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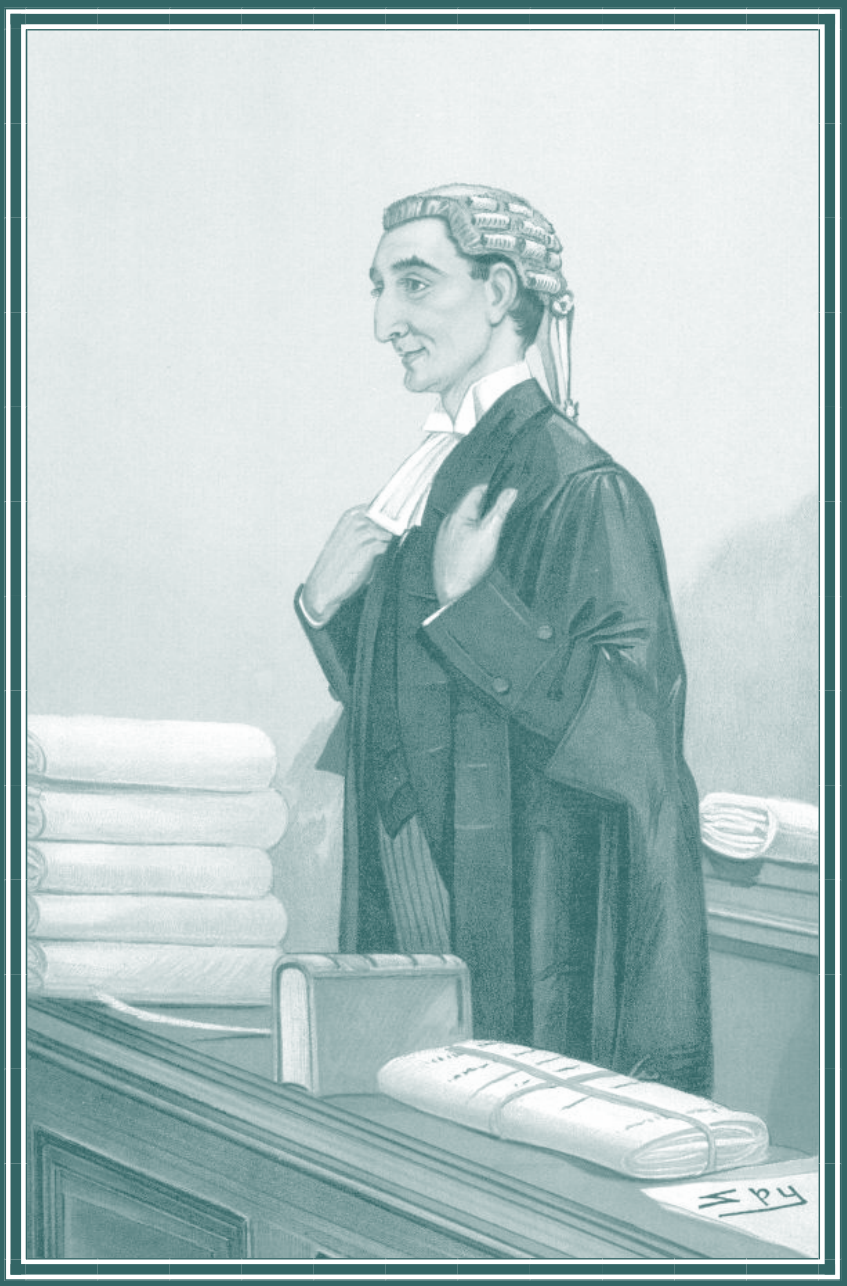

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The Reporter

FROM THE EDITOR

A plethora of information is packed into these 32 pages. Our lead articles include a timely piece on "club" drugs and an article on the penile plethysmograph. In the FYI section, you'll find a variety of interesting and informative articles including the residual hearsay rule in child sexual abuse cases and operational environmental law. Last month we carried an article from one of our department's senior leaders which discussed reasons to stay in the Air Force. This month on page 30, one of our junior members discusses the reason he has chosen the Air Force as a career. As always, you'll find useful articles on a variety of topics. Finally, we hope you enjoy some of the minor format changes we've made, both in print and online. We extend our sincere appreciation to the authors whose submitted the pieces that appear in this edition.

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Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's Department. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JAR (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802)

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A PRIMER ON UNDERSTANDING AND COMBATING CLUB DRUGS

Major Keith M. Givens

An alarming trend has surfaced in the Air Force. Recent headlines like *26 Airman Nabbed in Ecstasy Drug Ring at Langley AFB, Ecstasy Linked to over a Dozen Airman at Cheyenne Mountain and Peterson Field,* or *12 Cadets at the Air Force Academy charged in Ecstasy/LSD Drug Ring* point to the problem. It's not that Air Force members are using illegal drugs, but the drugs of choice have changed to what law enforcement officials have dubbed "club drugs."

The Air Force Office of Special Investigations (AFOSI) reported a 500% increase in club drug related investigations in CY00 over CY99.[1] Two of the primary club drugs, MDMA and LSD, accounted for 38 percent of drugs involved in all investigations, outpacing the traditional drug of abuse, cannabis, for the first time ever. Because of several unique characteristics, these drugs present a new challenge to the Air Force.

The use of club drugs in the Air Force is a troubling trend, but it needs to be put into perspective. Abusers of club drugs, combined with abusers of all other drugs, still equate to less than one percent of the total Air Force population. AFOSI conducted approximately 1,200 narcotics related investigations (423 of those involved MDMA, over 100 involved LSD) last year. During the same period, there were approximately 1,000 positive urinalysis tests in the Air Force, with approximately 61 of those involving MDMA. (As a matter of policy, AFOSI does not generally investigate Air Force members who test positive during a random urinalysis since the commander has all the necessary legal evidence to take action against the member without further investigation).[2]

The question arises whether the Air Force should even worry about the drug abuse problem with such a relatively low percentage of its members involved in the activity. The answer is yes, on many different levels. First, drug abuse impacts security, military fitness, readiness, and good order and discipline. With unit manning levels at their bare minimum, the loss of one key member can be devastating to the mission and the rest of the unit. One phenomenon associated with club drug use is its strong social nature. Club drugs are not used discreetly. Club drugs are used at social gatherings. For the most part, Air Force members' social structure consists of other Air Force members. This partly explains the relatively large numbers of individuals identified at a single location involved in their use. Twenty-six individuals at Langley, twelve at the Academy, thirteen technical school students at Keesler, and eight members at Ellsworth,[3] the list goes on and the trend is clear. If a commander can ill afford to lose one member from the unit, the loss of 26, 13, or 12 members can be devastating.

A second and just as compelling reason to combat drug abuse in the Air Force is the impact it can have on the individual. Aside from the fact that if found guilty in a court-martial, the member will forever have a federal drug conviction on his/her record, the health concerns associated with club drug use can be devastating. Everything from long-term brain damage to death has been attributed to club drug abuse, even with a single usage. While the Air Force has had no deaths directly linked to club drug abuse, over 100 American youth have died from club drug abuse while at the same time emergency room visits associated with club drug abuse has skyrocketed.[4]

"Everything from long-term brain damage to death has been attributed to club drug abuse, even with a single usage"

The Air Force seldom faced easy challenges, and combating drug use by its members is no exception. This article will examine the emergence of club drugs, provide information on each of the club drugs, and provide information how to combat the problem.

The Emergence of Club Drugs

Illegal drugs have long been a constant in American society, and today is no different. In the 1970's, marijuana and LSD were dominant. In the 1980's and 1990's, cocaine and crack emerged as the drugs of choice. Today, club drugs have become more widely used in American society, particularly in the 18-25 age

Major Givens (B.A., Slippery Rock University; M.S., Chapman University; Masters of Forensic Science, George Washington University) is the commander, AFOSI Det 531, Aviano AB Italy.

group. This age group represents the largest population group in the Air Force and the primary population source for new Air Force recruits.

The National Institute on Drug Abuse conducts annual surveys on the nature and extent of drug use among the eighth, tenth, and twelfth graders in America. The recently released 1999 study revealed no significant increase in the use of marijuana, amphetamines, hallucinogens, or heroin, and a decrease in the use of crack cocaine, crystal methamphetamine and cigarette smoking. However, the use of MDMA among tenth and twelfth graders increased significantly. Eight percent of those surveyed reported using MDMA in their lifetime, compared to only 5.8 percent in 1998.[5]

The 1999 *National Household Survey on Drug Abuse* (NHSDA) confirms this data in its annual survey on drug use among the American household population aged 12 years and older. NHSDA reported there are an estimated 14.8 million Americans who are current users of illicit drugs, meaning they used an illegal substance at least 30 days prior to the interview. This survey recorded a 21 percent overall decline of drug use among Americans aged 12-17 (with the exception of MDMA, which showed a significant increase). However, it recorded a 28 percent increase in drug usage among Americans in the 18 to 25 year age groups.[6]

While the 2000 surveys are not yet completed, other signs (emergency room admissions, increased Drug Enforcement Agency seizures of MDMA, the increasing availability of club drugs) all indicate this upward trend will continue.

What is most disturbing about this problem is these same surveys revealed that MDMA is viewed as a "harmless, fun, party drug." In fact, there is nothing benign about MDMA or any other of the club drugs. Abusers of club drugs may believe they are taking the drugs simply to give them energy to keep on dancing or partying, but there is a growing body of medical research that is being ignored that highlights the long-term dangers of club drug abuse.[7]

There are several drugs that are collectively known as club drugs being used throughout the country, primarily at all-night dance parties, rock concerts, and nightclubs.

3,4 Methylenedioxymethamphetamine/ MDMA (Ecstasy, XTC, X, Adam)

The kingpin of club drugs is MDMA, better known by its street name, ecstasy. MDMA alone accounted for 29 percent of the total types of drugs AFOSI investigated last year. Many believe this is a new drug, but its origins date back to the early 1900's when the German pharmaceutical company Merek synthesized, developed, and patented MDMA as an aid to weight loss. Because of its reported side effects, it was never marketed. MDMA remained mainly dormant until some psychotherapists used the drug in the 1970's, claiming it enhanced communications during patient sessions. MDMA's subjective effects have contributed to its emergence as a 'party' drug among young adults who frequent 'raves' or 'technos' (named for the loud, rapid-tempo music) or all night dance parties.[8] MDMA is taken orally, usually in tablet or capsule form, and its effects last approximately four to six hours. Users of the drug say that it produces profoundly positive feelings, elimination of anxiety, and extreme relaxation.[9] In addition, the drug is said to suppress the need to eat, enabling the users to endure two or three day parties.

Rave parties are not illegal, but they have become a conduit for the illicit sale of drugs like MDMA for the retail price of twenty to thirty dollars per tablet. Professional promoters with the required permits and licenses run many raves, while others are amateur operations at unapproved sites, such as open fields or warehouses. On any given weekend night, an Air Force member has access to a rave located in, or in close proximity to any medium or large city in the United States.[10] Raves are not indigenous to the United States; the rave culture was imported from the dance club scene in England, and many European cities have similar types of dance parties.[11] Since most Air Force bases are located near these types of cities, an Air Force commander needs to be aware of the rave culture and the lure for young Air Force members.

This is not to say that raves are the only access one would have to MDMA. In fact, some of the nation's top drug monitoring mechanisms recently disclosed that MDMA is rapidly spreading beyond the traditional rave setting. While the urban rave clubs have been the traditional venue for acquiring MDMA, many smaller suburban communities are experiencing an increased use of MDMA within the smaller party environment and through high school drug networks.[12] A recent survey by the National Institute on Drug Abuse revealed that 55% of eighth, tenth, and twelfth graders said MDMA was "fairly easy" or "very easy" to get.[13]

The majority of MDMA consumed domestically is produced in clandestine laboratories in Western Europe, primarily in the Netherlands and Belgium, which is also easily traveled to by military members stationed in Europe. The tablets are small, so a large quantity can be shipped in small packages via standard mailings or express couriers and aboard commercial airline flights.

Several recent AFOSI investigations have revealed the access USAF members have to this supply. AFOSI identified a USAF member who traveled to Amsterdam, purchased 199 MDMA tablets, and mailed them back to his APO address in England. At Spangdahlem Air Base, eighteen military members were identified for use, distribution and smuggling of MDMA. At Ramstein Air Base, a USAF contractor identified for the distribution of MDMA was in possession of 1,350 MDMA tablets at the time of his apprehension.[14]

The question arises for Air Force commanders as to the impact MDMA can have on the individual. Despite the fact that most users of MDMA view it as a relatively safe drug, nothing could be further from the truth. There is a growing body of scientific evidence that using MDMA causes long-term damage to those parts of the brain critical to thought and memory. Many users of MDMA face risks which are similar to abusers of amphetamines and cocaine such as psychological difficulties, including confusion, depression, sleep problems, drug cravings and paranoia, during, and sometimes weeks after, taking MDMA. Physical symptoms include muscle tension, involuntary teeth clenching (the reason some use a baby pacifier to soften the blow), rapid eye movement, faintness, and chills or sweating. The Drug Abuse Warning Network estimates reveal that nationwide hospital emergency room visits for MDMA abuse rose dramatically from 70 in 1993 to nearly 3,000 in 1999.[15] Primarily for these reasons, the Drug Enforcement Administration moved MDMA to Schedule I status. This means there is no accepted medical use for MDMA in the United States.[16]

There is another emerging danger associated with MDMA use. Tablets of MDMA have no standard look to them. There are many different logos stamped on the drug, with the most popular being butterflies, lightning bolts, and four-leaf clovers. This makes it difficult for the consumers of MDMA to know if the tablet they purchased is MDMA or an even more harmful drug, such as PMA (Paramethoxy-amphetamine, 4MA). PMA is a powerful stimulant that is cheaper and easier to manufacture than MDMA and is far more dangerous. So much so, that a popular rave culture website "DanceSafe," issued a warning to MDMA users about PMA after PMA has been linked to the nine confirmed deaths in the United States within the last year as well as many more in Europe and Australia.[17]

"Tablets...have no standard look to them."

