtroom or your case -- not a perception you want to foster. In extremely egregious cases, where the witness is nonresponsive and ill-mannered, it may be a good idea to appeal to the judge. But even then, you want to do it in such a way that the judge appears to be validating you and your actions.

"By using one fact per question...there is virtually no way for the witness to do anything other than provide a 'yes' or 'no' answer."

The best way to control a witness is with your questions. First, you have to LEAD the witness. Unless you are cross-examining an accused or an expert (this, of course, is a separate column), you should use leading questions exclusively. It seems like this ought to go without saying, but too many new counsel and even some veterans inexplicably insist on asking open-ended questions during cross. Theoretically, you are the one who is testifying on cross-examination. If you do it correctly, it will actually work out that way. By using leading questions and getting the witness to answer only yes or no, you are the one the panel is listening to. Using non-leading questions allows the witness to do all the talking and to control the examination. That is because you are never going to get a yes or no answer to a non-leading question.

Second, the questions have to be short . . . really short . . . really. In other words, you should only use one fact per question. Aside from the benefit of being easy to understand, it makes it hard for the witness to do anything but answer 'yes' or 'no.' For example, rather than asking a witness whether he can be sure it was your client he saw in the dark hallway with the burned out lights, ask the questions one fact at a time.

"You were in the dorm hallway?"
"Yes."
"You were at one end of the hallway?"
"Yes."
"Right by the exit door?"
"Yes."
"There were lights in the hallway?"
"Yes."
"But the hallway was dark?
"That's right."
"Because some of the lights were off?"
"Yes."
"In fact, only three lights were on, right?"
"Yes."
"There was a light right above you?"
"Correct."
"That light was on, right?"
"That's right."
"Two other lights were on?
"Yes."
"Both of those lights were in the middle of the hall?"
"Yes."
"So, the lights at the far end of the hall were off?"
"That's right."

By using one fact per question in this fashion—asking for bricks rather than for walls or entire buildings—there is virtually no way for the witness to do anything other than provide a 'yes' or 'no' answer. It constrains the witness and provides no effective wiggle room at all. Also, by

using one fact per question, it creates a "flow" in the questioning. As these short questions are asked and answered with a single word (or two), the witness gets into a rhythm that makes it much easier for counsel to exert control. In its simplest terms, the witness comes to expect this kind of exchange. The panel also finds it easier to settle into the "testimony" they are hearing from counsel. Finally and perhaps most importantly, the counsel gets into the same rhythm, allowing the questions to come more easily and more naturally.

Now, on the rare occasions when a witness tries to wiggle out from under your one-fact-per-question questions, the counsel's response should be immediate and firm. The counsel must go back and make the witness answer the question asked (at least until the witness's refusal to answer becomes absurd). The idea is to "teach" the witness the consequences of not answering the question—or, in other words, to make the witness pay. Either the witness will stop wiggling or his persistent refusal will cause him to lose all credibility with the panel.

Suppose that during the questioning outlined above, the witness will not admit the hallway was dark. The counsel must get the witness to answer the question. (Author's note: It might be helpful to actually have some pictures of the dark hall under the same conditions, with the same lights turned off at the same time of night, etc.; this could be very useful with such a witness.)

"The hallway was dark, wasn't it?"
"I wouldn't say that."
"Really? The hallway was not dark?" (with mock surprise)
"No." (now the witness is starting to think he has a problem)
"You entered the hallway at approximately 0230, correct?"
"Yes"
"At 0230 it was dark outside, right?"
"Well, yes."
"And, the hallway had windows?"
"Right."
"Two, right?"
"Yes.
"One at either end of the hall?"
"Yes."
"But, there was no light coming in the windows, was there?"
"No."
"Now, the hallway also has electric lights?"
"That's right."
"In fact, there are 20 of these lights?
"That's right."
"And, you know that because I asked you to count them, didn't I?"
"Yes."
"And, they are single bulb lights?"
"Yes."
"Recessed lighting?"
"Yes."
"In the ceiling?"
"Yes."
"In a row down the middle of the ceiling?"
"Yes."
"No other lights in the hallway, right?"
"Right."
"40 watt bulbs?"
"Yes."
"And you know that because I asked you to check, didn't I?"
"Yes."
"Of those 20 lights, only 3 were on that night."
"That's correct."
"One of those three lights was at your end of the hall?"
"True."
"Right above you?"
"Yes."
"The other two were in the middle?"
"Right."
"So one half of the hall had three out of its 10 lights on?"
"Right."
"And, that was your half of the hall?"
"Right."
"And the other half had no lights on whatsoever?"
"Well, yes." (the witness is caught . . . and he knows it)
"But now you're saying the hallway was not, dark?
"Well, . . . I guess it was *kind of* dark."

