The Reporter

March 2002

OFFICE OF THE JUDGE ADVOCATE GENERAL

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

The Reporter

FROM THE EDITOR

Our lead articles include a very instructive exploration into the often-overlooked false exculpatory statement instruction and an interesting and thought-provoking piece on the current usefulness of the Uniform Code of Military Justice to commanders. In our FYI section, there are two excellent articles that provide valuable practice pointers on handling medical malpractice claims from both the JAG and paralegal perspective. We extend our sincere appreciation to the authors who submitted the pieces that appear in this edition. Special thanks to the former editor of *The Reporter*, Major Eric Mejia, for his invaluable assistance in the preparation of this edition.

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The Reporter is published quarterly by the Air Force Judge Advocate General School for the Office of the Judge Advocate General, United States Air Force. Views expressed herein, unless otherwise indicated, are those of the individual author. They do not purport to express the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government.

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)

Subscriptions: Paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

Citation: Cite as [Author], [Title], The Reporter, [date], at [page number]

Distribution: Special, Air Force legal offices receive *The Reporter* from AFLSA/CCQ, Bolling AFB, D.C. 20332-6128 (Comm (202) 757-1515/DSN 297-1515).

LITIGATING WITH THE LAW:
AN INTRODUCTION TO THE "FALSE EXCULPATORY STATEMENTS" INSTRUCTION

Major John E. Hartsell

> *"Then you are to look at [the statements] to see whether he satisfactorily explains to you the making of these false statements; and, if he does not, they are the foundation of a presumption against him, for the reason I have given you, because, if they are not in harmony with nature, if they are not in harmony with the truth, if they do not speak the voice of truth, then they speak the voice of falsehood, they speak the voice of fraud, they speak the voice of crime, for they are not in harmony with that great law of truth, which, in all of its parts, is consistent and harmonious."*[1]

Several years ago, as a base-level judge advocate, I was assigned to prosecute a special court-martial; I was to be the lead counsel. The case was going to be a difficult one and I started working on it right away. I followed my usual case preparation routine -- reading the Air Force Office of Special Investigations report, interviewing prospective witnesses, viewing various pieces of physical evidence, writing out a detailed proof-analysis, and then choreographing and scripting every part of the trial (e.g. voir dire, opening statement, direct examinations, anticipated cross-examinations, closing argument, etc.). Several days later, my trial notebook was loaded and I was supremely confident in my case. Being prepared well in advance of trial, I had a full week left to fine tune various aspects of my case. I then began to focus on little, seemingly unimportant aspects of the case. In particular, I began to read the instructions provided in the Military Judge's Benchbook.[2]

Reading the Military Judge's Benchbook was not actually my idea. The Chief Judge of the circuit[3] was kind enough to provide United States counsel and defense counsel with feedback after every trial. He would offer helpful suggestions on improving our courtroom skills and he would routinely encourage both parties to study the instructions. I can't speak for other counsel, but I subconsciously filtered the judge's sage advice and interpreted it to mean, "Study the instructions *after* you've finished preparing everything else in your case." I soon learned, my interpretation was completely wrong.

I began to study the instructions; I started with the evidentiary instructions, reading them one by one and taking note of where they were positioned in the Military Judge's Benchbook and when—in terms of order—they would be read to the court members. I learned a lot. I learned the instructions were just as important as the elements of the of-

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fense in my initial proof analysis and I should have used them to help develop both the theme and the direction of my case.

Each instruction taught me how I needed to adjust my case to strengthen it. Each instruction taught me what testimony I needed to solicit from my witnesses in order to trigger the particular instruction. Instruction after instruction provided incredible insight. Then, I got to the very last evidentiary instruction. It was the last instruction to be read to the members; incredibly, I'd never even heard of it, despite having tried dozens of litigated cases. I felt as if I'd found gold in my own backyard. The instruction had the power to completely change my case; it had the power to replace my hyperbole-filled arguments with unrebuttable law. I decided to scrap much my earlier case preparation and start all over. I decided to craft my entire case around the "false exculpatory statements" instruction. [4]

"I felt as if I'd found gold in my own backyard. The instruction had the power to completely change my case"

Ask yourself, "What is the 'false exculpatory statements' instruction?" [5] Do you know? If you do, you may be in a small minority. The "false exculpatory statements" instruction is one of the most powerful tools in a prosecutor's arsenal and it is staggering to learn that few prosecutors are aware of it, much less utilize it. The "false exculpatory statements" instruction can help impeach a testifying accused, can level the playing field if the United States' witnesses have credibility problems, and can even assist in winning a close case. Unfortunately, the "false exculpatory statements" instruction is little known, unappreciated, and under utilized. Thus, this article seeks to introduce the instruction, review its legal foundations, and then discuss its legal potency in the courtroom.

The "false exculpatory statements" instruction is based upon the Supreme Court decision in *Wilson v. United States*.[6] In *Wilson*, a badly decomposed body was discovered near an Arkansas creek. A subsequent investigation revealed that Wilson had camped with the victim around the time of the murder and Wilson soon became a suspect. In Wilson's possession were found the victim's horses, wagon, gun, and bedclothing.[7] Wilson's footprints also matched footprints that were found near the decomposed body. The facts suggested a classic circumstantial case; however, there was additional incriminatory evidence. Wilson claimed the victim was his uncle, but the victim's relatives denied the relationship. Wilson claimed he knew the victim for years, but testimony revealed Wilson and the victim had only recently been introduced to each other. Wilson claimed the victim rode away from their camp, but Wilson was in possession of both the victim's saddle and his shoes. Wilson also claimed the footprints near the dead body were not his, he explained he had only been in the vicinity of the dead body; nonetheless, he declined an offer to confirm his alibi. Wilson also made contradictory statements about where the victim had gone when he allegedly left camp.[8] The facts suggested Wilson was a liar and his apparent false statements demonstrated his consciousness of guilt. The trial judge instructed the members that they could consider whether or not Wilson's various pre-trial statements were false and if so, whether or not there was a satisfactory explanation for the falsehoods. The judge colorfully instructed the members (as one can see from the introductory quote *supra*) that if the statements were not in

"harmony with truth" then they "speak the voice of crime."[9] The Supreme Court affirmed the murder conviction and held, "The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt, to be dealt with by the jury."[10] Wilson now serves as the general, legal basis for the "false exculpatory statements" instruction.[11]

The military began to use the "false exculpatory statements" instruction approximately seventy years later.[12] In *Opalka*, the accused was investigated for allegedly stealing a tachometer from a 1965 Mustang. The accused consistently maintained his innocence; however, his explanations of where he obtained the tachometer changed. The accused initially told an investigator that he purchased the tachometer from a store in Philadelphia, Pennsylvania. However, at trial, the accused told a different tale and claimed a friend purchased it for him. In fact, the accused's friend even testified that he purchased the tachometer for the accused at a gas station in Colombia, Pennsylvania. Both stories could not be true; at some point, the accused provided an inaccurate, if not untruthful, statement.

The court panel was advised they could consider any false exculpatory statements by the accused as evidence of consciousness of guilt[13] and the accused was subsequently convicted. On appeal, the appellant contended that the instruction was too abstract and the instruction should have specified which of the statements were shown to be false. The Court relied upon the *Wilson* decision and held, "Similarly, under military law, exculpatory statements by an accused which are successfully contradicted or otherwise shown to be false may be considered as evidence of a 'consciousness of guilt.'"[14] Moreover, the Court held that simply providing the general instruction and omitting specific false statements was sufficient.[15]

There are an endless number of ways to prepare a chicken for dinner, but all would agree that the basic ingredient of any chicken dish involves the use of a chicken. Similarly, there are an endless number of ways to prepare a case for prosecution, but all would agree that a basic ingredient involves the identification of incriminatory evidence. Solid, incriminatory evidence procures convictions and sustains them on appeal. Consciousness of guilt is solid, incriminatory evidence; in fact, it is incredibly powerful evidence.

The false exculpatory statements instruction is triggered by a false explanation or statement by the accused. A "general denial of any illegal activity" is insufficient.[16] The reason general denials are insufficient is obvious — "in order to decide that an accused's general denial of illegal activity is false, the factfinder must decide the very issue of guilt or innocence; and so the instruction would only tend to produce confusion because of its circularity."[17] Similarly, an accused would not appear to be subject to both a false swearing[18] or a false official statement[19] charge and the "false exculpatory statements" instruction for the same offense. On the other hand, the instruction extends beyond false explanations for a crime; the false utterance can concern virtually any false exculpatory statement of fact. Thus, an accused who provides a phony alibi is just as likely to hear the "false exculpatory statements" instruction as is an accused who says, "I don't even know the victim."[20] The instruction can be requested under many types of fact scenarios.

Imagine a case wherein an accused commits a crime, is questioned, and then provides a ridiculous alibi. Let's say, for the sake of argument, the alibi is ridiculous because he does not have time to fabricate a more sound or elaborate excuse for his criminal behavior. Now, imagine a trial three months later wherein the accused takes the stand and re-

markably has a more factually sound alibi. The accused has had time to learn the law, he's had time to learn the facts, he's had time to think, he's had time to reflect, and he's had time to come up with a new, perhaps more credible, story. Have you ever seen this happen? If so, did trial counsel request that the judge give the "false exculpatory statements" instruction?[21] When an accused is unabashed about providing a veritable smorgasbord of excuses, a simple—lengthy—cross-examination, followed by the "false exculpatory statements" instruction has the potential to expose unscrupulous lies and educate court members on how they may evaluate and consider those lies.