Lysergic Acid Diethylamide-LSD (Acid, Boomers, Yellow Sunshines, Trips)

LSD was involved in nine percent of AFOSI's total number of narcotics investigations in 2000. LSD is a powerful hallucinogen that is domestically produced and readily available throughout the United States. Retail-level distribution often takes place at raves and concerts, and generally sells for only four to five dollars a dose, making it very affordable to airman, particularly in comparison to the twenty to thirty dollar price tag on MDMA. LSD is produced by chemists in the crystalline form and then mixed into a liquid for production into ingestible forms. These ingestible forms can vary from a tablet to a sugar cube laced with LSD. However, the most common appearance of LSD is LSD impregnated blotter paper, often covered with colorful designs or artwork, and perforated into one-quarter inch square dosage units.[18]

As a hallucinogen, LSD induces abnormalities in the sensory perceptions. The effects of LSD are unpredictable, depending on several variables including the amount ingested, the surroundings in which the drug is used, and on the user's personality, mood and expectations. The typical user feels the effects of LSD 30 to 90 minutes after taking the drug. During the first hour after ingestion, the user may experience visual changes with extreme changes in mood and may also suffer impaired depth and time perception, as well as distorted perception of size and shape of objects. Under the effects of LSD, the user experiences difficulty in making sensible judgments and recognizing common dangers, making him/her susceptible to injury. The effects of a single dose can last for up to twelve hours.[19] Users also commonly report numbness, muscle weakness or trembling.

Two long-term disorders associated with LSD use are persistent psychosis and hallucinogenic flashbacks.[20] If there is any silver lining with the LSD of today compared to the LSD of the late 1960's, it is the lower potency of today's LSD. The typical LSD dosage unit today varies between 30 to 50 micrograms per dosage unit, a decrease of nearly 90 percent from the 1960 average dose of 250 to 300 micrograms. The lower potency doses probably accounts for the relatively few LSD-related emergency incidents during the past several years as compared to the "bad trips" associated with the 1960's use.

The low cost coupled with the perception of the relative safety of the drug account for the increased popularity among young people. Additionally, even though

it is routinely screened for, Air Force members face little risk of a urinalysis detecting LSD in their system because the window of detection consists of mere hours.[21]

Gamma-hydroxybutyrate-GHB (Grievous Bodily Harm, G, Liquid Ecstasy)

GHB is a strong central nervous system depressant that was banned by the Food and Drug Administration in 1990. It was originally sold in health food stores as a substance to stimulate muscle growth for body builders. GHB has resurfaced over the past several years in the rave and nightclub scene for its reported ability to produce euphoric or intoxicated state in the user. Some users also report that it is an aphrodisiac. In fact, it is often promoted as a drug that will increase one's sexual awareness and lead to more intense sexual activity.[22]

GHB is easily produced. Unlike MDMA and LSD that require a chemist to produce, GHB is often produced at home with ingredients, recipes, and kits sold over the Internet and then sold by the capful for five to ten dollars. GHB is generally found in the liquid form, but can also be encountered in a highly soluble powder form. Whether liquid or powder, GHB is often added to drinks, usually alcoholic drinks, which enhances its effects and increases the potential for respiratory distress. GHB's intoxicating effects can occur within 10 to 20 minutes after the drug is taken, with its effects lasting up to four hours. At low doses, GHB is known to cause drowsiness, dizziness, and visual disturbances.

At higher doses, GHB has become the most deadly of the club drugs. Overdoses usually require emergency room treatment, including intensive care for respiratory depression and coma.[23] *Dateline NBC* reported that 76 deaths have been attributed to GHB use with the number of emergency room visits for GHB overdoses skyrocketing from 38 in 1993 to over 1,700 in 1999.[24] Over 60 percent of the abusers being treated in emergency rooms were between the ages of 18 and 25 years of age. In addition, of the documented GHB deaths, 40 percent were between the ages of 15 and 24 years of age with an additional 29 percent between the ages of 25 and 29.[25]

GHB has also been coined as a 'date rape' drug. Although not the primary reason for the use, GHB has been used in documented sexual assaults cases because of its ability to render the victim incapable of resisting, and often causes memory lapses that complicate prosecution. Even though GHB has a slightly salty taste, it can easily go undetected in a person's drink.[26]

Rohypnol/Flunitrazepam (Roofies, Roche, Forget-me Pill, Mexican Valium)

Rohypnol is yet another drug that has gained its popularity in the club scene. The drug belongs to the benzodiazepine class of drugs (such as Valium, Librium, Xanax), whose pharmacological effects include sedation, muscle relaxation, reduction in anxiety and prevention of convulsions; however, Rohypnol's sedative effects are approximately seven to ten times more potent than Valium. Rohypnol has never been approved for medical use in the United States, but it is legally prescribed in over 50 countries and is widely available in Mexico, Colombia, and Europe where it is used in the treatment of insomnia and as a preanesthetic. Rohypnol is smuggled into the United States and sold at raves and nightclubs for as little as five dollars per tablet.

What makes Rohypnol dangerous to the unsuspecting victim is that it is tasteless and odorless and dissolves easily in carbonated beverages. When combined with alcohol, the toxic and sedative effects are aggravated. Even without alcohol, a single dose of Rohypnol can impair a victim from eight to twelve hours. The drug gets one of it's slang names "the forget-me pill" because of the profound "anterograde amnesia" it is reported to cause, often making the victim incapable of remembering events while under the influence of the drug.[27]

This is not to suggest that Rohypnol is only used by sexual predators on unsuspecting victims. A recent survey of college-aged women revealed a growing trend in self-administration of the drug for the intense sedative effects. Users of the drug report effects similar to alcoholic intoxication, without the caloric intake and hangover the following morning.[28] Adding to the popularity of the drug is the perception that the drug cannot be detected in a urinalysis. Unfortunately, this perception is not far from the truth. The Air Force drug detection program does not screen for Rohypnol. The Armed Forces Institute of Pathology can test for the drug in the urine if specifically requested; however, because of its short half-life, urine samples must be collected within seventy-two hours of ingestion.[29]

Other Club Drugs

Ketamine (*Special K, K, Vitamin K, Cat Valiums)* is an injectable anesthetic that has been approved for both human and animal use in medical settings; however, over 90 percent of the Ketamine legally sold today is intended for veterinary use. The drug gained popularity for abuse in the 1980's when it was reported that large doses would produce dream-like

states or hallucinations similar to those associated with phencyclidine (PCP). The demand of the drug has lead to a significant number of veterinary clinics being robbed specifically for their stocks of Ketamine.[30]

Ketamine has many forms. In its liquid form, it can be directly injected into muscle tissue, applied to smokable material, or consumed in drinks. A powdered form is also available by allowing the solvent to evaporate leaving an off-white powder, appearing very much like cocaine. The powdered form can be snorted or smoked. The average price for a dosage unit of Ketamine is twenty dollars.[31]

Methampetamine (*Speed, Ice, Chalk, Meth, Crystal, Crank, Fire, Glass)* is not as popular as the other synthetic drugs associated with the club drug scene, primarily due to the high cost, averaging $80 to $125 per gram, and because more is known about the harmful side effects of the drug. Methampetamine is a toxic, addictive stimulant that affects the central nervous system. Its use has been associated with serious health consequences, including memory loss, aggression, violence, psychotic behavior, and potential heart and neurological damage. Methamphetamine is a white, odorless, bitter-tasting crystalline power that can be smoked, snorted, injected, or orally ingested.[32]

Tools Available to Combat Club Drug Abuse

All Air Force members involved in combating drug abuse must become knowledgeable about the drugs affecting the Air Force. Club drugs now rate as the largest group of drugs identified in AFOSI investigations. Drugs of choice are often tied to generations, and the generation that comprises the majority of the Air Force today is no different. The only thing that is different is that 'traditional' drugs that most Air Force members are aware of, such as cocaine and marijuana, have given way to club drugs, which were not a problem until recently. These drugs present a significant challenge to the men and women of the Air Force to both accomplish the mission and to protect the lives of the airmen they are charged to lead.

The Air Force's Drug Demand Reduction program manager has stated that drug abuse in the Air Force is a moving target. As such, we all must be able to use the tools available to effectively detect and, more importantly, deter the use of illegal drugs.

The Air Force has systems in place to detect and deter the abuse of drugs. AFOSI agents, usually teamed with the Security Forces investigators, use a web of undercover agents and informants to detect drug abuse, provide commanders with local drug threat information (the availability of drugs in the local area), aggressively target the source of drugs to the military community with the aid of local law enforcement officials, and investigate those members of the Air Force that decide to use drugs.

Security Forces members further discourage the use of drugs with gate checks, with random vehicle inspections, and through the use of the military working dogs teams. However, dogs must be trained to detect specific drugs, such as MDMA, and most drug dog teams have not had that training. Additionally, most club drugs are virtually odorless, making detection more difficult.

Air Force Urinalysis Drug Testing Program

The most powerful tool available for deterring and detecting illegal drug use is the Air Force Urinalysis Drug Testing Program. The primary mission of the Drug Testing Program is to detect military members' use of controlled and/or illegal substances through a comprehensive drug testing program coupled with commanders playing a pivotal role in deterring drug use through appropriate command action. The entire premise of the program is to discourage illegal drug use by subjecting military members to random drug testing.

This program has been highly effective and has been endorsed by the entire leadership chain of command. In a 29 March 2000 letter to all Major Commands, Direct Reporting Units, and Field Operating Agencies, the Air Force Vice Chief of Staff wrote, "A robust, fair and efficient drug abuse testing (urinalysis) program is a vital deterrent to illegal drug use. It is a commanders' program designed to enhance unit readiness, morale, good order and discipline. It has been remarkably effective in keeping drug offenses and drug usage at very low levels. I solicit your strong, continuing support for this program. . . . Active commander support and involvement is essential to maintaining program effectiveness. . . . Your support for, and effective use of, this important program will deter and prevent drug use and thereby enhance readiness and ensure our position as the world's premier aerospace force."[33]

However, we must be aware that randomly subjecting military members to drug testing is insufficient to completely combat illegal drug use, particularly club drug abuse. Part of the reason for the growing popularity of drugs like MDMA, GHB, and LSD has been the belief that the Air Force Drug Detection Program does not regularly screen for those drugs as part of the inspection process.

Unfortunately, this belief has some validity. The Drug Testing Division (DTD) at Brooks Air Force Base, Texas, conducts the majority of the drug testing for the Air Force. The DTD routinely tests urine sam-

ples for the drug or drug metabolite of seven drugs: marijuana/hashish, opiates, cocaine, amphetamine/methamphetamine, barbiturates, LSD, and PCP. In addition, the program also routinely tests urine samples for drug analogs, or synthetic substitutes for existing drugs, when the parent drug is identified in the screening. When a urine sample tests positive for the presence of amphetamines, it would be subjected to an additional test to screen for the analogs of that drug, including MDMA (which is a synthetic version of amphetamine), MDA (Methylenedioxyamphetamine or "Adam"), and MDEA (Methylenedioxythylamphetamine or "Eve").[34]

While two of the primary club drugs (MDMA and LSD) are routinely screened by Brooks, two others are not. The club drugs GHB and Rohypnol, also coined the "date rape drugs," are not screened at all by the Drug Testing Division. If the commander, medical personnel, or law enforcement authorities believe an individual either knowingly or unknowingly ingested GHB or Rohypnol, they can request a special test of the urine sample and the sample can be sent to another laboratory for testing. Generally, the military sends such samples to the Armed Forces Institute of Pathology.[35]

The second 'barracks room' belief is that club drugs have a very short drug detection window. This belief also has some validity. A drug detection window is the period after ingestion during which the drug can be detected in the urine. The drug detection window is dependent upon more than just the type of drug ingested. It also depends on the amount or dose ingested, frequency of use, the time interval between using the drug and providing the urine sample for testing, urinary output, the pH level of the urine, and the individual's metabolism.

The Internet has multiple sites for illicit club drug use information. According to EROWID, an authoritative Internet drug information resource, MDMA, Ketamine, and Rohypnol are detectable in the urine only for 24-72 hours after use. LSD has a detection window of less than 24 hours and GHB's detection window is a mere 12 hours. Most drug testing laboratories generally agree with these stated detection windows.[36]

In light of these detection windows, if routine random urinalysis inspections continue to occur during the normal work week (Monday through Friday), abusers have a good chance of avoiding detection by the Air Force drug testing program because most club drug use occurs on Friday or Saturday nights in connection with raves, concerts, or nightclub activities. Despite the short detection windows, 61 Air Force members tested positive for the presence of MDMA in their urine during the first three quarters of last year. In addition, AFOSI conducted 423 investigations involving MDMA and over 100 investigations involving LSD.[37]

Deterring Club Drug Abuse

In addition to taking every opportunity to educate members on the dangers associated with club drug abuse, commanders need to play an active role in the Air Force Drug Detection Program. One way commanders can overcome the relatively short detection window for club drugs is to expand drug testing to include off-duty and weekend testing. The Air Force's Drug Demand Reduction Program manager recently said, "Commanders have always had the option to test after duty hours and on weekends. We have worked hard to remind commanders out in the field that they have the responsibility to constantly monitor the drug threat and to modify drug testing procedures based on the changes in the drug threat environment."[38]

Understanding the local drug threat environment is key for the commander. As mentioned earlier, the actual percentage of Air Force members abusing illegal drugs is less than one percent, so the commander must balance deterring drug use with the potential threat. For instance, a commander of a unit comprised mainly of mid to senior level NCOs and officers (statistically, not likely club drug abusers) might be hesitant to order weekend drug inspections of members of the squadron. On the other hand, a commander of a squadron comprised of very junior airman at a base near a medium to large city would be more inclined to order weekend sweeps. The commander has four basic methods to conduct drug testing. The method the commander uses directly affects the admissibility of the results in a court-martial.

Inspections

Commanders have inherent authority to assure the health, welfare, and morale of his/her unit, and inspections are the most visible deterrent the commander has available to achieve that end. Military Rule of Evidence (MRE) 313 sets forth the guidelines a commander must follow when conducting inspections.[39] An inspection includes both random drug testing and unit sweeps. Only commanders have the authority to conduct inspections. Unit sweeps can be tailored at the commander's discretion as long as the commander does not single out individual members for inspection. The commander may direct an inspection for the entire unit or a portion of it at any reasonable time, including weekends. Any positive test results obtained through an inspection can be used as a basis for any Uniform

Code of Military Justice (UCMJ) or adverse administrative actions, including an adverse characterization of service for an administrative discharge.

Probable Cause

Probable cause urinalyses are usually used in conjunction with a law enforcement investigation. MRE 315 sets forth the rules that apply to probable cause searches.[40] Typically, AFOSI agents will have information to believe that illegal drugs will be present in the individual's urine or that testing of the individual's urine will reveal evidence of a crime. These searches must be authorized by a military magistrate (normally the Support Group Commander) by the issuance of a search and seizure authorization grounded in probable cause. As long as the urine samples are properly taken, the results can be used as a basis for UCMJ or adverse administrative actions, including an adverse characterization of an administrative discharge.