Now, if you are feeling lucky like Vinny in *My Cousin Vinny*, you could say, "You guess so? Come on. It was dark, wasn't it? It's okay. You can say it. Everyone knows the answer." In reality, you would not have to do that because the point was won the minute the witness responded "yes" to your series of preceding questions leading the members to think, "Gee, that hallway HAD to be dark. No way he could see clearly.")

The key here is to recognize the real issue (whether the witness was or was not able to see clearly), remember what position you have taken on that issue (he was not; it was too dark), and realize that the witness doesn't want to accept your position. Therefore, rather than ram the position down his throat, feed him bite-sized questions based on facts you *know* are true (as in, the witness will admit to them or some other evidence will firmly establish them, such as photos) that support your position. This proves up the facts that support your position and moves the witness, question-by-question, fact-by-fact, in the direction of the truth. Then, when there is nowhere for the witness to hide, ask the ultimate (position) question again. The witness will have to give you the answer you want, or deny the obvious and look ridiculous doing it.

There are several benefits to this approach. First, it strengthens the relevance of a fact in the case. By getting the witness to admit to what he initially would not, it gives that fact that much more importance. Now, all of a sudden, not only was it dark, but the witness does not want the panel to know it was dark. Why? Is it because the witness could not see the other person very well? Seems . . . reasonable. Second, you are controlling the testimony and, therefore, your case. Third, imagine the witness answers, "Nope—I do not think it was dark." He will have lost all credibility and you will have lost nothing. The rest of the examination will be like leading a horse to water . . . and making it drink. This is witness control.

By using questions, the right questions, counsel can more effectively control a witness on cross-examination. Far better than telling the witness to answer in a certain way or asking the judge for help, using questions to control the witness has important benefits. Aside from getting the answers she wants, the counsel will actually be controlling the courtroom and her case. With control comes confidence, with confidence comes credibility, and with credibility comes victory.

GENERAL LAW

• *RESUMPTION OF ANTHRAX VACCINE IMMUNIZATION PROGRAM (AVIP)*

The Department of Defense has resumed the Anthrax Vaccine Immunization Program (AVIP) throughout the Armed Forces pursuant to a DEPSECDEF policy memo of 28 Jun 02 and USD/P&R memo of 6 Aug 02. These, and other important DoD policy memos, may be found on the DoD AVIP website (http://www.anthrax.osd.mil). The Air Force Implementation Plan was issued on 11 Oct 02 and may be found in any SG or XO office.

Currently, vaccinations are being given to Priority I and II personnel. Priority I includes personnel assigned to special mission units, manufacturing and DoD research, while Priority II includes personnel assigned or deployed for greater than 15 consecutive days to designated higher threat areas (HTAs), primarily in Southwest Asia. The HTA's are identified by country, but the information is "for official use only" and thus is not posted on military websites.

Commanders may request immunizations for other groups of individuals who rotate into the higher threat areas repeatedly for more than 15 cumulative days over a 12-month period, such as airlifter crews, maintenance recovery crews and aerial port teams. However, only the Air Force Medical Operations Agency (AFMOA), in coordination with DoD health officials, may approve additional immunizations.

One of the most important "lessons learned" from the early years of the program is that commanders, supervisors and medical experts must plan in advance for the response to unique issues at each installation. While commanders remain primarily responsible for oversight of the program, the Air Force AVIP requires each installation to establish a base-level AVIP team, chaired by a senior line officer, and supported by public affairs, intelligence, deployment, chaplain, medical, legal, and wing leadership. The team provides recommendations and expertise for the local command structure for both routine and unusual situations involving AVIP activities.

As in the past, education remains the critical component of the AVIP. Commanders, first sergeants, and other key leaders must be fully educated and comfortable with all aspects of the program in order to educate and support those identified for vaccination. The DoD website contains a wealth of information, including complete briefings, for the commander's use.

The commander exercises discretion in handling refusal cases. If a member indicates he or she is planning on refusing the vaccination, the commander should take the following approach: (1) find out why the member is reluctant to take the vaccine; (2) provide the member with additional education; and (3) refer the member to the appropriate expert or specialist who can assist the member resolve their concerns. If the member is still reluctant after these additional steps, the commander should consider sending the member to the Area Defense Counsel for an explanation of the potential consequences of refusing the vaccine. The AVIP program remains a mandatory force protection program. Thus, a commander's order to take the vaccine is lawful and may be enforced the same way any other lawful order is enforced.