Imagine a case wherein an accused commits a crime, is questioned, and reveals selective facts to the investigator. The accused insists the selective facts are the truth, the whole truth, and nothing but, then further questioning reveals he hid additional facts. Imagine a different case wherein the accused tells investigators one story and then he tells his friends at work or in the dormitory an entirely different version of the "facts." How about a different case wherein the accused says he was nowhere near the crime scene, but when his co-conspirators are immunized to provide testimony against him, he alleges he was at the crime scene, but it was the fault of the immunized co-conspirators? The "false exculpatory statements" instruction can be requested in all these cases to highlight the importance of the false statements, to educate court-members on the concept of consciousness of guilt, and to contribute to a prosecution theme relating to credibility.

Many cases hinge on credibility. Cases involving sex crimes are too often reduced to "he said, she said." Cases involving drugs often require the use of immunized witnesses whose motives to testify are challenged by the defense. Charges involving an intent to deceive must prove the intent beyond a reasonable doubt. Credibility cases can be extremely difficult, especially if your witnesses have provided inconsistent statements in the past, have a reputation for untruthfulness, and/or the accused elects not to testify and attempts to limit direct attacks on his credibility.[22] Credibility is equally important if the accused takes the stand[23] and puts on a good performance or the defense puts on an effective "good soldier" or "reputation for truthfulness" defense. Trial counsel must be prepared to address any and all credibility issues that will be presented to the trier of fact; the "false exculpatory statements" instruction will assist trial counsel in keeping the credibility focus on the accused rather than on other extraneous facts or witnesses.[24]

Trial counsel and defense counsel should heed the words of wise judges who recommend they read the instructions. Trials can be won or lost if members choose to believe or disbelieve an accused. Instructions should be considered at the start of case preparation—not when case preparation has concluded. Surely the Chief Judge knew nothing about my particular case, but he knew volumes about how both trial and defense counsel should prepare for litigation. Cases can be, and should be, fashioned and shaped to properly utilize the law. Trial counsel, in particular, must understand the magnitude of the "false exculpatory statements" instruction and must avail themselves of its value. If an accused's credibility is as sturdy as Jell-O®, trial counsel should illuminate that fact.

The credibility of the accused can be a central theme in the prosecution of an accused, and trial counsel should prepare their case with the accused's credibility in mind. Tapes, writings, videos, and testimony should all be scrutinized, from the outset, to determine whether or not the accused has made statements. If the accused has made statements, virtually any statements related to the alleged offense, trial counsel should investi-

gate whether or not there is any testimonial or physical evidence that undermines the credibility of the accused's statements.[25] If so, trial counsel should emphasize the accused's lack of credibility throughout their case. Trial counsel should consider discussing credibility during voir dire, consider addressing credibility during opening, dwell upon credibility during direct examination or cross examination, and hammer home credibility in closing argument. If the accused peddled a lie, made a covenant with dishonesty, tortured the truth, was unscrupulously untruthful, or attempted to hoodwink, bamboozle, or play others for fools, then trial counsel must highlight the lies and demonstrate their significance during closing argument. Once members have been picked, once the credibility evidence has been presented, once a consciousness of guilt argument has been made, once all the other evidentiary instructions have been given, the military judge gives the members their final instruction on evidence: "false exculpatory statements."[26] This is how you can litigate with the law.

[1] Wilson v. United States, 162 U.S. 613, 617, 16 S.Ct. 895, 898 (1896). In *Wilson*, a defendant appealed his murder conviction alleging, in part, that the jury instruction regarding his alleged false statements was improper. The Supreme Court found no error in the false exculpatory statement jury instruction and affirmed the conviction. *Wilson* now serves as the basis for the "false exculpatory statements" instruction in military courts-martial. *See also,* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 7-22, note 2 (1 Apr. 2001), [hereinafter BENCHBOOK].

[2] BENCHBOOK, *supra* note 1.

[3] Colonel James A. Young, III, currently, Chief Judge, Air Force Court of Criminal Appeals.

[4] BENCHBOOK, *supra* note 1.

> "There has been evidence that after the offense(s) (was)(were) allegedly committed, the accused may have (made a false statement) (given a false explanation)(_____) about the alleged offenses.
>
> Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused.
>
> If an accused voluntarily offers an explanation or makes some statement tending to establish (his)(her) innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish (his)(her) innocence. The drawing of this inference is not required.
>
> Whether the statement was made, was voluntary, or was false is for you to decide.
>
> (You may also properly consider the circumstances under which the statement(s) (was)(were) given, such as whether they were given under oath, and the environment (such as (fear of law enforcement officers)(a desire to protect another) (a mistake)(____)) under which (it was)(they were) given.)
>
> Whether evidence as to an accused's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members."

[5] *Id*., para 7-22.

[6] Wilson, *supra* note 1.

[7] Wilson, *supra* note 1, at 896.

[8] *Id.*

[9] *Id.* at 898.

[10] *Id.* at 899.

[11] BENCHBOOK, *supra* note 1, para. 7-22, Note 2.

[12] United States v. Opalka, 36 C.M.R. 938 (A.F.B.R.), *petition denied*, 36 C.M.R. 541 (1966).

[13] The instruction given to the members in Opalka closely resembles the instruction currently provided in the Military Judge's Benchbook. *Id*. at 944, *cf*., BENCHBOOK, *supra* note 1, para. 7-22.

[14] *Id.* at 944 (citations omitted).

[15] *Id.* at 944-945.

[16] United States v. Colcol, 16 M.J. 479, 484 (CMA 1983). "However, unlike a false explanation or alibi, given by a suspect when he is first confronted with a crime, his general denial of guilt does not demonstrate any consciousness of guilt." *Id.* at 484.

[17] *Id.*

[18] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 79 (2000).

[19] *Id.* at ¶ 31.

[20] Wilson, *supra* note 1.

[21] Presumably, trial counsel are not content with simply asking for the "false exculpatory statements" instruction without first spending considerable time in cross-examination highlighting the intrepid accused's remarkable ability to fashion two contrary statements out of one single truth.

[22] *See* United States v. Goldwire, 55 M.J. 139 (2001). A discussion on how to impeach the credibility of a nontestifying accused may be found in, Mathews, Christopher & Hartsell, John E.; *Impeaching a Silent Accused: "It is about credibility."* THE REPORTER. Sep. 2000.

[23] United States v. Pruitt, 43 M.J. 864 (A.F. Ct. Crim. App. 1996).

[24] The "false exculpatory statements" instruction does not unfairly shift the burden of persuasion to the defense." United States v. Mahone, 14 M.J. 521, 525 (A.F.C.M.R. 1982).

[25] Trial counsel must also give notice to the defense of any and all statements by the accused. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(d)(1) (2000).

[26] Trial counsel should make every effort to avail their case of the "false exculpatory statements" instruction; if not, if the judge declines to give the instruction, trial counsel can still argue consciousness of guilt.

IS THE UNIFORM CODE OF MILITARY JUSTICE STILL AN EFFECTIVE LEADERSHIP TOOL OF COMMAND?

COLONEL JOSEPH L. HEIMANN

On 31 May 2001 the Uniform Code of Military Justice (UCMJ) celebrated its 50th birthday.[1] This anniversary became the catalyst for the National Institute of Military Justice to sponsor a Commission on the 50th anniversary of the UCMJ.[2] The Commission issued a report of its findings and recommendations in May of 2001.[3] Highlighting that the last comprehensive study of courts-martial took place in 1971," the commission concluded that over the past three decades, "…**military justice in the United States has stagnated, remaining insulated from external review and largely unchanged despite dramatic shifts in armed forces demographics, military missions, and disciplinary strategies.**" (emphasis added)[4]

The commission also concluded that because of a "perceived inability of the military law to deal fairly with the alleged crimes of servicemembers, a cottage industry of grassroots organizations devoted to dismantling the current court-martial system has appeared…."[5] The purpose of this paper is to ask the question, "Is the UCMJ still an effective leadership tool of command?" The commission, composed of all lawyers clearly has concerns. What about commanders?

Since the beginning of the Republic, it has been accepted that there is a unique need for discipline in the military.[6] All agree that the maintenance of discipline is a critical component of successful leadership.[7] General George Washington believed that discipline is the "soul of an Army."[8] Despite many changes, this belief remained unchanged in the first 200 years of the existence of this republic. In 1974 Supreme Court Justice Lewis F. Powell, Jr. writing for the highest Court in America stated "…the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past."[9]

Few can argue that the need for discipline in the military is an accepted fact. The question then becomes is the UCMJ still an effective leadership tool for a commander to fairly maintain discipline within his/her unit.[10] In an effort to answer that question, this article reviews historical military justice statistical trends, with particular emphasis on trends since the implementation of the UCMJ and even greater emphasis on the period after the all-volunteer service in 1973.[11] This article then compares changing attitudes of commanders on the UCMJ by comparing changes in attitudes about the UCMJ from a survey given the 1978 Navy War College class and the 2002 Air Force War College class. Taken together, the conclusion is clear. The UCMJ remains an effective leadership tool for commanders in the 21st century.