Commander Directed

Commanders have the authority to order drug testing when a member displays behavior which is aberrant, bizarre, or otherwise unlawful, even when probable cause does not exist. Commanders need to be careful when directing that a member provide a urine sample, because the results of the inspection can only be used for adverse administrative actions. They cannot be used to characterize the discharge (e.g., under less than honorable conditions) or be used as the basis for UCMJ action. Typically, commanders use this method for samples collected as part of a drug rehabilitation program or for an aircraft mishap investigation.

Consent

Commanders and law enforcement authorities can always ask a member to give consent to give a specimen for testing. As a matter of practice, commanders and law enforcement officials generally ask the member for consent before a probable cause (even if they already have the probable cause search and seizure authorization) or command-directed urinalysis. Since the main challenge to this form of urinalysis is the voluntariness of the consent, the requester must inform the member that he/she does not have to give consent. Although not legally required, the requester should always attempt to get the member's consent in writing. The results can be used as a basis for UCMJ or adverse administrative actions, including an adverse characterization of service for an administrative discharge.

Conclusion

The alarming upward trend of club drug abuse in the Air Force mirrors that among the young population in the United States. Today, club drugs have become widely available and used in the 18-25 age group, the age group that represents the largest population group in the Air Force and the primary source for new Air Force recruits. The Air Force has experienced a four-fold increase in investigated abuse of drugs like MDMA and LSD within the last year alone. Air Force leaders need to ensure they first understand the devastating impact drugs like MDMA, LSD, and GHB can have on the individual members of the Air Force and the potential impact club drugs can have on mission readiness. Air Force members involved in the Air Force Urinalysis Program need to use it effectively to detect and to deter the use of club drugs, as well as any other illegal substances. Club drug detection presents a challenge due to the relatively short window of vulnerability for the abuser, but we have the tools to close the gap and limit the impact of this emerging threat to the Air Force.

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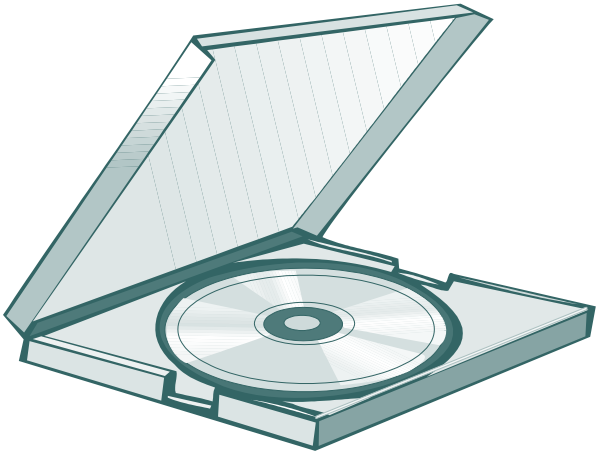
[20] Alan I. Leshner, "Club Drugs Aren't 'Fun Drugs'", National Institute on Drug Abuse News, Volume 15, Number 1, Oct 00.
[21] "A Handout for JAGS: The United States Air Force Urinalysis Program", Jan 00 Ver.
[22] "The Club Drug Scene."
[23] *Id.*

[24] "Drugs of Sexual Predators Segment", Dateline NBC, 5 Feb 01.
[25] "The Club Drug Scene."
[26] *Id*.
[27] Leshner, "Club Drugs Aren't 'Fun Drugs.'"
[28] "Drugs of Sexual Predators Segment."
[29] "A Handout for JAGS: The United States Air Force Urinalysis Program", Jan 00 Ver.
[30] "The Club Drug Scene."
[31] *Id*.
[32] Leshner, "Club Drugs Aren't 'Fun Drugs.'"
[33] Letter from General Lester Lyles, 20 Mar 2000.
[34] "A Handout for JAGS: The United States Air Force Urinalysis Program", Jan 00 Ver., page 4.
[35] *Id*, page 7.
[36] "The Club Drug Scene."
[37] Bercerril, "Air Force Sends Message to Drug Abusers."
[38] *Id*.
[39] Manual for Courts-Martial (MCM), Mil. R. Evid. 313.
[40] MCM, Mil. R. Evid. 315.



Get a compact disc video of the author's lecture on club drugs by contacting Steve Stevens at the Air Force JAG School, steve.stevens@maxwell.af.mil

Debunking Penile Plethysmograph Evidence

Major Christopher Mathews
Major John E. Hartsell
Captain Maureen Kohn

A penile plethysmograph is a biofeedback device developed in the 1950s. It is generally used to measure the engorgement of the male sex organ in conjunction with the administration of auditory and/or visual stimuli. The results of penile plethysmograph testing may be proffered by the defense in courts-martial in an attempt to "prove" that the accused is not a sex offender, or that his potential for recidivism is very low. This article explores the science and the assumptions underlying penile plethysmography and demonstrates that such evidence is insufficiently reliable for use in courts-martial.

How Penile Plethysmography Works

Use of a penile plethysmograph involves exposing the test subject to a variety of auditory and/or visual stimuli, and then measuring his response to those stimuli. The stimuli generally fall into four categories: depictions of normal sexual activity (e.g., adult, consensual heterosexual sexual contact); of abnormal or deviant sexual conduct (e.g., sex acts involving children); of neutral scenes or objects (e.g., photographs of clouds or forests); or of material meant to be disturbing and negative (e.g., depictions of skin lesions or other injuries). The stimuli are presented to a subject in varying sequences while the penile plethysmograph measures changes in the volume or circumference of the subject's penis while the stimuli are present. While there are several different types of devices, their purpose is essentially the same: to determine whether specific types of stimuli arouse the subject.

The underlying presumption in the study of penile plethysmograph data is that the results will accurately reveal which subjects are aroused by normal sexual stimuli and which subjects are aroused by abnormal sexual stimuli. The tests aim to successfully and reliably distinguish normal subjects from sexually deviant subjects. The belief that a penile plethysmograph will be able to differentiate normal subjects from sexually deviant ones is the basis for their proffered use in trial; most commonly, such test results are offered in child molestation cases.

Some proponents argue that penile measurement can effectively prove whether an alleged offender is sexually attracted to children. They reason that all child molesters, and *only* child molesters, are aroused by auditory and/or visual stimuli involving children engaged in sex acts: hence, any subjects who are exposed to these stimuli and show arousal are *ipso facto* child molesters or dangerous sexual deviants. Similarly, subjects who are exposed to these stimuli and are not aroused are either normal individuals with no sexual interest in children whatsoever, or at worst deviants with a low potential for offending. Thus, if a subject shows sufficient response to stimuli involving children, then that data is incriminatory evidence; and if the subject is not sufficiently aroused by the same stimuli then that data is exculpatory evidence, or is evidence of a low potential for recidivism. If these arguments are valid, penile plethysmography would be a powerful discriminator and a compelling forensic tool.

"The flaws in these arguments...are patently obvious"

The flaws in these arguments, however, are patently obvious and are addressed below. In fact, the use of the penile plethysmograph as a predictive or forensic tool fails to meet the relevant legal standards for ad-

Major Mathews (B.S., cum laude, Arizona State University; J.D., cum laude, Georgetown University Law Center) is presently assigned as the Chief Circuit Trial Counsel, Pacific Circuit, USAF Judiciary.
Major Hartsell (B.S., Nova Southeastern University; M.B.A., Nova Southeastern University; M.H., University of Richmond; J.D., Nova Southeastern University) is presently assigned as a Circuit Trial Counsel, Pacific Circuit, USAF Judiciary.
Captain Kohn (B.A. University of Illinois; J.D., The John Marshall Law School) is presently assigned as the Trial Counsel, 10th Area Support Group, Torii Station, Okinawa, Japan.
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missibility and has been repeatedly rejected by the scientific community.

Scientific Evidence In Military Courts: Frye, Gipson, and Daubert

Before 1993, admissibility of scientific evidence in federal courts was measured against the *Frye* test.[1] This standard mandated admission of evidence generally accepted by the scientific community. Military courts looked to the *Frye* test as a guide when analyzing such evidence.[2]

With the adoption of the Military Rules of Evidence in 1980, the *Frye* test came under increasing challenge. Seven years later, the test was explicitly abandoned in *United States v. Gipson*.[3] The *Gipson* court concluded that trial courts should instead focus on the reliability of the proffered evidence to determine whether it would be helpful under Mil.R.Evid. 702 or should be excluded under Mil.R.Evid. 403.[4]

In 1993, the United States Supreme Court similarly concluded that the *Frye* test did not survive the adoption of the Federal Rules of Evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[5] the Court held that a new approach should be used when evaluating scientific evidence, focusing on the reliability of the proffered scientific evidence and its relevance to the case at bar. Judges must act as "gatekeepers" to ensure that only relevant, reliable evidence is admitted.[6] *Daubert* sets forth several factors for the judge to consider when gauging the reliability of scientific evidence. These include: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; (4) whether there are operational standards for using the technique; and (5) whether the theory or technique has been generally accepted in the particular scientific field.[7]

Courts-martial now evaluate scientific evidence in light of *Daubert*.[8] Unreliable scientific evidence is not admissible; and even reliable evidence may be excluded where it does not "fit" the case at bar or otherwise runs afoul of the Rules or case law.[9]

Analysis of Penile Plethysmography Under Daubert

Most mental health experts agree that while there may be some place for the penile plethysmograph in research on arousal patterns in populations or in designing treatment regimens for sex offenders, it cannot be relied upon in a forensic setting. The reliability of the device is fundamentally compromised in two main regards: first, it has unacceptably high error rates (which may be influenced by the test subject's desire to present himself in the best possible light); and second, there are no generally-accepted standards for administration of the test or for scoring the results. These problems are discussed more fully below.

Faking and High Error Rates

A persistent problem cited by researchers in penile plethysmography is that the person being tested may be able to "cheat" the test by faking the desired result. The *Diagnostic and Statistical Manual of Mental Disorders* (Fourth Edition) of the American Psychiatric Association ("DSM-IV"), an authoritative treatise universally accepted by courts and used by mental health professionals in the diagnosis of mental disorders and diseases, cautions that

> Penile plethysmography has been used in research settings to assess various paraphilias by measuring an individual's sexual arousal in response to visual and auditory stimuli. *The reliability and validity of this procedure in clinical assessment have not been well established*, *and clinical experience suggests that subjects can simulate response by manipulating mental images.*[10]

Scientific literature on plethysmography confirms this fatal flaw. One study found that 80% of subjects were able to voluntarily and completely inhibit their sexual arousal as measured by the plethysmograph.[11]

Plethysmography has a poor track record in identifying child sex offenders: in one study, 42% of the pedophiles were classified as having normal sexual preferences, while in another, only 35% of pedophiles demonstrated a purported child-preference profile.[12] The accuracy of penile plethysmography on subjects who are involved in the legal process is even more problematic: researchers have commented on the heightened potential for both false-positive and false-negative results, as well as incidents of faking in offenders pending trial.[13]

Test Standards and Scoring

The other major criticisms of the penile plethysmograph are lack of standardized test stimuli; uncertainty as to which of the many aspects of stimuli cause arousal; and the absence of any generally accepted

framework correlating arousal data with deviant behavior.[14] Other deficiencies in the use of the plethysmograph include a lack of uniform scoring procedures for the penile plethysmograph; a lack of consensus as to what degree of arousal is clinically significant; and a lack of agreement concerning what conclusions can be inferred from percentages of engorgement measured by the device. Researchers have lamented the "enormous variability in plethysmographic assessment procedures and data interpretation."[15]

Even where the penile plethysmograph suggests an individual shows normal response patterns, or relatively innocuous deviant responses, it cannot be concluded that the person therefore poses no risk of committing a serious offense: molesters and other sex offenders frequently engage in multiple types of both deviant and non-deviant sexual activities and relationships.[16] A suspected offender might thus suppress his response to the relevant deviant stimuli (for example, stimuli involving children) while showing otherwise normal responses to nondeviant stimuli. For these reasons, the scientific community has long concluded that the penile plethysmograph is not reliable in any role other than broad studies of arousal patterns in populations and general efforts to treat and monitor sex offenders:

> Misuse of the plethysmograph is a major concern. *Using the plethysmograph to predict innocence, guilt, or likelihood of reoffending is beyond the scope of the test's validity. . . . Predicting who is at risk to commit a sexual crime and who is likely to recidivate cannot be predicted with even a moderate degree of confidence.*[17]

Indeed, as one practitioner in the field noted:

> I know of no psychometric procedure [or] psycho-physiological procedures that can be used to demonstrate with psychological certainty that a person has committed a legal offense or engaged in child sexual abuse or is likely to do so in the future. That is the province of sorcerers and witches, not of a psychologist. [18]

Rejection of Plethysmography by State and Federal Courts

In light of the serious issues undermining its reliability, it is not surprising that state courts have repeatedly excluded penile plethysmograph evidence.[19]

Federal courts have likewise rejected the test. In *United States v. Powers*[20] for example, the trial court excluded evidence concerning a penile plethysmograph test because it was not reliable under *Daubert*:

> [T]he scientific literature addressing penile plethysmography does not regard the test as a valid diagnostic tool because, although useful for treatment of sex offenders, it has no accepted standards in the scientific community. [In addition,] a vast majority of incest offenders who do not admit their guilt . . . show a normal reaction to the test. The Government argues that such false negatives render the test unreliable.[21]

The appellate court agreed and affirmed.[22]

Surveying state and federal cases, Professor John E.B. Myers of the McGeorge School of Law noted, "Penile plethysmography is not considered sufficiently reliable for forensic decision making."[23] In fact, in a recent military case the appellate court found no error where trial defense counsel elected not to even *offer* exculpatory plethysmograph evidence, because such tests are of little evidentiary value and can neither "validate prior behavior or . . . predict future behavior."[24]

Conclusion

The argument that all sexual deviants are aroused by sexually deviant stimuli and therefore any subject who is not aroused by such stimuli is either normal or a deviant who can be rehabilitated is inherently flawed. This argument fails to consider that the test can be manipulated, suffers from unacceptably high error rates, and is unreliable in a forensic setting. The use of the penile plethysmograph as a predictive tool is not generally accepted in the scientific community, nor does it comply with the relevant legal standards for admissibility.