Terrorist activities before and after the 11th of September, 2001, have convinced senior DoD officials that members of the Armed Forces are vulnerable to the use of anthrax as a method of biological warfare. The threat is not hypothetical -- it is real, as evidenced by domestic anthrax incidents that killed several Americans in late 2001. Those victims who survived did so only because of immediate and extensive medical treatment that may not be available to military personnel who are exposed to anthrax spores during warfare. Thus, DoD officials believe the best preventative measure continues to be the AVIP program.

Finally, the DoD web site contains detailed and persuasive information about the safety of the vaccine. Not only is it FDA-approved, but many authoritative medical institutions have verified its safety. Concerns about the vaccine's safety will be fully addressed by medical officials and, if necessary, through one-on-one counseling. Mis-

understandings about the vaccine's safety are usually resolved through education and counseling because the vaccine has been authenticated by a widely diverse collection of medical experts associated with private industry, government, nonprofit institutions and educational groups. Many of these authorities have no DoD connection or bias whatsoever.

In conclusion, the more commanders, first sergeants, and their staff judge advocates know about the AVIP program, the better prepared Air Force units will be when their members are tasked for deployment to a higher risk area. The vast majority of those members who are concerned about the vaccine's safety should be reassured through thorough education and counseling by the experts (DoD and non-DoD alike). And, if all other measures fail, enforcement of the program through existing force management measures is available to commanders, in their discretion.

• JUDGE ADVOCATE'S ROLE IN AN IG INVESTIGATION

The Judge Advocate's (JA) role in the Inspector General (IG) investigation process is much more than just reviewing a completed report for legal sufficiency. IAW AFI 90-301, Para 1.46, JA is responsible for assisting IGs at every level of the investigation. This includes identifying allegations of wrongdoing, framing allegations and assisting investigating officers during the investigation. SAF/IGQ has developed a "tool kit" to aid IGs and JAs in working with investigating officers. The tool kit will also give a better understanding of the IG investigation process to new Judge Advocates. The tool kit can be found at the following website: IO Toolkit: http://www.ig.hq.af.mil/igq/Training/iotoolkit/Version10/index_files/frame.htm

• UNDERSTANDING PRIVACY ACT SYSTEM NOTICES

What are system notices?

A Privacy Act system notice is an explanation of the purpose, location, and authority for a system of records (see generally AFI 33-332, chapter 6). It also tells you the routine uses of the records maintained in that system, as well as the system's exemptions. When you are confronted with a Privacy Act question, finding and analyzing the applicable system notice is usually your first step.

Pay particular attention to the routine uses section of a system notice, which defines the permissible uses of the records. The Privacy Act generally prohibits the disclosure of the information it protects unless the subject consents, or the disclosure is authorized by one of the 12 enumerated exceptions (5 USC 552a(b)). Exception 3 allows the government to use the information for the "routine uses" it has established and published in a system notice (5 USC 552a (b)(3)). In other words, the routine uses section of a system notice will tell you what disclosures of a record are consistent with the Privacy Act under exception 3.

Please note many AF system notices claim the "blanket" routine uses. The blanket uses are incorporated by reference in specific system notices. To understand all the appropriate uses of a record you must review the blanket uses as well.

The exemptions portion of the system notice is significant as well. Ordinarily the Privacy Act entitles a person to see their entire record. However, the exemptions portion of a system notice defines what information may be withheld from the subject of the record. While most systems do not have exemptions, Commander Directed, and Inspector General Investigations are notable exceptions. For example, the subject of an IG investigation may not be entitled to a full copy of the report. Rather, they will be entitled to a redacted version as defined by the exemptions portion of the IG record's system notice.

Where to find system notices: You can find a complete listing of system notices for Air Force records at http://www.defenselink.mil/privacy/notices/usaf/. The notices are grouped by OPR, so that IG system notices are together, and SG system notices are together. You can also find the name of the system notice in the preamble of the AFI that requires the collection or maintaining of personal data in a system of records (AFI 33-332, para 6.1).
You will find the "blanket" routine uses at: http://www.defenselink.mil/privacy/notices/usaf/

TORT CLAIMS LITIGATION AND HEALTH AFFAIRS

As reported in earlier articles, DoD continues to fine tune final implementing guidance on the new Health Insurance and Portability Accounting Act of 1996 (HIPAA). The regulation is due to become effective on 14 April 2003. It will apply to all DoD components and will give instruction on health information privacy. In the interim, the Privacy Act, 5 U.S.C. 552(a) and the Interim Guidance Letter from DoD dated 31 October 2000 (found on the JACT web site) should offer direction for any questions that arise in this area.