STATISTICAL TRENDS

The course of military justice has seen several fundamental shifts that make it difficult to track statistical changes in disciplinary actions over lengthy periods of time. Despite this difficulty, it is still useful to briefly consider some historical trends in military justice.

From the beginning of the Republic, discipline was maintained in the Army under the Articles of War which were adopted in 1775 by the Continental Congress and subject to revision only seven times until the adoption of the UCMJ in 1951.[12] Of those revisions only two or three are considered "major" revisions.

The Navy began with the Rules for the Regulation of the Navy of the United Colonies, which the Continental Congress adopted in 1775. These subsequently became the "Articles for the Government of the Navy" and, thus, remained in effect with four revisions until the Navy became subject to the UCMJ in 1951.[13]

Both codes gave great latitude to commanders and noncommissioned officers in the exercise of discipline.

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For example, in 1790 a standing order for the Army provided that a soldier who displayed an unshaven face and soiled uniform would be punished with twenty lashes.[14] In the 1870s noncommissioned officers, particularly first sergeants, were criticized for subjecting their men to persecution with no recourse to justice.[15]

Each year from 1922 to 1932, the U.S. Army court-martialed between 170 and 210 soldiers for every thousand on active duty.[16] (These rates per thousand compare with today's Air Force average of 3 per thousand in 2001.)[17] World War II saw over twelve million men and women called to arms.[18] Before the draw down was completed in 1949 almost 2 million court-martial convictions were handed down with over 80,000 general courts-martial.[19] Court-martial rates per thousand in WWII thru 1949 fluctuated from a low of 41 per thousand in 1946 to a high of 168 in 1948.[20]

It was fallout from WWII that brought about the most fundamental shift in the nature of military justice.[21] After extensive hearings focused on alleged abuses in the system, Congress passed the Uniform Code of Military Justice on 5 May 1950.[22] The most dramatic aspect of the new law was to set higher standards of due process for service members accused of crimes.[23]

While there have been several substantive changes the most significant one affecting a statistical review was a change to Article 15 of the UCMJ that became effective on 1 February 1963.[24] The change modified Article 15 to significantly increase the punishment a commander could impose administratively under Article 15 for minor criminal misconduct.

This change is important because it ushered in a significant reduction in the number of courts-martial conducted because of a drastic reduction in the number of summary courts-martial. For instance, in 1964 the services saw an over 50% reduction in the number of courts because of the changed authority regarding Article 15.[26] Therefore, in light of the changes outlined above, when looking at the evolving role of the UCMJ as a leadership tool from a statistical standpoint, it is best to begin with 1965.

Courts-Martial: Using Air Force statistics, we see a steady decline in the rates per thousand of courts-martial conducted in the Air Force over the last thirty-five years.[27] (See Figure 1) While at first glance the reductions may appear statistically insignificant, the trend suggests several significant points. First, the courts-martial reduction from 1965 to 1980 shows a drop of 35% in the number of courts as the Air Force transitioned to the all-volunteer force. Second, if one assumes the full transition to an all-volunteer force took 10 years, an almost constant steady state in the number of courts in the Air Force since 1985 can be seen. Since 1985, the rate of courts per thousands has remained within a very narrow range of 2.54 for a high and 2.39 for a low. This is a fluctuation of less than 5% over the past 15 plus years. This stability in commander's use of a court-martial to maintain discipline is particularly impressive to the utility of the UCMJ in light of the many changes in force structure and operational dynamics that have occurred since in 1985.

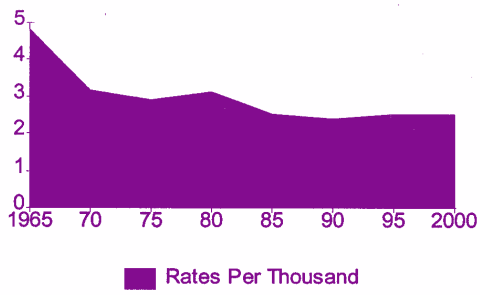
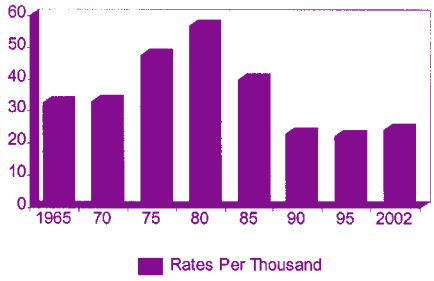


Figure 1. Air Force Courts-Martial

Just as impressive as the constancy of the rates of courts is the constancy in the offenses, charged in court by commanders. Looking at the top offense in each of the considered years, 1985, 1990, 1995, & 2000, use of a schedule I, II, or III controlled substance was the top offense in every year. The second top offense for the four years was split equally between use of marijuana and larceny of non-military property over $100. A review of the entire list of top seven offense show only minor deviations in the differences of offenses in which commanders found that a courts-martial was the most effective tool to address disciplinary issues of their command.[28]



Article 15s: Using Air Force statistics, we see a less obvious picture on the role Article 15s have played in the maintenance of discipline over the past 35 years. (See Figure 2) Despite the lack of a clear

Figure 2. Article 15s

constant trend since 1965, the statistics support a strong case for the effectiveness of Article 15 of the UCMJ by commanders throughout the past thirty-five years for several reasons. First, it is reasonable to expect an initial steady growth in Article 15 usage from a 1965 usage rate of 32.6 per thousand to a total of 56.6 per thousand in 1980 after the implementation of enhanced punishment options on 1 February 1963.

In addition to growth brought on by increased usage borne out of increased familiarity, the 1980 peak in Article 15s is reasonable in light of the Air Force's efforts during the late seventies to deal with a drug problem, particularly marijuana use, that had become prevalent not only in society but also in DOD.

Third, the statistics show remarkable constancy over the past decade despite significant challenges brought on by the end of the cold war, force reductions, and fundamental shifts in operational tempo. Looking to the years 1990, 1995, and 2000 a variation within ten percent can be seen.

Overall, a review of the statistics available on the number of courts-martial and Article 15, UCMJ actions over the past 35 years lend strong support to the conclusion that commanders consider both alternatives viable tools of leadership in an Air Force that has undergone remarkable changes in the last thirty –five years. The near constancy of the court-martial rates per thousand in the Air Force over the past three decades strongly suggests the continued need and viability of the court-martial well into the 21st century. At the same time, the fluctuations in the rate of Article 15s over the past thirty-five years are a testament to the flexibility of this tool of leadership. Its usage has changed in response to disciplinary threats facing command; but, ultimately, the real test of these tools of command, which can only be measured by commanders themselves, is the extent to which commanders accept them and the burdens they place on commanders as they work to effectively lead their organizations into the 21st century.

COMMANDERS SURVEYS

> "[T]he real test of these tools of command…is the extent to which commanders accept them and the burdens they place on commanders as they work to effectively lead their organizations"

So do commanders view the UCMJ as an effective tool of leadership? In 1953, the President directed the SECDEF to look into concerns about a "…growing lack of confidence among Armed Forces personnel in military service as a worthwhile and respected career."[29] The SECDEF directed a committee of flag officers from the four DOD components to look into the issue.[30] In their report dated 30 Oct 53, they stated: "[t]he committee unanimously concludes that professional standards have been permitted to deteriorate through lack of effective disciplinary controls. The adoption of the Uniform Code of Military Justice, with its unwieldy legal procedure, has made the effective administration of military discipline within the Armed Forces more difficult."[31]

In 1971 the Chief of Staff of the Army sent a team of two officers and one noncommissioned officer to evaluate leadership lessons learned in Vietnam.[32] In Vietnam, the team reported "…almost without exception the entire noncommissioned officer corps and most company grade officers believe that the judicial machinery of the armed forces had totally collapsed and is unresponsive to their needs."[33] The team found that virtually all believed that the military justice system was unworkable.[34] Despite these findings and the conclusions the UCMJ continued to remain the principal disciplinary tool available to commanders.

In 1978 in an attempt to quantify the level of concern about the "complexity and cumbersomeness" of the UCMJ, Colonel George L. Bailey, USMC, a Judge Advocate surveyed the Navy War College (NWC) class of 1978.[35] In the introduction to his research paper Colonel Bailey says that his "…. report contains an indictment of the military justice system."[36] He concludes his paper by stating there "…appears to be little doubt that our present military justice system is in substantial disarray, too costly, and in need of major repair."[37] In making these statements he relies to a great degree on responses to surveys given the NWC class of 1978.

By providing the NWC class of 1978 with his survey, Col Bailey was able to survey 173 officers in the grades of 0-4 thru 0-6 on their view of the UCMJ and its usefulness to them in their command.[38] His survey group all had command experience and, of those, 40% had more than three years of experience in command and 85% had more than one year experience.[39] His survey of 46 questions provides significant insight into the attitude of commanders about the usefulness of the UCMJ as a tool of leadership without ever directly asking the question.