Military courts should follow the lead of the state and federal courts that have rejected plethysmographic evidence as too unreliable for use in forensic determinations. They should also take into consideration the unfair prejudicial impact of such evidence. Like a polygraph, in which a person's physiological responses are purported to expose deception and reveal the past, the plethysmograph – according to its supporters – purports to cut through deception to reveal the past *and* to predict the future. Such uses usurp the

role of the finder of fact, inviting reliance instead on a supposedly objective graph, chart, or table of numbers.[25] In light of the test's lack of reliability and its susceptibility to faking, such reliance would be totally misplaced.

The "science" of penile plethysmography has been subjected to decades of testing and scrutiny. The firm conclusion of the experts is that the validity, reliability, and the quantification of penile plethysmograph results have an unacceptably high rate of inaccuracy. Moreover, the results of these tests can be manipulated and controlled by the subject. As a result, both psychologists and courts alike have overwhelmingly concluded that this particular scientific field is unacceptable when used to predict innocence, guilt, or potential recidivism. The military courtroom is often the battleground where innovative science is proffered for consideration; however, when it comes to use of penile plethysmography evidence, fifty years of unreliability, inconclusiveness, and error demand one consistent determination: the test is fatally flawed and legally inadmissible.

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
[2] *See, e.g., United States v. Hulen,* 3 M.J. 275 (C.M.A. 1977).
[3] 24 M.J. 246 (C.M.A. 1987).
[4] *Id.; see also United States v. Houser,* 36 M.J. 392 (C.M.A. 1993), *cert. denied*, 114 S.Ct. 182 (1993) (proffered evidence must be reliable and relevant to the case at bar).
[5] 509 U.S. 579 (1993).
[6] *Id*. at 592-93.
[7] *Id.* at 593-94.
[8] *See, e.g., United States v. Nimmer,* 43 M.J. 252 (1995) (remanding case for hearing on reliability of drug test method and identifying *Daubert* as a "significant refinement" of the *Gipson* standard).
[9] *See United States v. Bush,* 47 M.J. 305 (1997) (application of *Daubert* in military courts); *see also United States v. Blaney,* 50 M.J. 533, 546 (A.F.Ct.Crim.App. 1999) (discussion of the military judge's "gatekeeper function").
[10] DSM-IV, Paraphilias, at 524 (1994) (emphasis added).
[11] Hall, *et. al., Validity of Physiological Measures of Pedophilic Sexual Arousal in a Sexual Offender Population,* J. Cons. & Clin. Psych. 56(1):118, 121 (1988). *See also* Simon & Schouten, *Plethysmography in the Assessment and Treatment of Sexual Deviance: An Overview,* Arch. Sexual Beh. 20(1):75, 81 (1991) (surveying articles on plethysmography; "there are at present no generally accepted procedures for estimating the probability of faking, detecting it, or controlling for it"); *see also* Barker & Howell, *The Plethysmograph: a Review of Recent Literature*, Bull. Am. Acad. Psych. & Law, 20(1): 13, 26 (1992) ("until a way can be devised to detect and/or control false negatives and false positives, the validity of the test data will be questionable").
[12] Simon & Schouten, *The Plethysmograph Reconsidered: Comments on Barker and Howell*, Bull. Am. Acad. Psych. & Law, 21 (4):505, 508 (1993).
[13] Travin, "Sex Offenders: Diagnostic Assessment, Treatment and Related Issues," (in Rosner*, Principles and Practice of Forensic Psychiatry*, at 528, 531 (1994)). *See also* Myers, *et. al., Expert Testimony in Child Sexual Abuse Litigation,* 68 Neb. L. Rev. 1, 134-35 (1989) (voluntary control of penile response undermines reliability of plethysmography).
[14] *Supra* note 12 at 506-07.
[15] *See, e.g.,* Howes, *A Survey of Plethysmographic Assessment in North America*, Sexual Abuse: A Journal of Research and Treatment*,* Vol. 7, No. 1 (1995) (pointing to lack of standards in stimuli and data interpretation); *see also* Simon & Schouten, *The Plethysmograph Reconsidered, supra* at 507 (surveying literature); Simon & Schouten, *Plethysmography in the Assessment and Treatment of Sexual Deviance: An Overview*, *supra* (noting inadequate standards and even description of stimuli in studies; and categories of stimuli are imprecise because pedophiles exhibit idiosyncratic and overlapping patterns of preference and arousal).
[16] Abel, *et. al.*, *Multiple Paraphilic Diagnoses Among Sex Offenders*, Bull. Am. Acad. Psych. & Law, 16(2): 153-168 (1988).
[17] Barker & Howell, *The Plethysmograph: a Review of Recent Literature*, *supra* at 22 (emphasis added).
[18] Dr. William Pithers, *cited with approval in* Annon, *Misuse of Psychophysiological Arousal Measurement Data,* IPT Journal 5 (1993).
[19] *See, e.g. R.D. v. State*, 706 So. 2d 770 (Ala. Crim. App. 1997), *cert. denied,* 525 U.S. 829 (1998); *Nelson v. Jones*, 781 P.2d 964 (Alaska 1989), *cert. denied,* 498 U.S. 810 (1990) (trial court properly declined to consider penile plethysmograph evidence because test often gives false results); *People v. John W*., 185 Cal. App. 3d 801, 229 Cal. Rptr. 783, 785 (1st Dist. 1986) (opinion based on plethysmograph inadmissible because defendant failed to establish reliability), *overruled on other grounds, People v. Stoll,* 49 Cal. 3d 1136, 1153 n.18 (1989). *See also In re Mark C. v. San Diego County Dept. of Social Services v. David C.* , 7 Cal. App. 4th 433, 8 Cal. Rptr. 2d 856 (1992), *rev. denied,* 1992 Cal. LEXIS 4599 (penile plethysmography and other test battery properly excluded because reliability not established); *Gentry v. State*, 213 Ga. App. 24, 443 S.E.2d 667 (1994) (holding plethysmograph evidence inadmissible because of uncertainty as to reliability); *Stowers v. State*, 215 Ga. App. 338, 449 S.E.2d 690 (1994) (no error to deny funding for penile plethysmograph test because test not shown to be scientifically valid); *Cooke v. Naylor*, 573 A.2d 376 (Me. 1990) (upholding trial court's exclusion of plethysmograph because of test's "questionable reliability"); *Dutchess Cty. Dept. of Social Services v. G.,* 141 Misc.2d 641, 534 N.Y.S.2d 64, 71 (1988) ("the results of the plethysmograph as a predictor of human behavior cannot be considered"); *State v. Spencer,* 119 N.C. App. 662, 459 S.E.2d 812 (1995) (rejecting expert testimony drawing on plethysmographic data as unreliable); *State v. Ambrosia*, 67 Ohio App. 3d 552, 587 N.E.2d 892, 899 (1990) (trial court found penile plethysmography unreliable); *In the Interest of A.V.*, 849 S.W.2d 393 (Tex. Ct. App. 1993) (result of plethysmographic test accorded no weight by appellate court). *See also* Ore. Admin. Rule 413-060-0430(2)(d) (1996) ("Under no circumstances should the results of these instruments be used in the courtroom setting"); *but see Commonwealth v. Rosenberg,* 410 Mass. 347, 573 N.E.2d 949 (Mass. 1991) (trial court admitted plethysmographic test results).
[20] 59 F.3d 1460 (4th Cir. 1995), *cert. denied,* 516 U.S. 1077 (1996).
[21] *Id.* at 1470-71.
[22] *Id.*
[23] MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES, 580 (3d ed., 1997).
[24] *United States v. Hughes,* 48 M.J. 700, 718 (A.F.Ct.Crim.App. 1998).
[25] In *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court held that excluding polygraph evidence under Mil.R.Evid. 707 is constitutional. The Court articulated three bases for its ruling: first, Mil.R.Evid. 707 is a rational and proportional means of advancing the legitimate interest of prohibiting the use of unreliable evidence; second, Mil.R.Evid. 707 serves the government interest of preserving the jury's function of making credibility determinations; and third, Mil.R.Evid. 707 serves the government interest of avoiding litigation over issues which are collateral to directly determining the guilt or innocence of an accused.

PRACTICUM

• ACCURATE RECORDS OF TRIAL

The court, in *United States v. Bullman*, ACM 34403 (A.F.Ct.Crim.App. 20 Apr 01), addressed the importance of accuracy in records of trial. The record in the case contained numerous errors that apparently went unnoticed by the court reporter, trial counsel, defense counsel, military judge, staff judge advocate to the convening authority, and appellate counsel. This included failing to include the start times for recesses of the court at two points and inaccurate findings of the military judge as to two specifications of a charge. The court stated:

> Records of trial must report proceedings accurately. Rule for Courts-Martial (R.C.M.) 1103(i)(1)(A). While all personnel involved in the preparation and review of a record have a duty to ensure the accuracy of the record, the trial counsel's role is critical. This is so because the trial counsel must "examine the record of trial before authentication and cause those changes to be made which are necessary to report the proceedings accurately." Id. We find it ironic to review a record of trial replete with errors obvious to any conscientious reading in which the trial counsel stridently argues for harsh punishment for the accused's derelictions.
>
> At the same time, we are mindful of individual fallibility and we do not place form over substance. It is not unusual for a record to contain an occasional misspelling of a word or inaccurate punctuation. Where the accuracy of the record is not materially compromised, we tolerate these foibles without comment.

• PROPER HANDLING OF NEW MATTERS

In *United States v. Shaw*, ACM 33461 (A.F.Ct.Crim.App. 29 Jan 01), the convening authority invited the appellant to submit a statement from the appellant's wife, the victim of the offenses, indicating her opinion with respect to the appellant's request for early release from confinement. Trial defense counsel contacted the appellant's wife, who sent a letter directly to the convening authority recommending against any reduction in the amount of confinement. The staff judge advocate treated this letter a "new matter" and served a copy of the letter upon trial defense counsel, offering time to comment. However, a copy was not served upon the appellant and a statement was not attached to the record explaining why the accused was not personally served. Trial defense counsel waived any further comment. While it appears the staff judge advocate intended to present the wife's letter to the convening authority, there was no addendum documenting whether this was accomplished.

On appeal, the appellant asserted he was never informed of his wife's letter and never advised that he could respond. The court, while commending the staff judge advocate for erring on the side of caution in treating the wife's letter as a "new matter," set aside the convening authority's action and remanded the case for a complete review. The court held the accused must also be served with a copy of a "new matter," or an explanation must be included in the record why it was impracticable to do so. The lesson derived from this case is ensuring "new matters" are addressed in an addendum for the convening authority, with service of both the addendum and new matters on the defense counsel and accused, with appropriate explanation in the record if service on the accused is impracticable.

• SUICIDE PREVENTION AND PRETRIAL CONFINEMENT

In *United States v. Doane*, ACM 33234 (A.F.Ct.Crim.App. 2 Apr 01), the court addressed whether a military accused can be lawfully ordered into pretrial confinement while awaiting trial *solely* to prevent him from committing suicide. The appellate court held suicide prevention is not an adequate basis for placing or maintaining an accused in pretrial confinement. The court stated:

> There is a fundamental difference between how we treat an accused who is a threat to himself and an accused who is either a threat to flee the jurisdiction to avoid prosecution or to commit other serious offenses. The latter we put in pretrial confinement. The former we refer to mental health practitioners for evaluation and treatment and, if necessary, involuntary commitment in a mental health facility. We do not put an accused in pretrial confinement solely to protect against the risk that an accused might kill himself.

• ADMISSIBILITY OF LOR FOR COMMAND-DIRECTED URINALYSIS

In *United States v. Gaddy*, ACM 33827 (A.F.Ct.Crim.App. 28 Feb 01), the appellant alleged the military judge erred in considering a letter of reprimand (LOR) based on the results of a command-directed urinalysis as sentencing evidence. The military judge found the LOR was admissible, not to increase the punishment, but only to show the appellant's rehabilitation potential. The appellate court, on examining provisions in AFI 44-120, *Drug Abuse Testing Program*, and DoDD 1010.1, *Military Personnel Drug Abuse Testing Program*, disagreed. Based on these regulatory provisions, it determined that evidence of positive results from a command-directed urinalysis test may not be used in any disciplinary action under the UCMJ, except for impeachment and rebuttal purposes in limited circumstances. While the appellate court found error, it determined it was harmless.

• RECOUPMENT

Air Force members separated voluntarily or because of misconduct may be subject to recoupment of advanced educational assistance, special pay, or bonuses if they have not completed the required period of active duty. The statutory bases for recoupment are 10 U.S.C. § 2005 for advanced educational assistance and various sections of Title 37 for special pay and bonuses. Under 10 U.S.C. § 2005(g), the Air Force must ensure members who may be subject to these reimbursement requirements are advised about such requirements before "making a decision on a course of action regarding personal involvement in administrative, nonjudicial, and judicial action resulting from alleged misconduct." This means notice of recoupment must be given when a member is offered an Article 15 or when court-martial charges are preferred. While the AF Form 3070, *Record of Nonjudicial Punishment Proceeding*, has been modified to incorporate notice of recoupment into the form, care must be exercised to ensure notice is given in courts-martial cases, when appropriate. The notice of recoupment in court-martial cases should be included in the record of trial with pretrial allied papers in accordance with AFM 51-203, Figure 4.1, Item 20(j). For more information on recoupment, consult JAJM Policy letters, dated 7 December 1999 and 11 July 2000, on the Policy and Precedent section of the JAJM Webpage.

• UPDATE ON ONE-YEAR SPCM

As you may recall, on 5 Oct 99, the President signed the National Defense Authorization Act for Fiscal Year 2000. Section 577 of the act amended Article 19 of the Uniform Code of Military Justice (UCMJ), *Jurisdiction of special courts-martial,* to increase the jurisdictional maximum of special courts-martial. This change took effect in the UCMJ on April 1, 2000.

Before the expanded jurisdiction becomes effective in courts-martial practice, however, the President needed to make conforming changes to the Manual for Courts-Martial (MCM). Those conforming amendments were prepared by the DoD Joint Service Committee on Military Justice (JSC). After receiving public comment on the changes, the JSC forwarded the amendments to DoD General Counsel on 2 Jun 00 and published the final amendments in the Federal Register on 28 Jun 00. The DoD General Counsel then forwarded the changes to the Office of Management and Budget (OMB) on 30 Jun 00 for review by other Federal agencies prior to forwarding the changes to the President.