• *RES GESTAE*

The 2002 Medical Law Mini Course was held at Travis AFB, CA from 21 - 25 October 2002. The course, held annually, is geared to claims officers, paralegals who work extensively with medical malpractice cases, and personnel involved in quality assurance. Presentations were made by numerous medical specialists, who discussed the areas in their practices that were most ripe for malpractice occurrences. Lectures were also offered by members of the Medical Law Branch of JACT, the Legal Advisor to the Surgeon General, and representatives from the Air Force Surgeon General's office.

• *VERBA SAPIENTI*

As training needs are an essential part of Air Force health care, many of our Medical Training Facilities are sending and/or hosting residents and other trainees to/from civilian institutions. This modality of training is approved under the provisions of AFI 41-108, Training Affiliation Agreements. The Instruction is clear on required language that should be included in the agreements, including, where appropriate, insurance and indemnification provisions. Templates are attached to assist in the completion of these agreements.

It is wise to review the criteria contained in the instruction and to include all provisions necessary to protect the interests of our providers. In the event of a tort action, the Air Force provider who is working at a civilian institution requests representation from the Department of Justice. The Justice Department does not routinely offer blanket representation and protection; it will look on a case by cases basis for evidence from the agreement that our providers were indeed acting in scope of employment. In many cases, we have seen either no written agreements, or agreements that do not spell out duties and status of our providers. Consistency in following the provisions of the Instruction will help insure appropriate legal protection, and will also help to prevent the United States from being deemed responsible for actions of non-employees.

• *ARBITRIA ET IUDICIA*

Settlement costs of a non-consensual sterilization claim were significantly mitigated due to diligent documentation by a provider and equally diligent review of the record by the claims officer.

Following the birth of her second child, a claimant underwent a post-partum sterilization (one performed immediately after the birth procedure). The sterilization was performed successfully, but it was discovered after the surgery was over that the claimant had been confused with another in the labor and delivery ward, and she had never consented to a sterilization procedure. A claim for over six figures was filed.

LEGAL INFORMATION SERVICES

INFORMATION INTEGRATION CARRIES RISKS & RESPONSIBILITIES

Warfighting systems urgently need to begin working jointly, at least this was the premise stated in an article in the May 27, 2002 edition of Federal Computer Week (Experts: DOD nets need joint focus). According to this publication, systems integration between all the military branches was crucial for the U.S. military fully realize the potential of its people and equipment.

What is systems integration and, more importantly, why should we, as military legal professionals, be concerned with it? Systems integration essentially means that all equipment and technology is shared through a common medium, where every person who needs to access a technology can do so easily and quickly. This integration through network-centric operations makes every aspect of our legal practice more efficient and easier. Perhaps surprisingly, we are already further along toward integrating and centralizing our data than many believe. Yet, with systems integration comes the increased risk of infiltration and attack by adversarial parties. You can help prevent such attack by paying particular attention to how your computer system is used.

INFORMATION INTEGRATION THROUGH TECHNOLOGY

As legal professionals, our work revolves around information and research. The legal arena, particularly in federal practice, is a vast ocean of information. Obviously, a streamlined and accessible information source is the linchpin to successful and efficient practice.

FLITE (Federal Legal Information Through Electronics), which was formally established in 1963, is operated by the Air Force through AFLSA/JAS as the executive agent for the entire Department of Defense. The intent in the creation of FLITE was to provide routine and emergency computer-assisted legal research, both in the normal office environment and in deployments. It was understood that there must exist a means for military professionals to easily and efficiently access applicable legal and military sources of information in order to properly carry out their mission.

Later, AFCIMS, AMJAMS, ROSTER, LIONS, RAMS, and collaborative tools like DocuShare were added. The mission of AFLSA/JAS expanded from computer-assisted legal research to knowledge management and decision support for core JAG processes. We as legal professionals have blazed the trail in this area and continue to lead in data organization and dissemination ideas, with exceptional results.