Several responses to the survey are particularly worth highlighting. First, when asked if they believed that "the balance between the legal rights of the accused and the needs of command has tilted too far in favor of the accused", 74% of the officers said that they thought it had tilted too far in favor of the accused. Along this same line when they were asked their opinions of the rights of the accused, 77% thought that the accused had "too many rights" or "way to many rights." Second, when asked to what extent the NWC class thought that military justice impacts on "combat readiness", 85% of the class felt the system had an impact on combat readiness with 40% expressing a strong belief that the system impacted combat readiness. Finally, the response to the following question is particularly illusive, "Do you believe that most commanding officers perceive the present military justice system as being: a) Generally worth the cost in manhours and resources or b) Presently too costly in terms of manhours and resources." Eighty-two percent (82%) of the members of the NWC class of 1978 felt the current system was too costly in terms of manhours and resources.

In assessing the weight these survey answers should be given, it is important to keep in mind that 75% and 85% of the respondents had either initiated Article 15 or court-martial charges, respectively, against a member of their command. Further, 34% had spent more than 10% of their average day in their last command working military justice matters. Clearly this was a survey group that must be given credibility on the issue of the effectiveness of the UCMJ as a tool of leadership. The question then becomes, despite the statistics indicating a much greater acceptance of the UCMJ over the last several decades is this impression supported by the commanders in today's military? In an effort to answer this question the Air War College (AWC) class of 2002 was given the almost exact same survey as the NWC class of 1978. Their responses suggest a significant change in attitude about the UCMJ and the military justice system by commanders today.

The Air Force War College class of 2002 consists of a mixture of officers from all components of the DOD. Over 90% of the officers are in the grade of 0-5 with the remainders being in the grade of 0-6 with the average length of service being 20 years. The survey was voluntary for the approximately 200 active duty officers, with 75% of those being Air Force officers. Responses were received from 140 of the students.

The similarities between the survey groups were significant in a number of respects. First, like the NWC class 81% versus 85% had at least one year of command experience. Those with at least three years command experience only dropped from 40% to 35%. While the percentage of those referring a subordinate to a court-martial dropped from 85% to 45% the number who had imposed punishment under Article 15 remained virtually constant at 76% for the AWC to 75% for the NWC. The number spending at least 10% or more of their average day in their last command working military justice only dropped from 28% to 21%. These responses clearly support the proposition that the level of command experience and the involvement with the military justice system between the two groups were similar in more respects than not. It was here, however, that the similarities ended. Some of the distinctions were striking.

"Continued involvement of the commander remains critical to the continued success of the UCMJ as a leadership tool"

The greatest distinction between the two survey groups primarily focused on the acceptance by the AWC class of the due process rights the UCMJ affords men and women who serve in the military. In contrast to the NWC class, of which 77% thought the accused had too many rights, only 12% of the AWC class thought that an accused has too many rights. The number thinking that the accused had "too few" or "just enough rights" had jumped from 38% to 88%. When asked whether they thought an accused should be given the right to consult with a lawyer before deciding whether to accept an Article 15 the percentage agreeing went from 65% to 98%. Those who thought commanders understand the adversarial legal system jumped from 30% to 56%.

The acceptance by commanders today of the utility of the UCMJ is probably best highlighted by looking at their response to the same question regarding the perception of whether the military justice system is worth the cost in manhours and resources. Contrary to the 1978 NWC class, in which only 18% thought the

military justice system was worth the cost in man hours and resources, in the 2002 AWC class this number increased to 72%.

Overall, it seems clear that the AWC class of 2002 and, thus, commanders today, are significantly more comfortable with the status of the UCMJ as it exists today. As a group they indicated a strong acceptance of the added cost associated with a balanced system of justice in which the rights of the service are balanced against those of the accused.

CONCLUSION

In completing their report on the 50th anniversary of the UCMJ the commission made several recommendations. The commission's number one recommendation was to take senior commanders out of the process of selecting court members and making other "pre-trial legal decisions that best rest within the purview of a sitting military judge."[40] In making this recommendation the commission stated, "…the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice in the armed forces."[41] It has taken nearly fifty years for commanders to understand and accept their role in the UCMJ process. Continued involvement of the commander remains critical to the continued success of the UCMJ as a leadership tool. If commanders do not want to lose control of this valuable tool of leadership in the 21st century, they must remain vigilant against efforts to take it from them.

[1] 10 United States Code Section 801 et. seq.
[2] *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, National Institute of Military Justice Report (Washington D.C. May 2001).
[3] *Id.*
[4] *Id* at p. 3.
[5] *Id.*
[6] Baron Von Stueben, *Revolutionary War Drill Manual, A Facsimile Reprint of the 1794 Edition* (Mineola, N.Y.: Dover Publications, Inc., 1985), iii-vi.
[7] *See Generally*, Johnathan Lurie, *Arming Military Justice, Volume 1 The Origins of the United States Court of Military Appeals*, 1775-1950 (Princeton, New Jersey Princeton University Press, 1992).
[8] Quoted in Department of the Army Pamphlet No. 360-50, *Quotes for the Military Writer/Speaker,* 1982.
[9] *Schlesinger v. Concilman*, 420 U.S. 738, 757 (1974)
[10] *See Generally*, Perry M. Smith, *Rules and Tools for Leaders, A Down-to-Earth Guide to Effective Managing* (N.Y., N.Y. Avery 1998), pp. 27-32 and Noel M. Tichy, *The Leadership Engine, How Winning Companies Build Leaders at Every Level* (N.Y., N.Y.: Harper Collins Publishers, Inc. 1997), 104-127.
[11] William Bowman, Roger Little, and G. Thomas Sicilia, *The All-Volunteer Force After a Decade, Retrospect and Prospect* (Washington D.C.: Pergamon-Brassey's International Defense Publishers., 1986), 11.
[12] Homer E. Moyer, Jr., *Justice and the Military* (Washington D.C. The Public law Education institute, 1972), 9.
[13] *Id.*
[14] Ernest F. Fisher, Jr., *Guardians of the Republic, A History of the Noncommissioned Officers Corps of the U.S. Army* (Mechanicsburg, PA, 2001), 52.
[15] Jack D. Foner, *The U.S. Soldier Between Two Wars: Army Life and Reforms, 1865-1898*, (N. Y., N.Y.: Humanities Press, 1970), 61-62, 104-116.
[16] *Report to Honorable Wilber M. Brucker, Secretary of the Army by The Committee on the Uniform Code of Military Justice Good Order and Discipline in the Army* (Washington D.C.: Department of the Army, 18 January 1960), Chart found between pp.252-3.
[17] Department of the Air Force, *Automated Military Justice Statistics Report 201 for the period 01 Jan 01 – 31 Dec 01* (Washington D.C.: Air Force Legal Services Agency, Military Justice Division)
[18] William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y.: Kennikat Press 1973), 14.
[19] *Id.*
[20] Brucker Report, Chart found between p. 252-3.
[21] Generous, Jr., 14-21.
[22] UCMJ Commission Report., 2.
[23] *Id.*
[24] 10 United States Code Section 815. *See Generally*, House, Report of the House Armed Services Committee, 87th Cong., 2nd sess., 1962.
[25] *Id.*
[26] Major General Robert W. Manss, The Judge Advocate General, USAF, to Secretary of the Air Force, Office of Manpower (SAF-MPP), letter, unsigned, subject: Uniform Code of Military Justice, Article 15, undated.
[27] Department of the Air Force, *Automated Military Justice Statistics* (Washington D.C.: Air Force Legal Services Agency, Military Justice Division)
[28] *Id.*
[29] Rear Admiral J.P. Womble, Chairman, to The Assistant Secretary of Defense (Manpower and Personnel), letter, subject: Final Report - Ad Hoc Committee on the Future of Military Service as a Career that will Attract and Retain Capable Career Personnel, 30 October 1953.
[30] *Id.*
[31] *Id.*
[32] Fisher Jr., 338.
[33] Quoted in Fisher Jr., 338.
[34] *Id.* at 339.
[35] Colonel George L. Bailey, USMC, *Military Justice and Combat Readiness,* Research Paper, The United States Naval War College (Center for Advanced Research, 1978), v.
[36] *Id.* at 1.
[37] *Id*. at 88.
[38] *Id*. at appendix xv.
[39] *Id.*
[40] UCMJ Commission Report., 6.
[41] *Id.*

PRACTICUM

• RECENT CHANGES TO THE UCMJ

Amended Article 111

On 28 Dec 01, President Bush signed into law a change to Article 111, Uniform Code of Military Justice, affecting the blood alcohol content (BAC) limit for the offense of drunken operation of a vehicle, vessel or aircraft. For offenses within the United States, the BAC limit is now the limit under the law of the State in which the conduct occurred, as long as the State limit does not exceed .10 grams of alcohol per 100 milliliters of blood or .10 grams of alcohol per 210 liters of breath. For offenses which occur on a military installation which is in more than one State and the States have different BAC limits, the Secretary may select one BAC limit to apply on that installation. For offenses outside the United States, the BAC limit remains .10 (unless the Secretary of Defense prescribes by regulation a lower limit). The Services had asked Congress to lower the BAC limit in Article 111 from .10 to .08, not tie the BAC limit to state law.

Applicability of the Article 111 Amendment to Drivers Under Age 21

Congress did not expressly address BAC limits for drivers under age 21 when it amended Article 111. Each state has enacted legislation prohibiting drivers of any age from operating a vehicle with a BAC over a certain limit, usually .08. Furthermore, most if not all states have enacted legislation prohibiting drivers under age 21 from operating a vehicle after consuming alcohol. North Carolina, for example, prohibits "any alcohol" in the body, while the majority of states set a BAC limit of .02 for under age 21 drivers. A possible reason each state has under age 21 drinking and driving legislation is Congress has required the states to do so or risk losing transportation funds.