Although the OMB concluded its review in Fall 00, the draft executive order was not forwarded to President Clinton in the waning months of his administration. OMB returned the two pending military justice executive orders (1998 and 1999; 1-Year SPCM) to be re-staffed by DoD to OMB for review by the Department of Justice and other federal agencies. As such, implementation of the 1-Year SPCM changes is not anticipated until later this year.

CAVEAT

• POST-TRIAL ERRORS REVISITED

Much like that old "whack-a-mole" carnival game, just when you think all post-trial administrative errors have been nailed down, still another seems to pop up to bedevil Air Force military justice practice. One of the latest examples of this enduring phenomenon was discussed in the unpublished case of *United States v. Munar,* ACM 33052 (A.F. Ct. Crim. App. Oct. 12, 2000). In *Munar,* it was unclear when the defense counsel examined the record of trial. In its quest for the answer, the court ordered the government to obtain an affidavit from the defense counsel, who was by then no longer on active duty, stating whether or not she examined the record and, if so, when. The ensuing affidavit indicated that while the defense counsel did review the record before submitting her clemency package, she was not provided a copy of the record of trial until *after* it was authenticated by the military judge.

The court viewed the foregoing scenario as another

instance of the kind of recurring administrative errors plaguing contemporary military justice practice. As the court pointed out, the Manual for Courts-Martial requires the trial counsel to ensure the record of trial contains a notation that the defense counsel was given an opportunity to examine the record before authentication or an explanation why such opportunity was not provided. R.C.M. 1103(i)(1)(B), Manual for Courts-Martial (1995 ed.), the discussion immediately thereafter, and Manual Appendixes 13 and 14.

The Air Force court speculated that this error likely stemmed from the flexibility of the rules pertaining to defense counsel examination of the record, together with processing time standards imposed by higher headquarters. In any event, this practice, which the court termed as all too common, ignored the rules. Although in this instance the court did not find it necessary to direct remedial action, the clear message is that regardless of time constraints, military justice practitioners must take the time to insure adherence to all the basic requirements. Hopefully, enough said.

• WHAT A DIFFERENCE A DAY MAKES

In the unpublished case of *United States v. Walker,* ACM 34220 (A.F. Ct. Crim. App. Nov. 30, 2000), the Air Force court instructs military justice practitioners on the proper way to count--the way to count pretrial confinement days that is. In that case, the military judge erroneously calculated the number of days to be credited to the accused for his pretrial confinement. The erroneous number was thereafter repeated in the Report of Result of Trial (AF Form 1359), the CA action, and the promulgating order.

As the court noted, pursuant to *United States v. Allen,* 17 M.J. 126, 128 (C.M.A. 1984), an accused is entitled to credit for "any days spent in custody in connection with the offense or acts for which the sentence is imposed." The court cited the case of *United States v. DeLeon,* 53 M.J. 658, 660 (Army Ct. Crim. App. 2000), for a further refinement of the *Allen* rule. In *DeLeon,* the Army court expressed the view that "any part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit under *Allen except where a day of pretrial confinement is also the day the sentence is imposed." (*Emphasis added by the Air Force court).

In our *Walker* scenario, the accused began his pretrial confinement on 6 June 2000. The court sentenced him on 28 June 2000. According to the Air Force court's calculation, excluding the day sentence was adjudged the accused was entitled to 22 days of pretrial confinement credit. Both the trial counsel and the defense counsel came up with that number at trial. However, the military judge credited the accused with only 21 days. Before announcing sentence, the judge also granted a defense motion for 2-for-1 credit for his pretrial confinement.

Adding it all up, the Air Force court held that the accused was entitled to one additional day of legitimate pretrial confinement credit and another day for the illegal pretrial punishment credit found by the military judge. The court then remanded the record of trial for correction of the court-martial promulgating order and action.

CLAIMS

• DIRECT PROCUREMENT METHOD (DPM) CARRIER CLAIMS

This article discusses how to recover funds from direct procurement method (DPM) carriers contracted by the Department of Defense to move household goods. However, this information will assist any claims office in recovering funds at a local level.

How to Identify and Where to Send the DPM Claim

Dispatching the DD Form 1840 is the first step in the claims process. For Government Bill of Lading (GBL) shipments, the form is sent to the carrier listed in block 9. For DPM shipments, the form is sent to the carrier listed in block 9 and block 15c. The difficulty is in knowing the difference between a GBL and a DPM shipment. The shipment can be identified in several ways, such as the code of service listed in block 10 of the DD Form 1840. A code of service such as “HA” or “BA” would identify a DPM, but these are not the only keys to identify a DPM. The two-letter code should not be confused with the single letter code J shipment that is for hold baggage shipments. Block 10 could also have a contract number that could identify the shipment as a DPM. If there is nothing in the block, determine the origin and destination of the move. If it is a local move, such as off base to on base, it is probably a DPM. There are many different ways to use the DD Form 1840 to determine if a shipment is a DPM. If the claimant has a GBL, another clue is to look at the GBL block 1. If block 1 has only one carrier name and the name includes the words “Freight or Express” and block three of the GBL does not have a code to identify a carrier, then delivery of the household goods is a DPM. The GBL is issued for the freight carrier who delivers to a local carrier. The local carrier delivers the household goods to the shipper. There may be times a GBL could be used for a DPM, but it’s uncommon. If there is a question as to

whether a GBL has been used for a DPM, look for other information on the GBL. Check block 21 to find out if the carrier is billing the base directly, or block 25 for any special remarks such as "local move under contract #…" to find other keys to identify the shipment as a DPM. Some contracting offices issue Commercial Bills of Lading for DPMs. They are different from GBLs. When in doubt, dispatch the form to both carriers listed in blocks 9 and 15c.

The assertion of a DPM carrier recovery claim is against the delivery agent. The assertion against the delivery carrier is based on the Last Handler Rule. The Last Handler Rule states that loss or damage to goods that pass through several custodians is presumed to have occurred in the custody of the last custodian who handled the property. *McNamar-Lunz and Warehouses, Inc*., 57 Comp. Gen. 415 (1978), cited *in Eastern Forwarding Company*, B-248185, September 2, 1992. It now becomes the duty of the carrier to overcome the presumption of liability. The delivery carrier can accomplish this by providing factual documentation that they did not cause the damage.

Dealing With Carrier Arguments Against Liability

Frequently, the DPM carrier will argue they only picked up goods from the Non-Temporary Storage (NTS) Facility and therefore are not liable. Even if true, the carrier has not offered any facts to relieve them of liability. One way a carrier may request relief is to provide an interim inventory, or rider. The rider will list any missing or damaged items the carrier found when they took control of the household goods. The rider may relieve the DPM carrier if they identify a box or item that is damaged beyond any damage listed on the origin inventory. The items claimed would have to have been in the container or box listed on the rider. The damage to the item must be consistent with the damage to the box. In addition, some factual basis that the damage to the box caused the damage to the item may be enough to relieve the carrier of liability. Relieving a carrier from liability based on a rider should only occur if there is sufficient information to determine the carrier is not responsible for the damage.

Another common argument a DPM carrier will make is that the damage was caused by poor packing. This may be true, but the carrier's mere statement does not relieve them of liability. To overcome the burden of liability, the DPM carrier must provide an example of poor packing as required by the Defense Transportation Regulation, DOD Regulation 4500.9R. Further, the packing has to have been the proximate cause of the damage. Remember, facts, not assumptions, relieve carriers from liability.

Recovery if the Carrier Refuses to Pay

Once liability has been established, how can a claims office recover if a carrier still refuses to pay a claim? Claims submitted against DPM contract carriers are not forwarded to AFLSA/JACC, they are sent to the contracting office that controls the contract for the carrier. Generally, this is the contracting office on the installation where the goods were delivered, but not always. If this was a claim against a packing and crating DPM for example, it would be the contracting office who holds the contract at the origin base.

The key to success in recovering funds from a local DPM carrier is to know the contracting officer. It pays dividends for the claims office to have a rapport with the contracting officer. When a file is forwarded for offset through the contracting office, the relationship between the claims office and contracting office is tested. It is much easier to say no to an e-mail or ignore a file if either is from an unknown name or office. It is less likely that the contracting office will ignore someone they know. When a file is sent for collection the contracting officer should understand this is a last resort and the claims office would not be taking this step if there were any alternatives. Further, if there is a strong relationship with the contracting office, they will understand the offset is only for funds due to the Air Force and the claim is meritorious.

Many contracting offices are reluctant to offset funds against a carrier. The reasons can vary depending on the experience of the contracting officer and location of the installation. A frequent excuse is there is only one carrier in the area, and if they lose money, they will not want to continue moving Air Force families. Another justification used by some contracting offices is that the carrier should not liable for damage or loss because some damage is expected when moving. The reluctance of a contracting officer to offset funds can, and must, be overcome. Most contracting officers do not understand the legal basis for recovery. To avoid this barrier, a claims office should help them understand the legal basis and the necessity for recovering funds. Holding a carrier liable for loss or damage encourages better future performance. If a carrier damages or loses goods with no expectation of reparation, what will discourage future damage or loss? Contracting officers should use every effort to recover funds, including reminding carriers that future contracts will depend on current performance, including adherence to the contract provisions for loss or damage.

Conclusion

It is the responsibility of every office to accomplish its assigned mission. One such mission is the recovery

of funds from carriers. The first step is for the claims office to know the contract and its provisions. Next, know the contracting officer and help them understand the basis and need for recovering funds due the Air Force. A successful claims program and a good relationship with the contracting office go hand in hand. Using all available tools to recover all funds due will increase carrier performance and keep funds available to pay future claims. Taking a proactive approach to carrier recovery will give the claims office its reward: payment in full.

TORT CLAIMS AND HEALTH LAW

Medical personnel are susceptible to offers of gifts from private enterprises that may have a vested business interest with the United States. Many of these gift proffers seem innocuous and, unfortunately, hospital personnel may not understand the restrictions and limitation of receipt of gifts under the Joint Ethics Regulation. Personnel need to be reminded to be careful when dealing with prohibited sources or acting in ways which create the appearance of impropriety. It is valuable for legal offices to arrange with the Designated Agency Ethics Official for Medical Treatment Facilities briefings for the hospital staff.

• RES GESTAE

The 2001 Medical Law Consultants Conference was held in Rosslyn, VA, from 7-9 May 2001. Incumbent Medical Law Consultants, recent graduates from the Medical Law Consultant Course at Andrews AFB, JACT Medical Law and Health Affairs Staff, TRICARE Legal Counsel, and Surgeon General representatives were in attendance. Topics discussed included quality assurance, the new Health Integrity Protection Data Bank, Portable Licensure, Discretionary Function, and quality of medical legal reviews.

The 2001 Medical Law Mini-Course is scheduled for 22-26 October at Travis AFB, California. The course is an intensive week of training given by staff members at David Grant USAF Medical Center, staff from JACT, the Legal Advisor to the Surgeon General, and the Surgeon General's Clinical Quality Management Division. Topics include investigation and adjudication of medical malpractice claims, quality assurance, standards of care in the medical specialties, and bioethical dilemmas. The course is open to those attorneys, paralegals, and health care personnel who have significant responsibilities in the health law arena. JACT will be notifying the MAJCOMs in August regarding attendee nominations, but prospective attendees should express their interest to their SJAs or other appropriate supervisors as soon as possible. Local funds must be used for attending this course.

The fifth annual Accident Investigation Board Legal Advisor Course was successfully conducted at AFJAGS in May. At total of 38 students completed the three day course and are now authorized to perform legal advisor duties on accident investigation boards. To date, over 200 active duty and reserve judge advocates have completed the course. Each year the Air Force conducts approximately 25 investigations into Class A aerospace mishaps. At least one legal advisor is required for each investigation. A Class A mishap has occurred when the resulting total cost of damages to Government and other property is $1 million or more; a DoD aircraft is destroyed; or an injury and/or occupational illness results in a fatality or permanent total disability.

• VERBA SAPIENTI

When investigating a malpractice case, residents or students may be named as significantly involved providers. These individuals are working under supervision while in training, and, for purposes of National Practitioner Data Bank reporting, if a resident commits an act of malpractice for which moneys are paid, it is his/her supervisor who is named to the Data Bank.

There is, however, an exception to this rule. If the acts or omissions of the resident were considered outside the reasonable and normal purview of staff supervision, then it is the resident who may be named to the Data Bank.

There have been many cases reviewed where the nature and extent of supervision is nebulous, and, in some cases, facilities may have unclear supervision guidelines. Factors may include the type of training, the level of proficiency expected of the resident, and the nature of the act or omission itself. Because of the significance to providers of being named to the National Practitioner Data Bank, it is wise, during the course of an investigation involving residents or students, to ascertain the role and extent of supervision. This will be critical in standard of care evaluation not only for quality assurance purposes, but also for the ultimate adjudication of the claim.

• ARBITRIA ET IUDICIA

Udari Range Investigation Completed

On 1 May 2001, U.S. Central Command officials announced that they determined pilot error was the main cause of the deadly March 12 bombing accident

at Kuwait's Udairi Range. A Navy F/A-18 Hornet pilot incorrectly identified an observation post as his target and dropped three 500-pound bombs that killed five Americans, including one Air Force member, and a New Zealander and injured 11 others. Six Kuwaiti service members were among the injured.

The report identified pilot error as the main cause of the accident, but with three contributing factors:

- The forward air controller airborne pilot used non-standard terminology when speaking to the pilot on the bombing run.
- The ground forward air controller lost situational awareness at a critical point, reducing the time he had to call for an "abort" of the mission.
- Conditions at Udairi Range made the observation post and the target difficult to distinguish.

An Air Force judge advocate acted as a legal advisor to the investigation board, headed by Marine Lt. Gen. Michael P. DeLong.

LABOR AND EMPLOYMENT LAW

• Asbestos Information Requests From Union May Herald Litigation

Over the course of the past year, the Air Force Central Labor Law Office has repeated the warning that should any base receive a grievance, or the inkling of a potential grievance, regarding asbestos exposure or an environmental differential pay claim for asbestos exposure, that base should contact CLLO immediately.

This is more than just friendly advice. Of course, CLLO is here to help base legal offices on a variety of issues, but when it comes to asbestos exposure litigation, CLLO is more than simply interested. Three JAGs from AFLSA/JACL, teamed with base counsel at Kelly AFB, just concluded a several-weeks asbestos EDP arbitration hearing seeking hundreds of millions of dollars in back pay. The case involved millions of documents, thousands of pieces of evidence and took more than a year and a half of preparation for the litigation team. To date, the Air Force has spent several million dollars to prepare and litigate this case that now awaits the arbitrator's decision. All should be aware that there is at least one law firm that is traveling nation wide, appealing to individual union locals with the intent of filing large-scale grievances for asbestos exposure. The Army and Navy have already been hit with arbitration decisions finding them liable for tens of millions of dollars. Clearly, the Air Force is also on this "hit parade" with Kelly AFB being merely one of the first bases in the line.