THE DANGERS OF CENTRALIZED INFORMATION

Information centralization, though beneficial, is not without risks. For instance, cyber warfare can make a network-based military structure stop in its tracks. Worse, it could infiltrate the system and lead to catastrophic breakdowns, not only in purely information systems, but also in military warfighting equipment that relies upon those systems. Such an attack would certainly be an appealing plan for adversaries who recognize the fact that they cannot take on the U.S. military in a conventional battle and are seeking new ways to strengthen their armed forces. Terrorists, for instance, are a prime example of those groups who do not have the military might to confront the U. S. directly, but try to make operations difficult or impossible through other, less visible means. Yet, small extremist organizations are not the only threat. China, for one, has been vigorously developing such cyber warfare initiatives as one of its key warfighting tools for the future. "It could be the next blitzkrieg," stated retired Adm. William Owens, a former vice chairman of the Joint Chiefs of Staff. It is urged by many that the U.S. begin spending more money to maintain and protect its technological superiority.

In the June 7, 2002 edition of Aerospace Daily, a warning was issued with the article entitled, "Cyberspace Seen Area Of 'Great Threat And Great Danger.'" This grim announcement was followed by statements from Lt Gen Ed Anderson, deputy commander in chief of U.S. Space Command, pointing out that "I will tell you that if there's anything that keeps me awake at night, more than any of the other things we do, it's cyberspace." According to Lt Gen Anderson, from 1998 to 1999, there was a five-fold increase in detected instances of 'hacking' into unclassified military networks. In 2001, there were close to 30,000 instances detected, and over 40,000 instances are expected in 2002.

What does this mean to you in the field? Each of us, whether attorney, paralegal, or civilian employee, carry an obligation to do our part to protect information and systems we use. The concept of information security means that data entered into or retrieved from a computer will be

accessed only by those authorized to do so. Essentially, it requires keeping the bad guys out and letting the good guys in.

Now, particularly after September 11, with the desire of third parties to gather as much information and cause as much disruption against the U. S. as possible, the need for information security is greater than ever. Some huge businesses as well as government agencies have fallen victim to security vulnerabilities over the last few years and have shored up their systems as a result. Although you may think nobody would care about accessing your computer based on your relatively low-level position in an office rather than at the "tip of the spear," that is precisely the reason you are a likely target: complacency.

Our field of work has additional responsibilities for information security based upon legal and ethical considerations that should not be ignored. For instance, attorneys and their staff have an obligation to keep client confidences and secrets secure.

PROTECTING RESOURCES

Many simple, proactive steps can be taken by each of us to ensure information security on a day-to-day basis. For instance, at every military legal office, security begins with properly securing the premises and ensuring each workstation is protected from unauthorized access or removal. Protecting programs and data against virus attacks through up-to-date software is also essential. In addition, vital work product should be backed up frequently to supplement a strong contingency plan you enact, should any security breach occur.

Currently, many safeguards exist for military legal professionals to protect them from unauthorized disclosure of information. These include password protection, antivirus programs, firewalls, secure remote servers, and web browser security. However, you control many other potentially susceptible areas that need continuous vigilance, such as email traffic.

CONCLUSION

Information centralization and integration is a key ingredient to successful legal practice in the military. You are on the cutting-edge of technological innovation, receiving the newest developments of information access. However, information security is an area where a high degree of awareness and protection is absolutely essential to prevent creating a situation where our reliance upon technology becomes our downfall. We should all take steps to proactively keep information access a powerful, effective, and safe tool for legal professionals today and in the future.

CONSIDERING ETHICS, ADVERSITY, AND ACCUSATIONS

Major John E. Hartsell
Major John B. Flood

Common sense dictates that you don't tell a chef that he is an embarrassment to his profession *before* you place an order for your meal. Common sense should also discourage you from standing in front of the restaurant's clientele and personally insulting the cook—especially if the chef runs the only restaurant in town. The same admonishment holds true if the chef is also your next-door neighbor and you two will spend your entire lives in each other's proximity. The reason you don't insult your neighbor chef, before you place your order, at the only restaurant in town, is simple: your future experiences with him or her may become knowingly, or unknowingly, unpalatable.

The wisdom that discourages one from insulting their chef is sometimes lost in our adversarial justice system. Our system can involve competition, stress, conflict, and even desperation. It can also involve strong personalities and heated conflict. Nonetheless, our adversarial system does not force adversaries to openly insult each other. An adversary who personally attacks his or her opposition generally does it publicly and consciously, and when the attacks occur they are often without any regard for the ultimate consequences. This brief article is a simple effort to remind litigating judge advocates that personal ethical attacks against one another are, for at least ten reasons, as unwise as insulting your chef before your meal is ordered.

Three years of little sleep, lots of stress, and constant adversity can certainly strain human relationships; however, three years of circuit work forged a strong friendship for both of us. Hartsell was a tenacious prosecutor while Flood was a zealous defense counsel and the clashes in the courtroom were often of Olympian proportions. No one who witnessed our trials could ever accuse us of shying away from battle; however, no one who witnessed our friendship could ever accuse us of taking trial work personally. Each and every case was relentlessly pressed by both of us and even though ~~Hartsell was the better litigator-Flood was the better litigator.~~ .we fought in the courtroom, we maintained professional and personal respect for each other.