States vary in how they deal with under age 21 drivers with alcohol in their bodies. The North Carolina under age 21 statute is a misdemeanor and may be charged along with driving with a BAC over .08. Other states take only administrative actions (e.g., suspended driver's license). At least one state, Massachusetts, does not have a per se BAC limit; it is a permissive inference of intoxication.

The legislation changing Article 111 simply states the BAC limit is "the blood alcohol content limit under the law of the State in which the conduct occurred…." It does not differentiate between state BAC limits for all drivers and state BAC limits for drivers under age 21. Therefore, it appears state BAC limits for under age 21 drivers could be used when alleging Article 111 violations. Because this issue is not clear cut, bases can expect offenders and defense counsel to argue the legality of using a state's under age 21 BAC limit when alleging Article 111 violations.

To avoid this issue, bases can use the state's BAC limit for all drivers when alleging Article 111 violations against those of any age, and allege dereliction of duty for underage drinking for those drivers under 21 who have alcohol in their systems.

Twelve Members Required in Capital Cases

Effective for offenses committed after 31 December 2002, the UCMJ has been amended to require no less than twelve court-members in general court-martial cases that have been referred as capital. This requirement is specified in the new Article 25a and referenced in Article 16(1)(a) (defining the membership of a general court-martial) and Article 29(b) (quorum requirements). Article 25a includes an exception when twelve members are not reasonably available because of physical conditions or military exigencies. If the exception applies, the convening authority shall specify no less than five members and make a detailed, written statement to be appended to the record, stating why a greater number of members was not reasonably available.

Proposed But Not Enacted Changes

The House passed legislation to create Article 52a to permit an accused to request sentencing by military judge rather than by members after members had decided guilt or innocence. This proposal was not passed by the Senate and the House receded in conference. The Article would have stated that where the accused was convicted by a court-martial composed of a military judge and members, sentence could be imposed by military judge rather than the members if, after findings and before evidence in sentencing was introduced, the accused, knowing the identity of the military judge and after consultation with defense counsel, requested orally or in writing that the military judge impose sentence. This option would have been applicable only in noncapital cases

The House sought to codify a requirement for regulations for delivery of military personnel to civil authorities when charged with certain offenses. The proposal would have amended Article 14 to require the Services to issue uniform regulations to provide for the

delivery to the appropriate civil authority for trial, in any appropriate case, of a member accused by civil authority of parental kidnapping or a similar offense, including criminal contempt arising from any such offense or from child custody matters. The proposal also required the Services to specifically address the special needs for cases where a member assigned overseas is accused of an offense by civil authority.

Awaiting Action in the Senate

HR 503, the Unborn Victims of Violence Act of 2001, would add Article 119a, Causing Death of or Bodily Injury to Unborn Children. The act has passed the House and been introduced in the Senate. The bill amends Title 18 and the UCMJ, by providing that a person who engages in conduct (murder, manslaughter, rape, robbery, maiming, arson or assault) and thereby causes the death of, or bodily injury to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense. The Act contains specific definitions of the term 'child in utero' and other terms. Punishment would be the same as had that injury or death occurred to the unborn child's mother except that the death penalty is not authorized.

• EXECUTIVE ORDER CONSOLIDATING CHANGES TO MCM

Under DoD Directive 5500.17, the Joint Service Committee on Military Justice (JSC) provides an annual review of the Manual for Courts-Martial (MCM) to DoD/GC. Proposed changes to the MCM are published in the Federal Register and the public is afforded a 75-day comment period after the publication of the notice. A public meeting is normally held during the public comment period. After the public comment period, the proposed changes are modified as necessary and forwarded to DoD/GC in the form of a draft executive order (EO). After DoD/GC approval, the draft EO is forwarded to the Office of Management and Budget (OMB) for review by DoJ, DoT, and other federal agencies prior to being forwarded to the President for signature.

Each year since 1998, the proposed changes have been published in the Federal Register, have gone through the public comment period, have been incorporated into an EO, and have been forwarded to OMB. The pending EOs, however, were not acted upon by President Clinton before he left office. As a result, OMB returned all pending EOs to the appropriate agencies for review shortly after President Bush was inaugurated. The pending EOs were consolidated into one EO, coordinated at DoD, DoJ, and OMB, and forwarded to the White House for signature. On 11 April 2002, President Bush signed EO 13262. It contains numerous MCM changes including the increased jurisdiction of special courts-martial; expanded guidance on adultery to give commanders a better understanding of what factors to consider when determining whether such conduct is prejudicial to good order and discipline or of a nature to bring discredit to the armed forces; RCM provisions to better define prior civilian convictions that may be admitted in courts-martial for the purpose of determining an appropriate sentence; conforming changes to authorize a general court-martial to adjudge a sentence of life without eligibility for parole (Article 56a); and MRE 615 amendments to extend to victims the right to be present at all public court-martial proceedings related to the offense, unless the military judge determines that testimony by the victim would be materially affected. These changes took effect on 15 May 2002.

For further guidance on implementing these changes, as well as links to the Federal Register issuance of the EO, go to the AFLSA/JAJM web page at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JUSTICE/JAJM/LEGISLAT.htm

CAVEAT

• OUT "DARN" SPOT

Since before our Judge Advocate General was a captain and the star of the TV series *JAG* was born, military judges have given a sentencing instruction from an Army Military Judges' Benchbook about the "ineradicable stigma" of a punitive discharge. There is no question that one who has a punitive discharge suffers a stigma, but is that stigma ineradicable? The military judge in the case of *United States v. Greszler,* __ M.J. __ (A.F.Ct.Crim.Apps, 25 January 2002) believed it was not and failed to use the adjective in his instruction. The appellant claimed error; the court affirmed.

As Casey Stengel used to say, "You can look it up." Your dictionary defines "ineradicable" as "incapable of being eliminated." But a punitive discharge, along with its stigma, CAN be eliminated or eradicated. Take a deep breath--the convening authority can elect not to approve one adjudged, the Air Force Court of Criminal Appeals can decide not to affirm it, the United States Court of Appeals for the Armed Forces may set one aside for legal error, The Judge Advocate General, Secretary of the Air Force, or

the Air Force Clemency and Parole Board can remit an unexecuted sentence (including a punitive discharge), the Secretary can substitute an administrative discharge for the punitive discharge, and statutory boards, i.e., the Discharge Review Board (for special court BCD's) and Board for Correction of Military Records, can eradicate the heretofore thought ineradicable.

• DON'T EVEN THINK ABOUT IT

In the unpublished case of *United States v. Fargo*, ACM S29977 (AF.Ct.Crim.App., 28 December 2001), the sentence adjudged by the members included a fine in the amount of $4,000.00. In his post-trial clemency submission to the convening authority, the accused included a letter from one of the court members. In it, the member urged the convening authority to grant clemency because, "I can state the assumption was made [presumably during sentence deliberations] that AB Fargo received a monetary bonus upon completion of technical training here at Sheppard AFB." The member added that she had subsequently become aware the accused had *not* received a bonus, and requested the convening authority remit the fine. The court member obviously wrote the letter as a result of a discussion with the accused's defense counsel.

On appeal, the appellate defense counsel argued that under the circumstances the accused's fine was too severe. In response, the Air Force court noted that R.C.M. 606(b) and 1007(c) prohibit court members from testifying about their deliberations and voting except on issues of whether extraneous prejudicial information was improperly brought to their attention, whether any outside influence was exerted on them, or whether there was unlawful command influence. On that basis, the court concluded that the court member's letter, clearly elicited from her by the accused's defense counsel, improperly entered into the deliberative process and could not be considered.

Defense counsel may legitimately seek post-trial clemency letters from court members who sat in judgment of their clients. However, in so doing they must exercise great care to ensure such quests cannot, under any circumstances, be construed as questions about the members' deliberations and voting.

• IT'S FOR YOUR OWN GOOD

A primary issue before the Air Force appellate court in *United States v. Wardle,* ACM 34140 (A.F.Ct.Crim.App., 27 December 2001), was whether the accused's pretrial confinement was unlawful because it was based upon his threat of suicide.

The accused Wardle, while serving as the travel pay agent at a small naval detachment, used his position to steal more than $68,000.00 of military funds. After being found out and relieved of his duties, he went AWOL, checked into a local motel, and attempted suicide by cutting his wrists. Shortly thereafter, he changed his mind, bound his wounds, called his commander, and told her he injured himself and planned to go to the hospital the next day. His very concerned commander persuaded him to check into a hospital immediately.

His wounds required 14 stitches to close, and were almost severe enough to be fatal. The treating facility had him transferred to a VA hospital for psychiatric monitoring and assessment. After two weeks, he was released from the hospital, and, on that same day, his commander ordered him into pretrial confinement. She also arranged for him to obtain mental health counseling. In a memorandum prepared pursuant to Rule for Courts-Martial (R.C.M. 305(h)(2), the accused's commander indicated she based her decision to confine him on: 1) his disobedience of her order to report to her on the morning he went AWOL; 2) his AWOL; and 3) his attempted suicide.