Typically, the matter begins with what may appear to be a relatively innocuous, though long, union request for information under section 7114. Do not be deceived into believing that this is an ordinary information request! First, be aware that your opponent (i.e., the union and their counsel) are by this point well-prepared and have already begun preparing their case against your base. Second, be prepared for the massive undertaking that will be required to comply with the information request. The volume of documents sought can often be weighed by the ton. Whether the length of the request is short or long, you can count on it being broad in scope. For example, the request might ask for: "a copy of all asbestos files relating to (your) AFB; a copy of all asbestos assessments and surveys; listings or rosters of all WG employees included within the bargaining unit in current and previous years (might go back 25 years or more)."

Such a sweeping request may well herald an expensive, time consuming grievance to follow. Call CLLO immediately! We can, as a minimum, discuss the request, assist in the preparation of a response, and discuss the strategy for handling such a grievance.

• President Bush Revokes "Partnership" Executive Orders

On 17 Feb 01, President Bush released Executive Order 13203 that explicitly revoked all the "Partnership" Executive Orders (E.O. 12871, 12893, and 13156) and the "Reaffirmation Memorandum" of October 2000. This succinct Order may be reviewed on the CLLO On-Line Law Library, under "Federal Labor Relations Authority," "Executive Orders." We have also loaded a copy of a thorough question and answer memorandum prepared by the Field Advisory Service that discusses the ramifications of E.O. 13203.

The executive order states clearly that no collective bargaining agreement currently in effect is abrogated by this Order. Therefore, do not assume that your base's "Partnership" agreement or memorandum of understanding is null and void. An agreement is an agreement. Until the parties negotiate other terms or agree together to terminate the agreement, any "Partnership" MOU/MOA in effect is ultimately enforceable by the Federal Labor Relations Authority.

The immediate impact of President Bush's Order is to instantly negate any impetus to form new or more elaborate "partnerships." Further, all guidelines or policies that implemented the original Clinton Executive Orders are now rescinded, which would appear to include any reporting requirements. The CLLO also expects to see a revision, if not an outright revocation,

of the "guidance" authored by the Office of General Counsel, FLRA. Two "guidance" documents, entitled "Pre-Decisional Involvement Guidance" (July 15, 1997) and "Duty to Bargain Over Programs Establishing Employee Involvement and Statutory Obligations" (Aug 8, 1995), directly incorporate E.O. 12871. The CLLO would recommend no further reliance on either of these memoranda.

- **U.S. Supreme Court to Hear Arguments on Front Pay Damages under the Civil Rights Act of 1991**

The U.S. Supreme Court has scheduled oral arguments for *Sharon Pollard v. E.I. DuPont de Nemours Company* (00-763), *cert. granted* January 8, 2001, for April 23, 2001. At issue is whether the $300,000 damages cap of the Civil Rights Act of 1991 limits front pay damages. The underlying opinion at 213 F.3d 933 (6th Cir. 2000) is worth a read for the jaw-dropping facts alone.

Practitioners in labor and employment law can easily become cynical of claims of sexual harassment and hostile work environment. However, these private sector facts, spanning 1994 to 1996, remind all of us what can take place in the workplace, the employer's responsibility, and the ramifications of an employer's refusal to act.

- **When Do "Rumors" In the Workplace State an EEO Claim?**

Although the EEOC has consistently held that remarks or comments unaccompanied by a concrete agency action are not a direct and personal deprivation sufficient to render an individual aggrieved for purposes of Title VII, do they apply the same rule when it comes to co-workers spreading rumors? In looking at recent decisions issued by the EEOC, the answer is: It depends! For example, in *Gibbons v. Department of Agriculture*, EEOC Appeal No. 01A05628 (Jan 19, 2001), the Commission found that the complainant's allegation that a line officer spread rumors about him, while not to be condoned, were not so severe or pervasive as to alter the conditions of complainant's employment. Similarly, in November 2000, the EEOC upheld the VA's dismissal of a complaint for failure to state a claim where the complainant alleged that his supervisor called him a liar, someone asked the complainant whether he was "prejudiced," and someone started a rumor that he had spent a night in jail. *Kinsey v. VA*, EEOC Appeal No. 01A04693 (Nov 28, 2000). Again, considering all the alleged harassing incidents and remarks in the light most favorable to the complainant, the Commission found that they were not sufficiently severe or pervasive to alter the conditions of the complainant's employment. But, in *Hartmann v. Department of Transportation*, EEOC Appeal No. 01997202 (Dec 7, 2000), the EEOC reversed an Agency's dismissal for failure to state a claim where a complainant alleged that she was "attacked by a co-worker with rumors."

There were some key factors the EEOC used to determine whether a complainant has successfully stated a claim based on rumors in the workplace. For example, in *Hartmann*, the complainant alleged that she had apprised the agency on repeated occasions over a two-year period regarding the co-worker's purported rumors without any action by management. In *Kinsey*, there was no such managerial notification or inaction: "the complaint involve[d] nothing other than remarks made by several different employees."

The answer as to whether rumors in the workplace state a claim is really a question as to whether the rumors create a hostile work environment. *Smith v. Air Force*, EEOC Appeal No. 01A04103 (Oct. 11, 2000). As the Supreme Court stated in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), this is not "a mathematically precise test." Instead, it depends upon factors such as the frequency of the conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance. Supervisors should be advised, however, that if an employee informs the supervisor that certain rumors are creating a hostile work environment, the supervisor must take all reasonable steps necessary to quash such rumors. See *Smith v. Air Force*, EEOC Appeal No. 01A04103 (Oct. 11, 2000)(supervisor's purported failure to address the rumors after the complainant reported them constituted a claim of retaliatory harassment).

- **It's What You Say <u>And</u> Where You Say It - An Interesting Case To Ponder**

Litzenberger v. Office of Personnel Management, 231 F.3d 1333 (Fed Cir., November 7, 2000), is a case to note. Litzenberger's relationship with his Agency was so bad the parties had to sign an agreement to help keep the peace. That didn't work either, and Litzenberger sued in state court to force compliance with the agreement. On the stand, Litzenberger verbally attacked and disparaged managers, employees, and contractors employed by the Agency. Litzenberger lost the case, and the Agency fired him for (1) causing the Agency to lose all confidence and trust in him and (2) violating its Conduct and Discipline directive. All of

the grounds for these two reasons were in what Litzenberger said about managers, employees, and contractors of the Agency during his state court testimony.

Once fired, Litzenberger applied through his former Agency to the Office of Personnel Management (OPM) for a discontinued service annuity. Although the Agency's forwarding documents never mentioned misconduct or delinquency, OPM looked at the paperwork, figured Litzenberger was fired for misconduct/delinquency, and denied the application. (A misconduct or delinquency firing renders one ineligible for the discontinued service annuity.) Litzenberger appealed OPM's annuity denial to the MSPB, who denied him as well. The MSPB refused to delve into whether or not Litzenberger's firing by the Agency was valid, and accepted OPM's right to label the Agency's action as misconduct or delinquency-based. In other words, neither the Agency nor the OPM looked into the legality of firing someone based on what they said on the witness stand in a court case (see *Donohoe Construction Co., Inc. v. Mount Vernon Associates*, 369 S.E.2d 857 (Va. 1988)(holding statements made in a judicial proceeding to be "absolutely privileged"). The appeals court picked up on it, however, saying the OPM - and then the MSPB - had a duty to confront the issue of privileged testimony. It was error not to do so, and it was error for the OPM to blindly pigeonhole Litzenberger into a misconduct/delinquency label. The court reversed the MSPB decision and remanded the case in a 2-1 opinion.

• U.S. Supreme Court Grants Certiorari in *Gregory v USPS*

On 20 Feb 01, the most-watched federal employment case to come out of the U.S. Court of Appeals for the Federal Circuit in some time entered a new phase in its appellate life. The U.S. Supreme Court granted certiorari for *Maria A. Gregory v. United States Postal Service*, 212 F.3d 1296 (Fed. Cir. 2000), *cert. granted*, 121 S.Ct. 1076 (2001).

Gregory announced the troubling holding that the deciding official of a removal action of a federal employee could not consider any prior discipline that remained on appeal. Personnelists and employment attorneys across the federal government have been crying foul since the decision was released. If the *Gregory* holding is allowed to stand, it arguably encourages disciplined employees to appeal every action as long as possible. Considering the number of years that it takes to bring an EEO complaint to hearing, this is a very real danger. All labor practitioners should watch this appeal as it unfolds.

• MSPB Allows Future Medical Expenses as Damages in IRA Whistleblower Case

In a case of first impression, the Merit System Protection Board ruled that future medical costs are recoverable under the Whistleblower Protection Act, 5 USC 1221(g)(1)(A)(ii). In *Joan Pastor v. Department of Veterans Affairs*, (PH-1221-99-0089-P-1, January 11, 2001), the appellant claimed future medical expenses of $13,750 for 50 more visits to her psychotherapist and 10-20 more visits to an Eye Movement Desensitization Reprocessing specialist.

The Board considered the remedial nature of the Whistleblowers Protection Act and noted that remedial statutes are to be "liberally construed." To better make the Individual Right of Action (IRA) appellant whole, the Board found that paying for medical treatment to the extent necessary to alleviate the results of an employer's retaliatory act means to pay for future medical expenses. The Board did note the future costs could not be based on conjecture, surmise, or speculation, but must be proven with reasonable certainty.

• CLLO'S ELECTRONIC LIBRARY

For more information on these topics and others, be sure to tap the "Labor" hotbutton on the FLITE web page for direct access to the CLLO On-Line Library.

GENERAL LAW

• Chain of Command 101

Understanding command authority requires a fundamental knowledge of the chain of command and how organizations are created within that chain. The federal military chain of command has two branches, operational and service, both originating with the National Command Authority. This article briefly summarizes the elements of both of these branches as well as the sources of authority for the command authority exercised within each branch. Although the concepts may seem fairly basic, we believe it merits periodic review, because, surprisingly, the answers to all of the complicated command and organization issues that arise from joint operations are derived from this basic information.

Chain Of Command

The National Command Authorities (NCA) are the President and Secretary of Defense. The term NCA is used to signify constitutional authority to direct the Armed Forces in their execution of military action.

Under the Goldwater-Nichols DOD Reorganization Act of 1986, the operational chain of command runs from the President to the Secretary of Defense to the combatant commanders (CINCs) unless otherwise directed by the President. (10 U.S.C. §162(b)). The chain of command for purposes other than the operational direction of the Combatant Commands runs from the President to the Secretary of Defense to the Secretaries of the Military Departments to the commanders of Military Service forces. (DoDD 5100.1, para 6.1. See also, 10 U.S.C. §§ 113 and 8013).

Operational Command Authority

The CINCs are responsible to the President and the Secretary of Defense for accomplishing the operational military missions assigned to them. CINCs exercise combatant command (COCOM) command authority over forces assigned to them. Subordinate commanders exercise command authority derived from COCOM such as OPCON (operational control), TACON (tactical control) or Support, or provide ADCON (administrative control). (*See* Joint Pub 0-2, *Unified Action Armed Forces (UNAAF)*)

The unified command structure is flexible, and changes are made as required to accommodate evolving U.S. national security needs. A classified SecDef memorandum called the *Unified Command Plan* (UCP) establishes the combatant commands, identifies geographic areas of responsibility, assigns primary tasks, defines authority of the commanders, establishes command relationships, and gives guidance on the exercise of combatant command.

The CINCs' exercise of COCOM specifically includes "authority with respect to selecting subordinate commanders, selecting combatant command staff, suspending subordinates, and convening courts-martial, as provided in subsections (e), (f), and (g) of this section and section 822(a) of this title, respectively," "assigning command functions to subordinate commanders," "giving authoritative direction to subordinate commands and forces necessary to carry out missions assigned to the command, including authoritative direction over all aspects of military operations, joint training, and logistics," "prescribing the chain of command to the commands and forces within the command," and "organizing commands and forces within that command as he considers necessary to carry out missions assigned to the command." (10 U.S.C. § 164)

Service Command Authority

The chain of command for purposes other than the operational direction of the Combatant Commands runs from the President to the Secretary of Defense to the Secretaries of the Military Departments to the commanders of Military Service forces. Authority for the Secretary of the Air Force to organize service forces and appoint commanders is found at 10 U.S.C. § 8013 and 10 U.S.C. § 8074.

The Secretary of the Air Force has authority under 10 U.S.C. § 8013 to organize Air Force forces and to carry out "the functions of the Department of the Air Force so as to fulfill (to the maximum extent practicable) the current and future operational requirements of the unified and specified combatant commands." More specific authority to establish commands within the Air Force is found at 10 U.S.C. § 8074, which provides "[e]xcept as otherwise prescribed by law or by the Secretary of Defense, the Air Force shall be divided into such organizations as the Secretary of the Air Force may prescribe."

The Goldwater-Nichols Act requires that forces under the jurisdiction of the Service Secretaries be assigned to the combatant commands, with the exception of forces assigned to perform the mission of the military department (e.g., organize, train, equip) or NORAD. (10 U.S.C. § 162) In addition, forces within a CINC's geographic area of responsibility normally fall under the command of the combatant commander, except as otherwise directed by the Secretary of Defense. (10 U.S.C. § 162(a)(4), *UCP* and *Forces For Unified Command*)

The operational command relationships between Air Force organizations and commanders and the combatant commands are set forth in the classified document, *Forces For Unified Command*. Entire Air Force organizations (MAJCOMs or NAFs) are assigned as the Air Force service components of the combatant commands. In addition, Air Force forces may be transferred to a different combatant command by authority of the Secretary of Defense under procedures prescribed by the Secretary and approved by the President. (10 U.S.C. §162) This is usually done to build or maintain a Joint Task Force to carry out a specific contingency or ongoing operation.