Our epic battles and continuing friendship are a testament that warriors can shake hands. In fact, when combatants respect each other and follow a code of professionalism, justice runs smoother and faster and it can be more readily achieved. For these reasons, we decided there must be some lessons learned, or at least wisdom collected, that we can pass along to young (and even experienced) trial counsel and defense counsel who are seeing their professional relationships becoming strained or who might believe that the "E" (ethics) bomb is a weapon to be used as often as an evidentiary objection. Thus, we have worked together and compiled a list (yes, there was a plan between the two of us followed by an overt step to fulfill that plan) of the:

"Top Ten Reasons for Judge Advocates to Treat Each Other Professionally."

10. *So you can spend your effort on your case,*

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Major Flood (B.S., Oklahoma Christian University of Science & Arts, J.D., Oklahoma City University, L.L.M. Georgetown Law Center) is presently assigned as a Labor Counsel at the Air Force's Central Labor Law Office. Major Flood is a former circuit defense counsel who routinely trounced Major Hartsell in court; Major Hartsell never took the losses personally.

not on tit for tat. Time spent trying to embarrass your opposition is time lost preparing or presenting your case.

9. *How do you want your own mistakes to be perceived?* Sometimes legitimate mistakes are wrongly construed as sneaky or unprofessional tactics. If you routinely label all of your opponent's mistakes as unethical behavior you'll soon find yourself subject to the same exaggerated scrutiny. Try to give fellow attorneys the benefit of the doubt; remember, you're not perfect and when you make mistakes you will want to be given the benefit of the doubt.

8. *So your zeal does not overtake your commonsense.* Many times you will develop a passion for your case and passion is not necessarily a bad thing; however, don't let your excitement for a case weaken your everyday commonsense. While working on a case, do your best to carefully examine what you are going to say, what you are going to do, and what you are going to submit to the court (and to the world) before you do it; make sure your actions are grounded in logic and not emotion.

7. *It's required.* TJAG Policy Letter #40 says, in part, "We will treat all participants in the legal process with respect ... [w]e will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process, nor will be abuse other such participants in the legal process." Moreover, you are both Air Force officers, don't neglect to act like one.

6. *JAGs today, JAGs tomorrow.* You joined the Air Force JAG Department for the *esprits de corps*; don't forfeit the camaraderie that makes the career appealing.

5. *So you can break bread and not each other's reputation.* When the dust from the trial settles, when you have a little time, and when it is appropriate for you to be seen together, share a meal. Eat together and talk as friends. It might be a little awkward for the first fifteen to thirty minutes (if there's been a massive battle), but then the walls come down and the laughter and the war stories begin to flow. Meals with your comrades are some of the best you'll ever enjoy. **Make the effort!**

4. *So you can look maahvelous.* You can make each other look like litigating professionals or make each other look like bickering fools: your choice.

3. *Enough people hate lawyers, you don't have to make it worse.* Try not to encourage or continue the disdain that some members of the community have for attorneys. In fact, if you, in the heat of the battle, are the one defending the character of your opposition, folks may begin to understand that it really is our job and it isn't ever personal.

2. *Quid pro quo* (*i.e.* what goes around comes around). If you start calling state bar associations, you'd better be prepared to get a call from yours.

1. *You may just increase the number of your lifelong friends by a factor of one.*

(JEH) By following these top ten reasons you can ensure you will always win your cases and still look good.

(JBF) On the contrary, by following these reasons you can always ensure acquittals and still look good.

(JEH) Major Flood, I think you missed the learning point, why don't you come visit me tomorrow when I put on a lesson on "how to prosecute a case and win"; it will in be your courtroom. Don't be late.

(JBF) I'll be there, you won't miss me, I'll be the one with an actual case.

(JEH) Case? Try suitcase, I hope your client packed his prison bag. He'll need about five year's worth of clean undershorts.

(JBF) You're as amusing as your so-called evidence.

(JEH) That ain't amusing, this is amusing: knock, knock?

(JBF) Who's there?

(JEH) Dishonorably discharge.

(JBF) I'm not even going to answer that one. I'm just trying to defend America's defenders.

(JEH) Yeah, when your client stole those CDs from his roommate, exactly what part of America was he defending?

(JBF) Are you hungry?

(JEH) I'm starved.