On appeal, the accused renewed the argument he unsuccessfully made at trial that his pretrial confinement was improper because it was ordered to prevent him from committing suicide. Addressing this issue, the Air Force court cited its earlier en banc, published decision of *United States v. Doane,* 54 M.J. 978 (A.F.Ct.Crim.App. 2001), as controlling precedent for the principle that a military accused may not be ordered into pretrial confinement *solely* to prevent him from committing suicide. In the *Doane* case, the majority of a sharply divided court nevertheless observed, "an accused's mental condition is an appropriate consideration in deciding whether to place or maintain an accused in pretrial confinement…." On such basis, the court decided that the accused's contention was without merit. His commander ordered him into confinement because he was both a suicide risk *and* a flight risk (as evidenced by his disobedience of the order to report and his AWOL).

The *Wardle* case makes it clear that although a threat of suicide may be a significant factor for consideration in deciding whether pretrial confinement is necessary, the R.C.M. 305 requirements must still be satisfied before members of the military can be deprived of their freedom before trial.

GENERAL LAW

• USE OF O & M FUNDS FOR HEALTH, MORALE AND WELFARE COMMUNICATIONS

Recently, we were asked whether the use of O&M funds would be authorized to pay for Health, Morale and Welfare (HMW) telephone calls, e-mail and voice over internet acquired from a commercial provider for personnel deployed to Diego Garcia. Our conclusion was that because of the circumstances existing on Diego Garcia, and with the approval of the theater commander, there was statutory and regulatory authority to use O&M funds for the stated purpose. However, the authority is discretionary with the funds approving official who may, as a matter of policy, determine there are higher priority uses for the limited O&M funds available.

It is firmly established Federal Government policy that telephone calls placed over Government-provided and commercial long distance systems that will be paid for or reimbursed by the Government, shall be for the conduct of official business only. (Federal Property Management Regulations, Telecommunications Management Policy, 41 CFR 101-35.201(c)). This policy is incorporated into paragraph 2-301 of the DoD Joint Ethics Regulation (JER)(DoD 5500.7-R). The JER reiterates the general rule that Federal Government-funded communications systems are provided only for official use (2-301a.). However, the JER goes on to state that official use:

> may include, when approved by theater commanders in the interest of morale and welfare, communications by military members and other DoD employees who are deployed for extended periods away from home on official DoD business. JER 2-301a.(1).

In our view, this definition recognizes that where personnel are deployed for extended periods at overseas locations, providing for a reasonable amount of communication between a member or employee and his or her family is in the overall interest of the Government and warrants the expenditure of appropriated funds. This definition of "official use" to include HMW calls for deployed personnel is also consistent with the statutory authority to expend Operation and Maintenance (O&M) appropriations for morale, welfare and recreation purposes (10 U.S.C. 2241 (a)(1)). The statute and the regulation both recognize that under certain conditions, activities that would otherwise be personal business do in fact provide a sufficient benefit to the Government to justify the use of appropriated funds to pay for them.

With the theater commander exercising his authority under the JER and approving HMW calls as official use for personnel deployed to Diego Garcia, we opined there was no legal objection to such use of O & M funds. We presumed that in arriving at this decision, the commander took into consideration all the circumstances present at Diego Garcia and that in his opinion these warranted the use of appropriated funds for commercial HMW communications. However, similar circumstances justifying the use of O&M funds for HMW communications cannot be presumed to exist at all overseas locations where Air Force members and civilian employees are deployed for extended periods. Each site must be considered and approved by the appropriate theater commander as set forth in the JER.

To summarize, in certain circumstances there is legal authority to use O&M funds to pay for HMW communications directly acquired from a commercial provider and there is no Air Force-wide policy that bars such use. Nevertheless, the appropriate funds manager retains the discretion to decide whether or not to fund HMW communications over commercial networks as a matter of policy. If it is determined that the funds available would be better used for higher-priority purposes, then O&M funds clearly need not be used for HMW calls or e-mail. Further, the responsible commander/funds manager has the responsibility to establish appropriate guidelines and restrictions on access to and use of commercial systems for HMW communications to avoid abuse of the benefit and ensure availability to the maximum number of personnel within the funds available.

• SPLIT DISBURSEMENTS

The question periodically arises whether commanders have the authority to order "split disbursement" as a mandatory means of reimbursing travel

entitlements to Government Travel Card (GTC) users. With the formal modification of a DoD "Task Order" with the current GTC contractor in April 2001 that requires implementation of "default split disbursement," most of the questions that have arisen under this topic have been resolved.

The Task Order required the DoD to implement default split disbursement beginning in July 2001. That portion of the travel settlement related to transportation, lodging and rental car expenses should be forwarded to the travel charge card contractor; the remainder of any entitlement (associated with meals and other incidental expenses) should be sent to the traveler. However, the traveler may elect to specify an exact amount be forwarded to the travel charge card contractor. The traveler may also decline the split disbursement default entirely. The default split disbursement procedures will be implemented in a revision to Chapter 3, Volume 9 of the *DoD Financial Management Regulation* (DoD 7000.14-R). The decision to implement split disbursement on a "default" rather than "mandatory" basis stems from the view of the DoD Deputy General Counsel (Fiscal) that 37 U.S.C. 404 creates an "entitlement" to travel and transportation allowances. The entitlement extends to a right of direct reimbursement unless the traveler agrees to having the payment made to the travel card contractor (DoD Deputy General Counsel (Fiscal) memo of Nov 27, 2000 to DFAS).

Therefore, the DoD's implementation of split disbursement on a default basis, and the opinion of the DoD/GC that split disbursement can not be a mandatory procedure, precludes the Air Force and its Major Commands from implementing any procedure inconsistent with the requirements that will be established in the DoD FMR for default split disbursement.

• AIR FORCE DRUG TESTING LABORATORY 101

The Air Force Drug Testing Laboratory (AFDTL), located at Brooks Air Force Base, Texas, has operated as the Air Force's only drug testing lab since the 1970s. The AFDTL is one of 6 DoD certified drug detection labs. Since its inception, the AFDTL has undergone changes in mission, technology, procedures, and organization. Initially, the AFDTL identified illegal drug use exclusively to support administrative actions and rehabilitation programs. Over time the technology for identifying and quantifying drugs improved and gained scientific acceptance. In the early 1980s, the results of drug testing gained sufficient scientific acceptance that they became admissible as evidence in courts-martial. Consequently, the importance of the AFDTL to deterrence of drug use took on new importance.

As with most Air Force organizations, the AFDTL has undergone a number of reorganizations and realignments. The most recent and perhaps most significant change took place in 1992. At that time the AFDTL was realigned under the Surveillance Directorate of the Air Force Institute for Environment, Safety and Occupational Health Risk Analysis (AFIERA). In that reorganization the laboratory commander position was abolished and the head of the AFDTL became a division chief and the position of Staff Judge Advocate to the AFDTL was abolished. Presently, AFDTL's chain of command runs up through AFIERA, through the 311th Human Systems Wing, Brooks Air Force Base, to Headquarters, Air Force Materiel Command. Internal legal advice to the AFDTL is provided by the 311th HSW/JA, as the host legal office. Within the 311th HSW/JA, there is a judge advocate specifically designated to assist the lab. This judge advocate provides day-to-day legal support to the lab and assists judge advocates in the field who require litigation support from AFDTL.

Policy guidance for the AFDTL is established at the DoD level. This ensures a high degree of uniformity across the Service laboratories. DoDI 1010.16, Technical Procedures for the Military Personnel Drug Abuse Testing Program, establishes responsibilities within DoD. The Assistant Secretary of Defense for Special Operations and Low Intensity Conflict ensures that the DoD Office for Counternarcotics:

1. Establishes procedures and standards for the technical aspects of the Military Drug Abuse Testing program.
2. Maintains a certification program for drug test ing laboratories.
3. Maintains an inspection process for the Armed Forces Institute of Pathology Drug Testing Laboratory Quality Control (QC) Program and DoD certified drug testing laboratories.

In turn, the DoD Demand Reduction Program office, through policy guidance and budget management, implements the procedures and standards established by the DoD Office for Counternarcotics.

As set out in DoDD 1010.1, Military Personnel Drug Testing Program, there are three goals to:

1. Use drug testing to deter military members from abusing drugs and to permit commanders to detect drug use and take appropriate action against members who test positive (administrative and judicial).

2. Ensure that urine specimens collected as part of the drug abuse testing program are forensically supportable.
3. Ensure that all military specimens are tested by a DoD certified testing laboratory (subject to minimal spelled out exceptions).

Within the Air Force, program management of the military drug abuse testing program is delegated to the Air Force Drug Demand Reduction Program Management Office, a component of the Air Force Medical Operations Agency (AFMOA). AFMOA, in turn, falls under the Air Force Surgeon General's Office (AF/SG). Implementation of the drug testing program is accomplished through the policies and guidance established by the program manager and set out in AFI 44-120 and AFI 44-121. The program manager also exercises budgetary management and oversight of AFDTL. At the headquarters level, the General Law Division (AF/JAG) provides legal support to the AFMOA program manager and assists in the oversight of the AFDTL.

The Armed Forces Institute of Pathology (AFIP) provides quality oversight of the lab. AFIP carries out quality assurance oversight for all DoD drug testing labs. AFIP is a joint service organization headquartered at Washington, DC.