Regardless of how an Air Force organization is assigned or attached to a combatant command or joint force, an Air Force-created organization normally retains its commander and its structure as established by the Air Force. The Air Force commander has ADCON from the Air Force and whatever elements of operational command authority are delegated by the joint force chain of command. While the CINC or the Joint Force Commander (if delegated) has the power to change the command or organization of assigned or attached Air Force organizations, joint doctrine favors leaving the organization intact and under its established command. In order to establish unity of admin-

istrative control (ADCON) for all Air Force forces in a joint command, one Air Force Officer will be designated as the Commander of Air Force Forces (COMAFFOR, also know by the joint term "service component commander" or the Air Force term "SAFO" or "Senior Air Force Officer").

GENERAL LITIGATION

CIVIL LIABILITY OF LEGAL PERSONNEL

A civil suit filed in the 9th Circuit against the Air Force and individually against eight Air Force military personnel highlights the potential liability to Air Force legal personnel arising from legal advice they provide to commanders and first sergeants in the military justice arena. As this case shows, it is necessary to carefully research civilian case law as well as military case law when advising commanders about military justice matters especially when dealing with statutes restricting the collection of evidence. Such statutes include the Federal Wiretap Act, the Right To Financial Privacy Act, and the Privacy Act.

The lawsuit resulted from advice to the base security police about using illegally taped telephone conversations to support an investigation for adultery. An Air Force sergeant taped his civilian wife's phone calls without her knowledge, believing she was having an affair with another Air Force member. When he obtained information he believed proved the affair, he reported the information to the security police and informed them of the phone conversations he recorded. The security police called the base legal office to inquire about using the tapes in an investigation of the two military personnel. The security police were given the green light and eventually the two military members were disciplined based largely on the evidence contained on the tapes.

In March 2000, the two military members and three civilian woman, all of whose conversations were contained on the tapes, sued the Air Force and individually sued the legal office personnel, security police, and commanders who used the evidence on the tapes to investigate and discipline the two military members. The plaintiffs alleged the defendants had violated the Federal Wiretap Act, 18 U.S.C. 2511, et. seq., which makes criminal the taping of phone conversations without the consent of at least one of the parties to the conversation and also makes illegal the knowing use or disclosure of illegally taped conversations, even by a party who was not involved in making the illegal recording. Significantly, this criminal statute specifically provides for a civil cause of action by an aggrieved party against individuals who violate the statute.

Numerous federal civilian appellate courts have addressed the scope and applicability of the Federal Wiretap Act. The military appellate courts have not. The 9th Circuit Court of Appeals addressed the scope and applicability of the Federal Wiretap Act in *Chandler v. United States Army, et.al.*, 125 F.3d 1296 (9th Cir. 1997), five months before the events that unfolded at the Air Force base. *Chandler* held that Army investigators and commanders violated the statute when they used illegally recorded phone conversations (secretly recorded by Captain Chandler's wife) to support an investigation for adultery against Captain Chandler. Factually, this case was indistinguishable from the situation that arose at the Air Force base five months later.

In October 2000, the Department of Justice and the General Litigation Division, AFLSA, filed a motion to dismiss the case. In a decision dated 15 February 2001, the district court agreed that the complaints brought by the two military members were barred under the Feres Doctrine; dismissed the United States Air Force and United States as defendants on sovereign immunity grounds; and dismissed the three commander defendants from the lawsuit on the basis of "absolute immunity," finding that their actions in disciplining the two military members were quasi-judicial in nature. The court, however, refused to grant qualified immunity to the security police officers, the first sergeant, and judge advocate, holding that the 9th Circuit's *Chandler* decision was "on all fours" and therefore controlling legal authority. The court declined to accept the argument that military case law was controlling and, therefore, the defendants had acted reasonably under "clearly established law." Instead, the court found that the *Chandler* decision should have been discovered by the defendants prior to their actions and determined that the *Chandler* decision was factually and legally "on all fours."

Because of the potential liability to the Air Force and individual Air Force officials as a result of decisions made by them in the military justice arena, especially when such decisions may impact a civilian's statutory or constitutional rights, it is important to research not only what the military court system has to say about a particular legal issue or statute, but also what the federal civilian and state courts in the jurisdiction your base is located have ruled.

USING THE RESIDUAL HEARSAY RULE IN CHILD SEXUAL ABUSE PROSECUTIONS

LIEUTENANT COLONEL BRUCE D. LENNARD

Few cases are more difficult to prove than allegations of child sexual abuse. Children are typically pitted against an accused parent. The physical integrity of the family is normally broken apart, with the accused parent ordered to have no contact with the victim. The non-offending parent is estranged from the accused, allied with him or her against their own child, or confused about where to stand as they wrestle with guilty feelings of their own. The child may have suffered physical and emotional harm and be in therapy. There may be ongoing and bitter domestic law issues between the accused and the non-offending spouse; issues which set the stage for insinuation that the non-offending spouse has coached the child. The non-offending spouse may be acutely aware of the financial devastation which may result if the accused goes to confinement and therefore wary of cooperating with the trial counsel. The accused's spouse may even have been involved in the abuse itself.

Additionally, witnesses and physical evidence are rare. Cases boil down to the word of an accused against that of a overwhelmed young child This child may have been interviewed so many times, for so many purposes, that he or she no longer really knows how to express what actually happened to them or what it is that their current questioner wants from them. When the case goes to court, the child witness' ability to relate what took place may be so degraded that proof of the case beyond a reasonable doubt seems next to impossible. Faced with this challenge, trial counsel may find themselves wishing that they could put before the members evidence of what the child said about the sexual abuse very early on in the case; perhaps even of statements made to investigators. The purpose of this article is to point out that with MRE 807, trial counsel can sometimes do just that, particularly when a professional, forensic interview has been accomplished.[1]

Many courts have recognized that while Congress intended the former residual exceptions[2] to the hearsay rules to be used very rarely, and exceptional circumstance generally exists when a child abuse victim relates to an adult the details of the abusive event.[3] How can trial counsel use MRE 807 to his or her advantage? The three requirements for the admissibility of evidence under MRE 807[4] have been held to mean that a statement admitted as "residual hearsay" must be (A) **material**, (B) **necessary**, and (C) have adequate **indicia of reliability.**[5] Put another way, "[t]he question in each case must be whether a particular hearsay declaration, otherwise inadmissible, has such great probative value as evidence of a material fact and such a high degree of trustworthiness under all of the circumstances that its reception outweighs any risk to a defendant that unreliable evidence may be received against him, the deficiencies of which he cannot adequately test because he cannot cross-examine the declarant."[6]

Proving that the out-of-court statement of a child victim is material is simply a matter of showing the military judge that the statement proves key facts in issue in the case. These key facts might relate directly to the elements of the offenses charged or to other material points such as whether or not the mother of the child has coached or improperly influenced that child to bring false allegations. The more difficult issues generally involve whether the residual hearsay statement is reliable enough to overcome Confrontation Clause concerns and whether it is necessary that trial counsel be allowed to put the statement into evidence.

In *Idaho v. Wright,*[7] the Supreme Court addressed how courts should balance the Confrontation Clause with exceptions to the hearsay rules and how courts should determine whether a statement carries adequate indicia of reliability to overcome Confrontation Clause concerns. The Court drew a distinction between using the "firmly rooted" exceptions to the hearsay rules and using the former residual exceptions to the hearsay rules. The Court stated that there are no Confrontation Clause issues when trial counsel offers into evidence a statement properly admissible under the present MRE 803 or MRE 804.[8] On the other hand, there are Confrontation Clause concerns when trial counsel seeks to

Lt Col Lennard (B.S, United States Air Force Academy; J. D., University of Arizona College of Law) is the Chief, Military Personnel Brach, General Litigation Division, AFLSA, and is a former Circuit Trial Counsel, pacific Circuit.

use the residual hearsay rule. In fact, a presumption of unreliability adheres to an out-of-court statement offered as residual hearsay until rebutted by the proponent.[9] To overcome these concerns, trial counsel must prove to the military judge that the statement he or she offers as residual hearsay has "particularized guarantees of trustworthiness."[10] The question is: how do we prove these particularized guarantees of trustworthiness or, as military courts have called them, these "equivalent circumstantial guarantees of trustworthiness?"[11]

In answering this question, trial counsel must first examine the availability of the declarant of the statement. If the declarant is unavailable, then trial counsel may not use corroborating evidence to guarantee the trustworthiness of the statement. Instead, particularized guarantees of trustworthiness must be shown only from the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. In many cases, trial counsel is left in a very difficult position in this regard as he or she must reconstruct the circumstances surrounding the making of the statement. In doing so, it pays to know what circumstances are important to highlight for the military judge. The *Idaho v. Wright* opinion gives a list of factors the Supreme Court found helpful in determining the statement in that case was reliable. These factors included: the spontaneity of the statement; any consistent repetition of the statement; the mental state of the child declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate.[12]

On the other hand, if the statement trial counsel seeks to have admitted has been videotaped and the statement has been rendered during the course of a professionally conducted forensic interview, the videotape itself serves to substantially reconstruct most of the particulars surrounding the making of the statement. Trial counsel need only develop how it is that the parties in the videotaped interview came together for that interview and what might have transpired between the parties prior to and after the actual taping. This highlights how important it is to get AFOSI professionals involved just as soon as possible when a report of child sexual abuse is made.[13] The earlier the forensic interview is conducted, the better the interview will be as far as spontaneity, mental state, etc. The videotape itself also allows the military judge to assess the demeanor of the child declarant which can go very far in proving the reliability aspect of MRE 807. Whether trial counsel has a videotaped, forensic interview or not, he or she should always bear in mind that the *Idaho v. Wright* Court declined to endorse a mechanistic test for finding particularized guarantees of trustworthiness and held that "the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth ***when the statement was made*** (emphasis added)."

If the declarant of the statement is available, trial counsel can prove the reliability of the statement by showing how the totality of the circumstances that surround the making of the statement render the declarant particularly worthy of belief and by corroborating the statement with extrinsic evidence.[14] This ability to use corroborating evidence is extremely powerful. In fact, if the statement goes directly to the charged offenses, trial counsel can present his or her entire case to the military judge on the reliability issue.[15] In the end, trial counsel can argue that the statement he or she seeks to have admitted as residual hearsay is reliable because the entire case shows the accused to have done just what the child says he did.

The next step is to prevail on the probativeness, or necessity, prong of MRE 807.[16] The issue, here, is whether or not trial counsel has any other evidence which is qualitatively as good as the statement he or she seeks to have admitted as residual hearsay. If trial counsel has other evidence on the point in issue which is just as good as, or better than, the residual hearsay statement, that statement is not more probative on the point for which it is offered and, according to MRE 807, not necessary to trial counsel's case. In child sexual abuse cases where a victim has recanted, or refused to testify, the decision as to what is more probative is generally easy for the military judge. But what of the case where the victim is available and willing to testify? In this instance, the military judge may not be willing, or able, to find that a residual hearsay statement from this same witness is more probative than the victim's live testimony to the members until such time as he or she has heard from the witness in open court. Therefore, trial counsel must be prepared to wait for a ruling on the overall admissibility question and renew the offer of the residual hearsay statement after the witness has testified.

In renewing the offer, trial counsel should argue that the residual hearsay statement is qualitatively superior to the witness' testimony. The Court's holding in *U.S. v. Shaw*[17] is very helpful on this point. There, a residual hearsay statement was determined to be more probative than the child sexual abuse victim's in-court testimony because (1) the residual hearsay statement reflected the first known statement made to anyone about the sexual incidents; (2) the hearsay statements were made just days after the last sexual incidents; and (3) the hearsay statements contained specific details as to the dates of the incidents – details that could not be provided at trial. *Shaw* shows how important early

statements are in terms of the quality of the description of the abuse, and how important it is to capture those early statements on videotape, if possible.

The *Shaw* opinion also stands for the proposition that "even though the evidence may be somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the 'more probative' requirement cannot be interpreted with cast iron rigidity." Using this, trial counsel can argue that, despite a victims' live testimony, evidence of the facts and circumstances surrounding the child's earlier revelation, as well as the substance of the revelation itself, are certainly the most probative evidence available on the question of whether the child has been coached or improperly influenced by her mother. If that early revelation has been videotaped under strict forensic conditions, trial counsel may also use a footnote in *U.S. v Morgan*[18] to his or her advantage. Footnote 6, though not discussing residual hearsay, addressed an issue of whether coaching or improper influence had occurred in a child sexual abuse case. The Court there said: "Ironically, if coaching or improper influence occurred, the videotape of the interview should have been the defense's best evidence of it. … We can think of few media more effective than videotape for allowing the members to answer this question in their own minds."

In the final analysis, trial counsel should never overlook the possibility of putting a child sexual abuse victim's first revelation, or early description, of abuse into evidence under MRE 807. These statements typically are made before many other issues are created and often times are the most genuine accounts of what has happened. Also, judge advocates who receive reports that a child may have been sexually abused should immediately contact AFOSI to arrange for videotaped, forensic interviews of that child and any siblings. These interviews can be very helpful in satisfying the requirements of the residual hearsay rule. Coordination and cooperation with AFOSI on this vital aspect of the investigation of child sexual abuse cases may be the single most important step leading to a successful prosecution.

[1] According to Lt Col Nancy Slicner, Ph.D., Chief, Violent Crimes Branch, HQ AFOSI, a forensic interview is one which follows an identifiable structure including: an introduction, explanations of the purpose of the interview, rapport building, questioning, and a summarization of what has been learned. The key features are that the questions asked are developmentally understandable to the child, any aids are age appropriate, and there is a section where competency and credibility are assessed. The good forensic interview will: (1) start with a request for information in an open manner and then narrow the questions down by cueing to a specific time or place; (2) avoid leading and or suggestive questions; (3) reflect a neutral, objective appearance; (4) use techniques designed to enhance memory retrieval, usually starting with the most recent episode and working backward; and (5) look for idiosyncratic or unusual details and affective, tactile or sensory memories.

[2] Recent changes to the Military Rules of Evidence have eliminated MRE 803(24), and its counterpart formerly found at MRE 804(b)(5). These two residual hearsay exceptions to MRE 803 and 804, respectively, have now been transferred to the new MRE 807. This transfer is consistent with the fact that the analysis for each exception was virtually identical, the only difference between the two exceptions having to do with the availability of the declarant, a difference which was largely immaterial. The new MRE 807 reflects that immateriality and the fact that we need only one rule which embodies the residual hearsay exception. As the language of MRE 807 mirrors that of the former MRE 803(24) and MRE 804(b)(5), it's safe to say that the following analysis and references to case law discussing MRE 803(24) are wholly applicable to the new MRE 807.