(JBF) Okay, let's go to the club, I'll drive.

(JEH) You'll drive? Oh no granny, I'll be driving.

(JBF) Better let me drive Mr. Prosecutor, driving requires you to have your eyes open to the world around you.

(JEH) Oh reeaaally! Actually, we should probably take separate cars and let's eat somewhere off base.

(JBF) Good point Amigo.

Well, as you can see, old habits are a little hard to break. However, we are convinced that that treating your opponent in a professional manner at all times will pay big dividends for you, both professionally and personally, without compromising the integrity of your respective side of the case. In fact, if you are concerned your adversary has, or may soon, cross "over the line" then tell them. Do it nicely. Approach them, ask to speak with them privately, and raise your concerns respectfully and genuinely. Odds are, the problem will get resolved, collegiality will be maintained, and accusations won't be unnecessarily injected into a court transcript. Then you can focus on your work. It's not necessarily easy to be civil and professional all the time, but you'll expend the right effort for the right reason and arrive at the right relationship with your adversary. Adopt that as one of your goals for each case and put it into practice, following the old adage, "fight hard, but fight fair." We think you will be ~~glad..happy..~~.pleased that you did.

THE PARALEGAL LITIGATOR: A New Perspective on the Claims Process

MSgt Layne P. Berryhill

Who has the most successful litigation record in your office? It might be an enlisted member working in claims. If the definition of "litigation" includes arguing a case or advocating for a client, then a paralegal working in carrier recovery claims probably does more litigation on a daily basis than anyone else in the legal office. The purpose of this article is to help claims personnel significantly increase their carrier recovery rates by approaching claims from a different perspective. The article will address a claims philosophy that may be new to most readers and identifies the elements required to support every carrier recovery claim ever asserted. This new philosophy coupled with effective use of the elements can drastically improve carrier recovery.

The common claims philosophy is simply, pay the claimant, and then fight the carrier for the money later using whatever information the claimant provided at the time of submission of the claim. There is a better way. Looking at a claim the same way that a military justice case is examined can assist claimants in obtaining every dollar due to them for their meritorious claims and can increase carrier recovery rates at the same time. When a First Sergeant or commander comes into the military justice office with some facts about an individual suspected of a crime, the paralegal or the attorney refer to the Uniform Code of Military Justice and look up the elements of the offense. If the facts support the elements, the legal office can recommend and support a disciplinary action by the commander. The same is approach can be applied to every claim, or for the purpose of this article, each case.

To assert a case against a carrier for loss or damage incurred during a household goods move, the office making the assertion must ensure the elements of liability have been met. The elements to establish a *prima facie case* against a carrier are: 1) items must be tendered to a carrier in a certain good condition, 2) the item is not delivered or delivered in a more damaged condition, and 3) an amount of loss or damage.[1] It is not enough to know each of the elements; one must understand what they mean and how to establish them.

There are many ways to establish the first element of tender. The primary method listed in the Military/Industry Memorandum of Understanding (MOU) on Loss and Damage Rules for HHG Shipments, dated 24 January 1992, is the inventory as prepared by the carrier. The inventory describes the condition of the item at the time the carrier took possession of it. This is a great document for those items specifically listed on it, but what about the items not specifically listed? The inventory does not list every item from a household; many items are packed into boxes. Figurines, vases, or mantle clocks could be packed in a box listed on an inventory as "living room," "knick-knacks", "glassware" or another non-descriptive way. Crystal, Pyrex ®, or even a small television that was kept in the kitchen could be listed on the inventory in a box simply labeled "kitchen plates." What evidence can be used to establish tender of such items? The answer lies with the claimant who is the "investigator" to gather the evidence against the carrier. As the individual with the most knowledge of the property, and how it was handled, the claimant is the best source to establish tender. A simple handwritten statement by the claimant, establishing the facts of where the items were in the home and how they were packed, could be the proof needed to establish the first element of the case. If the claim is for items not on the inventory or items which do not bear a "reasonable relationship" to the carton or container they were packed in, a

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statement of facts from the claimant could establish your tender element. For example, it would not seem normal to have a television in a kitchen in a box labeled "Cutlery", but a statement from the claimant explaining how the television was next to the cutlery block when the kitchen was packed could provide powerful proof of the tender.

Another significant tender issue involves electronic items. The carrier will almost always list an electronic item as "mechanical condition unknown," (MCU) whether it is a computer, stereo, or electric mixer. This is one of the easiest issues to overcome and often the most neglected. To establish tender for an electronic item, the claimant can provide a handwritten statement on the condition of the item immediately prior to shipment. For example, a statement such as "the carrier watched Jerry Springer on my 27-inch television while packing my living room, and when the television was unpacked it did not work", would establish the tender element.