AFDTL is comprised of four branches; forensic sciences, production, quality control, and support services. There are 50 civilians and 3 military members assigned to AFDTL. Its stated mission is to:

1. Deter and detect the use of controlled and illegal drugs by military personnel through random urinalysis drug testing.
2. Report test results and prepare litigation packages for commanders for use in adverse judicial and administrative actions.
3. Develop new methodologies of drug detection in response to changing drug threats.

In CY 2001 AFDTL tested nearly 370,000 urine samples. Each sample is tested for evidence of use of up to seven drugs. Every sample is tested for evidence of use of marijuana, cocaine, PCP, LSD, and amphetamines. Additionally, every sample is also tested for evidence of use of opiates or barbiturates. Every tenth batch of samples is tested for evidence of use of all 7 drugs. Amphetamines include the Club or Designer drugs, (Ecstasy, MDA, and MDEA) and opiates include heroin and morphine.

It should be clear from this short discussion that management of the AFDTL is complex. DoD sets the overarching polices; AFIP oversees quality assurance; SG, through the program manager at AFMOA, sets policy and handles budget and oversight; and finally, AFMC exercises command responsibilities through AFIERA and the 311th HSW. HQ USAF/JAG provides advice on policy and oversight while the 311th HSW/JA office provides day-to-day advice to the AFDTL and assists with litigation support.

Points of contact for AFDTL questions are: Maj Jennifer Hays, 311 HSW/JA, DSN 240-2257 and Lt Col Donald Holtz, HQ USAF/JAG, DSN 224-4075.

CONTRACT LAW

- **BUY AMERICAN ACT CAN**
- **TRIGGER THE ANTIDEFICIENCY ACT IN COMMERCIAL ACQUISITIONS**

In an opinion dated 18 Jan 2002, the Department of Defense Office of General Counsel (DoD/GC) determined that an expenditure of funds in a commercial item acquisition that fails to comply with the Buy American Act (BAA) could also violate the Antideficiency Act (ADA).

The opinion found that commercial item acquisitions are subject to the BAA (41 USC 10a-d) notwithstanding an arguable exemption granted by the Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 212.503(a)(xi). Having determined that the DFARS subpart did not exempt commercial item acquisitions from the purview of the BAA, the opinion reasons that an ADA (31 USC 1341) violation may occur where the current DoD appropriations act contains the customary prohibition against making an expenditure of funds not in compliance with the Buy American Act. [Note: the ADA violation actually results from the violation of the so-called "Purpose Statute," 31 USC 1301(a).]

The DFARS provision at 212.503(a)(xi) that was rejected as an exemption from the BAA reads as follows:

> (a) The following laws are not applicable to contracts for the acquisition of commercial items:
> (xi) The Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years.

The DoD/GC opinion observed that the BAA was not listed by its popular name title in the FAR and DFARS Subparts (FAR 12.503 and DFARS 212.503)

that identified laws that do not apply to commercial item procurements. Moreover, it noted that the terms of DFARS 212.503(a)(xi) apply to appropriation act provisions enacted for 1996 and after, and the BAA is not an appropriation act provision, and it was enacted well before 1996. In closing, the DoD/GC opinion acknowledged that the DFARS provision created an ambiguity that made a contrary opinion reasonable, and it made its opinion effective prospectively only.

In order to avoid the double pitfall of a BAA and ADA violation in a commercial item acquisition, be sure to review and apply the BAA provisions located at FAR Part 25 and its supplements. The DoD/GC opinion is posted on the AFLSA/JACN web site under Resources—Miscellaneous Guidance at the following Internet address: https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacn/Resources.htm.

- **DISCLOSURE OF PROPRIETARY DATA IN AN UNSOLICITED**
- **PROPOSAL**

On 4 February 2002, the United States Court of Appeals for the Federal Circuit (CAFC) affirmed the ruling of the United States Court of Federal Claims that the contractor's failure to mark each page of its unsolicited proposal with a restrictive legend was fatal to its claim for unlawful disclosure of proprietary information contained therein. *See* The Xerxe Group, Inc., v. United States, No. 01-5055, 2002 U.S. App. LEXIS 1670 (Fed. Cir. Feb. 4, 2002).

The Court of Federal Claims granted summary judgment for the Government, and the Court of Appeals affirmed based upon the operation of sections 15.608 and 15.609 of the Federal Acquisition Regulation (FAR). FAR 608(b) prohibits Government personnel from disclosing restrictively marked information contained in an unsolicited proposal. FAR 15.609 requires the restrictive marking to appear on the title page of the unsolicited proposal, and again on every page that the contractor wishes to restrict. Finding that Xerxe included restrictive legends only on the cover letter, a document entitled "Company Profile Capability Statement," and the title page of its unsolicited proposal, CAFC affirmed the lower court's holding that only those documents were restricted from release.

As indicated by the decisions of both courts, restrictive markings—if they are to be effective—must appear not only on the title page of an unsolicited proposal, but also on each individual page the contractor seeks to protect from disclosure by the Government. Stated affirmatively, these holdings authorize the Government to disclose data contained in an unsolicited proposal unless restrictive markings appear on the title page and each individual page the contractor seeks to protect from disclosure.

The decision in *Xerxe* appears on its face to give the Government broad rights in contractor-furnished data. There are, however, various other provisions that restrict the Government's rights in such data. For instance, data contained in an unsolicited proposal cannot be used as a basis for a solicitation or disclosed in the course of negotiations with a different offeror. *See* FAR 15.608(a). Moreover, such data cannot be released to a non-Government evaluator without the offeror's permission. *See* FAR 15.609(g). The data also cannot be released to a Government evaluator from another agency or to a non-Government evaluator without the offeror's written permission. *See* FAR 15.609(h). Finally, if the information is bid or proposal information within the definition at FAR 3.104-3, it cannot be disclosed to any unauthorized person. *See* FAR 3.104-5.

TORT CLAIMS AND HEALTH LAW

- **SOLATIA**

Since U.S. forces are currently deployed into several different countries, we have been asked about the propriety of paying solatia in the various areas we have troops.

By its definition, solatia payment is an immediate expression of sympathy, in a nominal amount, paid according to the custom in a particular foreign country. It is not tort-related compensation, nor is it a substitute for payment under the Foreign Claims Act.[1] Rather, it is an offering to show concern for an injured person or his or her family. On 16 October 1958, the Air Force General Counsel issued an opinion that the 1959 DoD Appropriation Act authorized the use of regular O&M appropriations to pay solatia.[2] Prior to the opinion, solatia were paid by "passing the hat" among the troops. Subsequent DoD Appropriation Acts contained similar provisions:

> Appropriations contained in this Act shall be available for… payments in advance of expenses determined by the investigating officer to be necessary and in accord with local custom for conducting investigations in foreign countries incident to matters relating to the activities of the Department concerned… [3]

Current DoD Appropriation Acts do not contain such

language. Rather, the authority to pay solatia may be found in 10 U.S.C. §2242, "Authority to use appropriated funds for certain investigations and security services," which states, in pertinent part:

> The Secretary of Defense and the Secretary of each military department may--(1) pay in advance for the expenses of conducting investigations in foreign countries incident to matters relating to the Department of Defense, to the extent such expenses are determined by the investigating officer to be necessary and in accord with local custom…

Solatia, therefore, must be a local custom in order to be paid. We know solatia payment is a custom in Japan, South Korea, and Thailand.[4] We are unaware that solatia payment is a custom in any other country in the world, including Afghanistan and Somalia. This is not to say that there are no other countries--we just don't know of any yet.[5]

Solatia, when appropriate, are paid from unit Operation and Maintenance funds, and not from claims funds. They are not subject to the assignment of single service claims responsibility. In other words, even though the Air Force has claims responsibility for Japan, the Navy would make its own payments of solatia. If you become aware of solatia payments being made in a country other than Japan, Korea or Thailand, please contact AFLSA/JACT as soon as possible. We want to discuss any payments with our counterparts in the Army and Navy to be sure we are all addressing situations similarly. The last thing we want to do is create an expectation of payment because one service believes solatia are appropriate, and another does not.

[1] 10 U.S.C. §2734.
[2] Air Force Manual 112-1, 2 July 1962, para 222(1).
[3] AFM 112-1, 2 July 1962, para 222(2).
[4] Local command instructions may specify the method, timing and amount of any payments.
[5] We've received varying reports as to whether solatia were paid in South Vietnam during the war. Even if they were, we would want to examine whether it is currently a custom in the Socialist Republic of Vietnam before making any payments.

• RES GESTAE

The 2002 Medical Law Consultant's Conference was held from 15-17 May 2002 in Rosslyn, VA. Attendees included new and incumbent Medical Law Consultants, Regional TRICARE counsel, representatives from the Surgeon General's Clinical Quality Management Division, and staff from AFLSA/JACT's Medical Law and Health Affairs Branches. Topics included discussion of DoD implementation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) which deals with the protection and dissemination of patient information, Data Base reporting, patient competency, patient safety and disclosure of errors, proficiency maintenance training, and enhancement of expert medical reviews in malpractice cases. The conference followed the 2002 Medical Law Consultant's course which was held at Malcolm Grow USAF Medical Center, Andrews AFB, Maryland.