[3] *U.S. v. Shaw*, 824 F.2d 601 (8th Cir.1987), *cited with approval in U.S. v. Wiley*, 36 M.J. 825 (ACMR 1993).

[4] MRE 807 reads as follows: A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[5] *U.S. v. Johnson*, 49 M.J. 467 (CAAF 1998).

[6] *U.S. v. Hines*, 23 M.J. 125 (CMA 1986).

[7] 497 U.S. 805 (1990).

[8] *See also Ohio v. Roberts*, 448 U.S. 56, 66 (1980), holding that when the proponent establishes that a declaration falls within the scope of a firmly-rooted hearsay exception, "(r)eliability can be inferred without more."

[9] *Bourjaily v. United States*, 483 U.S. 171 (1987).

[10] *Idaho v. Wright, supra*.

[11] *Hines*, *supra*; *United States v. LeMere*, 22 M.J. 61.

[12] Other opinions are helpful as well such as *Hines*, *supra*, and *U.S. v Cabral*, 47 M.J. 268 (CAAF 1997).

[13] AFOSI has professional forensic interviewers available through their headquarters at Bolling AFB.

[14] *See U.S. v. Johnson*, *supra*, wherein our highest military court interpreted the *Idaho v. Wright* holding to permit the use of corroborating evidence when the witness is available to testify. *See also U.S. v. Martindale*, 40 M.J. 348 (1994), and *U.S. v. McGrath*, 39 M.J. 158 (1994).

[15] This presentation of evidence is governed by MRE 104 which addresses preliminary questions of admissibility and provides that the Military judge is not bound by the rules of evidence except those with respect to privileges. Therefore, Trial counsel can offer prior statements of others, prior Article 32 testimonies, photographs, police reports, medical records, affidavits, etc.

[16] *U.S. v. Wiley*, *supra*, offers a helpful discussion of what it means for some evidence to be more probative than other evidence concluding that "[t]his means … the link between the evidence and the fact for which it is offered is logically shorter and tighter than the link from other available evidence to the fact in issue."

[17] *U.S. v. Shaw*, *supra*.

[18] 31 M.J. 43 (CMA 1990).

OPERATIONAL ENVIRONMENTAL LAW

COLONEL JOHN S. VENTO

It's happened. You've been deployed to an international contingency operation[1] and the operational wing commander calls you in to discuss, no, you would never have guessed it, whether she must comply with federal environmental law in constructing an extension to the existing runway through the rainforest surrounding the base. You wonder whether domestic environmental law of the United States has extraterritorial reach? No, you recall, it does not.[2] You breathe a sigh of relief and change the topic to something you're more confident in, such as fiscal law. "You are," as my favorite law professor frequently said, "100% right, but I'll tell you where you're wrong."[3] Although the strict requirements of domestic environmental law are not applicable to most overseas operations, it is the **policy** of the United States to adhere to U.S. environmental requirements where feasible.[4] More importantly, Executive Order (EO)12114, 44 Fed. Reg. 1957 (1979), reprinted at 42 U.S.C. § 4321 (1998), extends the intent of the National Environmental Policy Act (NEPA),[5] 42 U.S.C. §§ 1531-1543 (1993), overseas by creating similar environmental impact analysis requirements for specific categories of "major (federal) actions" which affect the environment outside the United States, its territories, and possessions. Whether by mandate or policy, the challenge is to maintain environmental quality while conducting day-to-day operations in sovereign nations that have different environmental expectations, concerns and infrastructures.[6]

EO 12114 defines a "major action" which has "significant environmental effects" outside the United States as one which:

(1) Involves substantial expenditures of time, money, and resources;
(2) Affects the environment on a large geographic scale, or has substantial or concentrated environmental effects on a more limited area; and,
(3) Is significantly different from other actions previously analyzed with respect to the environment.[7]

Col Vento (B.A., University of Pittsburgh; J.D., Duquesne University Law School; LL.M., University of Michigan Law School) is currently the Senior Individual Mobilization Augmentee at JACE.

Building a runway through the rainforest, for example, could certainly meet this test.

The EO also states that the DoD must conduct a documented review of *every* contemplated major action, *which is not otherwise exempt*, if an action may significantly affect the natural or ecological resources of any of the following:

(1) The global commons, that is the oceans or Antarctica;
(2) A foreign nation not participating with the United States in the action;[8]
(3) A foreign nation, which receives from the United States (during the action) a product, prohibited or strictly regulated by federal law; or,
(4) An area outside the United States with natural or ecological resources of global importance, that is resources either designated by the president or by international agreement as having global importance, e.g. the rainforest.

The exemptions are quite broad and are as follows:

(1) Actions that DoD determines do not do significant harm to the environment outside of the United States;
(2) Actions taken by the President or members of his Cabinet;
(3) DoD action taken pursuant to the direction of the President (or Cabinet member) during an armed conflict;
(4) Action taken pursuant to the direction of the President (or Cabinet member) when national security or interests is involved;
(5) Activities of the Defense intelligence components, such as DIA, NSA, etc.;
(6) Actions with respect to arms transfer to foreign nations;
(7) Actions taken with respect to membership in international organizations;
(8) Disaster or emergency relief actions; or,
(9) Where SECDEF approves additional exemptions after consultation with the Department of State.

The EO provides that where none of the exemptions apply, different types of environmental analysis and

documented review must be conducted depending upon the potential occurrence of adverse effect to one of the preceding four areas of natural or ecological resources. For example, if a major action (such as building the runway), is to occur in an area of global importance (the rainforest), there must be a "bilateral or multilateral environmental study or a concise environmental review of the specific issues involved." This study or review could include an environmental assessment, summary environmental analysis, or other appropriate documents.[9] Needless to say, the exemptions will be closely examined for applicability to avoid what may be time-consuming and onerous documented review requirements.

In summary, judge advocates must recognize that, whether by policy or mandate, there will be some measure of environmental review and evaluation by United States forces in regard to extra-territorial operations. At a minimum, all reasonable steps should be taken to act as a good environmental steward consistent with mission requirements.

Note: This article is limited to the requirement to conduct an environmental impact analysis on an operation off of an installation overseas. If the operation would have been on an installation overseas, then the Final Governing Standard (FGS) would apply for that operation; and if no FGS exists, then the Overseas Environmental Baseline Guidance Document (OEBGD) would apply.

[1] A contingency is defined as "an emergency, involving military forces, caused by natural disasters, terrorists, subversives, or requiring military operations." AFFARS Appendix CC, ¶ CC-102, 4 JUNE 1999. It includes peacekeeping and peace enforcement; and support to diplomacy, such as peacemaking.

[2] *See NEPA Coalition of Japan v. United States Department of Defense*, 837 F. Supp. 466 (D.D.C. 1993) (refusing to hold that NEPA has extraterritorial applicability because of the strong presumption against it, and the possible adverse impact upon existing treaties and U.S. foreign policy).

[3] Professor Aaron Twersky.

[4] This policy is implemented in DoD Dir. 6050.7, *Environmental Effects Abroad of Major DoD Actions*, 31 March 1979; and, as to the Air Force, in AFI 32-7006, *Environmental Program in Foreign Countries*, 29 APR 1994, which is undergoing substantial revision by HQ USAF/ILEVI, and which in its proposed revised form, Draft#10, 18 Dec 00, states that "It is Air Force policy to achieve and maintain environmental stewardship in all activities and operations to ensure continued long-term access to the air, land, and water needed to conduct the Air Force mission in the U.S. and abroad."

[5] For the uninitiated, NEPA is our basic national charter for protection of the environment. It establishes policy, sets goals, and provides means for carrying out the policy. It also contains "action-forcing" provisions to ensure that federal agencies act in accordance with the letter and spirit of the Act. 40 CFR §1500.1(a).

[6] DoD facilities located outside of those areas defined in E.O. 13148 § 902 (b) (formerly referred to somewhat ambiguously as "the customs territory of the United States") or in other sovereign nations are encouraged to abide by the spirit of the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. § 11001 *et seq*. Abiding by the spirit of EPCRA is interpreted as planning for and preventing potential harm to the public through chemical releases, and observing the environmental protection hierarchy in the Pollution Prevention Act, 42 U.S.C. §§ 13101-13109, i.e., source reduction, recycling, treatment, and disposal. For a more comprehensive treatment of this topic *see* Phelps, R., Lt. Col., *Environmental Law for Department of Defense Installations Overseas*, 4th Ed., March 1998, United States Air Forces in Europe.

[7] It would therefore not be applicable to routine deployments of units, ships, aircraft, or mobile military equipment. *See* Department of Defense Overseas Environmental Baseline Guidance Document, 17-2, ¶ 9 (March 2000).

[8] This has been broadly defined to avoid the Order. For example, the Office of the Legal Advisor to USEUCOM, and the Office of the Judge Advocate, United States Army Europe and Seventh Army, have taken the position that, as to Operation Joint Endeavour, Bosnia and "other former warring factions nations" were "participating nations" under the Order. Thus, rather than compliance with the Order, there has only been compliance with the general environmental steward mandate, i.e. that there will be compliance to the extent that doing so does not unacceptably interfere with operations, particularly force protection. *See* E-mail Message to Major Richard Whitaker, Professor, International and Operational Law Department, The Judge Advocate General's School (Army), entitled Environmental Law in Bosnia, 28 March 1997, from Robert E. Dunn, Attorney Advisor, Office of the Judge Advocate General, United States Army Europe and Seventh Army (available from the Army JAG School).

[9] Air Force activities will follow the Environmental Impact Analysis Process (EIAP) procedures found in DoDD 6050.7 and use the additional specific rules for overseas EIAP found in § 2.1 and Chapter 5 of AFI 32-7061.

MENTORING THE YOUNG JAG

CAPTAIN MICHAEL P. DILLINGER

INTRODUCTION

It's only fair to begin this article by introducing myself. I am a direct appointee and graduate of JASOC 01-A, having entered active duty on August 24, 2000. I am sure most people will not be surprised to learn money was not the reason I joined the Air Force.[1] In fact, I am almost certain money was not the determining factor for most of my JASOC classmates.[2] The reason I joined the Air Force JAG Department, the reason I will continue my military career, and my motive for writing this article can be summed up in one word – mentoring.

WHAT IS MENTORING?

I guess I shouldn't be surprised the Air Force has a publication defining mentoring. I am quickly realizing the Air Force has an instruction on nearly everything. AFI 36-3401 provides "[m]entoring . . . is a relationship in which a person with greater experience and wisdom guides another person to develop both personally and professionally . . . . Mentoring is an essential ingredient in developing well-rounded, professional, and competent future leaders."[3] Effective mentoring can be further defined as guiding a person by discreetly passing on knowledge and experience while not using position to coerce their compliance.

WHO ARE THE MENTORS OF YOUNG JAGS?

Webster's New World Dictionary defines mentor as "a wise advisor or a teacher and coach." AFI 36-3401 provides "[a] mentor is defined as "a trusted counselor or guide."[4] The Air Force correctly recognizes mentoring is not limited to immediate supervisors.[5] In fact, young JAG's can be mentored by nearly everyone, especially more experienced attorneys, paralegals, and civilian personnel. Certainly, nearly everyone reading this article can recall their past and present mentors.

WHEN CAN YOUNG JAGS BE MENTORED?

The short answer to this question is anytime. The logical approach is for the leadership to initiate mentoring. The important lesson here is that it is crucial to provide guidance to young JAGs. Even a little time will likely produce immeasurable appreciation from the person being mentored.

Unfortunately, others not taking the time to mentor is one complaint many of my JASOC classmates related to me when I solicited input for this article. This seems to be related to many of the offices being understaffed.

HOW CAN YOUNG JAGS BE MENTORED?

AFI 36-3401, para 2.1 provides:

> Air Force mentoring covers a wide range of areas, such as career guidance, technical and professional development, leadership, Air Force history and heritage, air and space power doctrine, strategic vision, and contribution to joint warfighting. It also includes knowledge of the ethics of our military and a civil service professions and understanding of the Air Force's core values of integrity first, service before self, and excellence in all we do.

Somewhat surprisingly, many young JAGs I spoke with are more interested in developing their general knowledge of the Air Force than continuing legal education. This was especially apparent among direct appointees. Additionally, more mentoring in JASOC on the internal operations of a base legal office was an often-requested topic. Other areas included mentoring on the base mission, types of aircraft and weapons, and the base chain of command. Mentors at the base level simply taking the time to orientate young JAGs to their assigned office and base, and introducing them to other base personnel could alleviate many of the base-level problems.

However, mentoring is not limited to the areas listed in AFI 36-3401. Often the most effective mentoring concerns the practical problems associated with being a young JAG. Examples of practical advice sought by young JAGs includes understanding the peculiarities of the military lifestyle, working on a particular base, or living in the geographical area. This advice will allow young JAGs to make good decisions in their careers and off-duty life.

WHY SHOULD YOUNG JAGS BE MENTORED?

The answer to this is obvious. A young JAG with a positive mentor will not only perform better, but also

Capt Dillinger, (B.S., University of Mary; J.D., University of North Dakota) is currently an Assistant Staff Judge Advocate at Mountain Home AFB.

enjoy the experience and continue their Air Force career past their initial obligation. After speaking with a number of my counterparts, it is readily apparent that a positive initial assignment experience often makes the difference concerning retention decisions.

There are also definite benefits for the mentor. The amazing part of mentorship is that most mentors do not realize the positive effect their actions have on the protégé and the protégés do not realize the pleasure most mentors receive from passing along their knowledge. Mentorship is definitely a win-win situation where both parties receive benefits.

CONCLUSION

Ability to mentor is not specifically evaluated on Air Force performance reports. However, it is practiced daily in the Air Force JAG Department. This is a commendation to the individuals currently working in the Department. It is essential these individuals know their continued mentoring is vital not only to the career progression and retention of young JAGs, but can also benefit them as well.

[1] However, this is, at best, a generalization. For example, in my case, I am actually making more money than the average new attorney would received in North Dakota. The JAG Continuation Pay program has also improved the compensation discrepancy between military and civilian practitioner. Nevertheless, the salaries offered to me and many other young attorneys in the metropolitan areas are substantially more than most young JAGS are paid.

[2] Many of my JASOC classmates related to me they expect an Air Force JAG career to provide a better lifestyle than their law school classmates are experiencing while working at law firms. Patriotism and a sense of making a difference were additional reasons cited.

[3] Air Force Instruction 36-3401, Air Force Mentoring (1 June 2000).

[4] *Id*. at para. 1.

[5] *Id*. at para. 3.

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