The second element, loss or damage, is somewhat easier. The primary document to to prove that loss or damage has occurred for which reparation is expected is the *Joint Statement of Loss or Damage at Delivery*, DD Form 1840 at the time of delivery, and the 1840R after the date of delivery. The MOU requires that the carrier be provided proof of the loss or damage via the 1840/1840R within 75 days from the date of delivery. The 1840/1840R, also known as the pink form, should list the name of the item, the inventory number, and a general description of the loss or damage. It is imperative the 1840R is dispatched properly and in a timely manner. Dispatching the 1840R against a carrier under a Government Bill of Lading (GBL) shipment is accomplished by sending it the carrier listed in block 9 of the DD Form 1840. For local moves under the Direct Procurement Method (DPM) or other contractual provisions, the form is sent to the carrier listed in block 15c of the 1840. Blocks 2 though 4 on the DD Form 1840R must be properly filled in, including signing the form. It is also very important to fill in the Date of Dispatch, block 3b. If in doubt of the type of shipment, GBL, DPM or other, dispatch the form to both of the carriers listed on the DD Form 1840.

Further proof of damage can come through an inspection of the damaged property. The base legal office can only support the assertion for damage when it **confirms** the damage claimed is truly different than the damages listed on the inventory at the time the goods were tendered.[2] This is a critical step in developing the case, but often times it is overlooked.

Another source for proof of damage can come from experts. For example, a statement from the expert in computer repair that a normally sturdy internal component has been damaged and the cause of the damage was rough handling can be compelling.

The third and final element in establishing the case against a carrier is to establish the dollar amount of loss or damage. When an item is lost, the replacement cost should be the current market value for the item. The Defense Office of Hearing and Appeals (DOHA) has stated that, generally, that when settling a claim for loss or damage, a common carrier by motor vehicle of household goods shall use the replacement costs of the lost or damaged item as a basis to apply a depreciation factor to arrive at the current actual value of the lost or damaged item.[3] There are many sources for finding a current replacement cost, such as the Base Exchange (BX). Depending on the size of the installation BX, this could be the best and easiest source to use for replacement costs.

Another alternative is to consider whether the item requiring replacement could be ordered through a catalog. Every claims office should have a library of current catalogs, including a BX catalog, which could be used to support a dollar amount claimed.

When repair estimates are to be used as the basis to establish a dollar amount of damage, the claimant should be encouraged to obtain very specific information from the repair experts. For example, the furniture repair estimate that contains one line item "refinish table" and an estimated cost is less substantial that the one which identifies the table as a particular type of wood with a large scratch across the top of the table which appears to be new and will require a complete refinishing of the table top.

The bottom line in establishing your amount

of loss or damage is leave out the unknown and use hard evidence, not speculative evidence. When all the evidence has been gathered to support the elements of the case against the carrier, it is time to present the case to the carrier.

When presenting the case against the carrier (commonly known as the "assertion"), the carrier must be provided with all the evidence, very much like discovery in a military justice case. The bottom of the assertion letter should include a list of all the attachments being sent. This should prevent the carrier from requesting documents already sent. If there is an issue in the case where there is the potential for the carrier to argue liability, then the assertion should address the issue up front. Let the carrier know why they are liable for a particular item. If a carrier has a reputation for repeating making the same arguments, then the assertion should address the argument before the carrier can make it. For example, if a carrier constantly argues the MCU issue, then the assertion letter should provide all the information to overcome the carrier's argument before it made. It is more powerful and better time management to be proactive. Make the arguments strong by using the MOU, the inventory, and DOHA decisions as much as possible. The argument with the carrier must be based on facts and the law governing liability, not on opinion or conjecture. By knowing the elements and proving them in every claim, the collection ratio will increase.

Paralegals in the claims office working carrier recovery are true litigators for the Air Force and their efforts provide benefits to the Air Force and its members. The Air Force must pay meritorious claims to its members and has a subsequent duty to recover funds from carriers for the loss or damage to personal property. Putting together a successful case puts more money in the pockets of both the claimant and the Air Force.

[1] Missouri Pacific RR Co. v. Elmore & Stahl, 377 U. S. 134 (1964).

[2] Claims Case No. 97062427, DOHA, (July 15, 1997); See 49 C.F.R. 1005.5(b)

[3] *Id.*

FROM THE EDITOR:

Have you worked an interesting issue in a recent court-martial?

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