• VERBA SAPIENTI

Well over a decade has passed since implementation of the Patient Self-Determination Act, along with the development of advance directives for patients who may eventually succumb to a prolonged dying process or persistent vegetative state. By law, patients need to be educated upon admission as to their rights and options regarding advance directives. This is commonly done by a written brochure or notice given to the patient at time of admission. Unfortunately, many patients may not have sufficient opportunity to ask questions or discuss concerns about the directives, or may simply feel too stressed at the time of admission. It is wise work with the local medical facility to see just what information is being given, how it is given, and whether it is current and consistent with host jurisdiction law (note special "full faith and credit" for military advance directives afforded in 10 USC 1044c). In addition, it would be valuable to work with the hospital in setting up briefing sessions on base in non-stress situations and environments to discuss the use of advance directives. It is an important tool for everyone to be aware of.

• ARBITRIA ET IUDICIA

The United States recently suffered two adverse decisions with respect to when a medical malpractice claim accrues for purposes of the two-year statute of limitations under the Federal Tort Claims Act. In Kubrick v. United States, 444 U.S. 111 (1979), the Supreme Court established what is known as the "discovery rule" to determine when the accrual clock starts to run in a medical malpractice claim. In Kubrick, plaintiff alleged that he was negligently administered Neomycin, an antibiotic, to treat his leg infection resulting in a hearing loss. Although he learned soon afterwards that the Neomycin caused his hearing loss, he argued that his claim did not accrue until he learned from his private physician that the Neomycin should never have been administered. The Court ruled that a medical malpractice claim accrues on the date

the claimant knows, or in the exercise of reasonable diligence should have known, that he or she has suffered an injury and knows its likely cause. They rejected the argument that a claim does not accrue until a plaintiff learns that his injury was negligently inflicted. 444 U.S. at 122. Thus, in Kubrick, accrual occurred when claimant learned that the Neomycin caused his hearing loss, and not when he later found out that it should not have been prescribed and administered. More recently, the Third Circuit, in Hughes v. United States, 263 F.3d 272 (2001), a Veteran's Administration case, and the Ninth Circuit, in McGraw v. United States, 2002 U.S. App. LEXIS 2867, a Navy case, have issued rulings that have significantly diluted the "discovery rule" for purposes of accrual.

In Hughes, plaintiff was informed that he suffered an allergic reaction to the heparin that was administered following his heart surgery, causing gangrene and resulting in amputation of both his arms and legs. The Appellate Court ruled that accrual did not occur until such time as plaintiff learned that the VA doctors failed to provide appropriate medical treatment to arrest the spread of the gangrene. That is, accrual did not occur until plaintiff discovered that the VA failed to timely diagnose the allergic reaction to the Heparin, and/or could have arrested the gangrene. Thus, the Third Circuit seems to make a distinction between negligent affirmative acts (the administration of the wrong antibiotic in Kubrick) and omissions (the failure to diagnose or treat the gangrene in Hughes).

In McGraw, a wrongful death case, decedent was seen as early as February 1994 for an abnormality in his lungs. In August 1996 he was diagnosed with lung cancer that metastasized to his brain and bones. He died 17 days following the diagnosis. His surviving daughter presented a claim in October 1998, a little more than two years after the date of death. She had not received her father's medical records until October 1997, and much later learned from her experts of her father's 1994 pre-existing condition and of the Navy's delay in diagnosing this malignancy. The Appellate Court ruled that in a failure-to-diagnose claim, as in this case, accrual does not begin until the claimant knows or has reason to know not only of her father's pre-existing condition, but also of its transformation into a more dangerous ailment.

The Office of the Solicitor General chose not to petition for a writ of certiorari in Hughes. A decision has not been made yet on whether to appeal McGraw.

In light of these two recent decisions, it is imperative that in cases where the statute of limitations is a possible defense the seven point memorandum thoroughly analyzes the District Court and Appellate Court decisions within that jurisdiction, and their interpretation of Kubrick. Moreover, even in the face of a potential statute of limitations defense, we must still fully investigate the claim.

LABOR LAW

• Supreme Court Rules Plaintiff Not Substantially Limited in Performing Manual Tasks

The Supreme Court started the New Year with a major decision involving whether an employee is substantially limited in performing manual tasks. In *Toyota Motor Manufacturing, Inc. v. Williams*, No. 00-1089 (January 8, 2002), the Court held that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.

The employee, Ms. Williams, worked for an automobile manufacturing plant and was initially diagnosed with carpel tunnel syndrome and tendonitis, with work restrictions precluding her from lifting more than 20 lbs, frequently lifting more than 10 lbs, repetitive movement of her wrists or elbows, overhead work, and use of vibrating or pneumatic tools. Settlement of a prior ADA claim yielded her an assignment to an assembly team requiring four tasks, but for two years she only performed two of the four tasks, doing them both well: visual inspection and wiping cars with a glove. Later, however, the company required all team members to perform all four tasks, including requiring the employee to hold her arms at shoulder height for several hours at a time, causing pain in her neck and shoulders. She was then diagnosed with myotendonitis, a condition leading to nerve pain in her upper arms and neck, and she requested ADA accommodation seeking to be returned to the two of the team's four tasks which she had previously performed well without pain.

The District Court granted summary judgment for the employer, finding the employee physically impaired, but not ADA-disabled because she was not "substantially limited" in the major life activity of "performing manual tasks," based on evidence she successfully performed other manual tasks for her employer and was able to perform manual tasks relating to personal hygiene and home upkeep.

The Sixth Circuit Court of Appeals reversed and found the employee ADA-disabled as a matter of law, holding that to determine whether she was substantially limited in the major life activity of performing manual tasks (the "major life activity" under examina-

tion), the correct focus was whether her disability "involved a class of manual activities which affect the ability to perform tasks at work," disregarding evidence of her ability or inability to perform various other manual tasks in her personal life. In other words, it found as a matter of law that she possessed a "manual task disability" based only upon evidence of her inability to do certain repetitive tasks with her hands and arms extended above shoulder level for extended periods of time, the "class of tasks" required by her assembly line job.

The Supreme Court reversed. Although the EEOC regulations do not define key terms such as "substantial" and "major," the Court turned to the ordinary usage. In interpreting these terms strictly, the Court stated that the word "substantial" "clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities." Likewise, because "major" is defined as "important" the phrase "major life activities" refers "to those activities that are of central importance to daily life. As a result, in order to be substantially limited in performing manual tasks, "an individual must have [a permanent or long-term] impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

The Court stressed that in applying this standard the inquiry is individualized. This is particularly important where the impairment is one whose symptoms vary in length and/or severity from person to person. The Court noted that carpal tunnel syndrome is a condition that varies from person to person and can be resolved in as short as a one month time period. "Given these large potential differences in the severity and duration of the effects of carpal tunnel syndrome, an individual's carpal tunnel syndrome, on its own, does not indicate whether the individual has a disability within the meaning of the ADA."

The Court found the Sixth Circuit's analysis that an employee may demonstrate a manual disability by showing that the condition involved a "class" of manual activities and that those activities affect the ability to perform tasks at work lacking any support. Although the Sixth Circuit relied on the Court's decision in *Sutton v. United Air Line*s, 527 U.S. 471 (1999), for this proposition, the Court stated that *Sutton* did not suggest that a class-based analysis should be applied to any other definition other than working in general. An analysis based on a "class" of activities should be undertaken only when the "major life activity" involved is working. Where manual tasks are concerned, the main inquiry is whether the employee is unable to perform the "variety of tasks central to most people's daily lives," not whether the employee is unable to perform tasks associated with a specific job.

The Supreme Court remanded the case to the Court of Appeals to consider whether the employer may be entitled to summary judgment on the issue of whether the employee was not disabled as a matter of law within the meaning of the ADA, after that court considers the evidence of other work-related and non-work-related manual tasks she could perform.

• 7th Circuit Finds Diabetic Substantially Limited in Ability to Think and Care for Himself

Similar to carpal tunnel syndrome, diabetes is an impairment whose symptoms vary widely from person to person and therefore requires a case-by-case analysis regarding disability determinations. In *Nawrot v. CPC International Corp.*, No. 00-2849 (January 11, 2002), the Seventh Circuit reversed the District Court's decision to grant summary judgment. While the decision noted that diabetes does not, per se, qualify as a disability under the ADA, it found that the plaintiff did not rest solely on his diabetic status. Instead, the plaintiff demonstrated that as a consequence of his diabetes, he had to inject himself with insulin approximately three times a day and test his blood sugar level at least ten times a day. In addition, although the plaintiff was able to manage his diabetes with constant monitoring and insulin injections (itself a substantial burden), these precautions hardly remedied all the other adverse effects of his diabetes.

The circuit court found that despite his most diligent care the plaintiff could not completely control his blood sugar level and, therefore, was disabled in the major life activity of being able to think and care for himself. The court noted that the plaintiff suffered from unpredictable hypoglycemic episodes of such extreme severity that death was "a very real and significant risk." In addition, on several occasions when the plaintiff suffered from such episodes his ability to think coherently and function was significantly impaired. The plaintiff had lost consciousness and fallen several times. In addition, his ability to express coherent thoughts was impaired, causing him to make nonsensical statements.

This case highlights the importance of performing an individualized assessment when an employee claims to have a disability. Discounting particular impairments out of hand as not disabling can be a costly mistake.

TOO MUCH TO DO IN TOO LITTLE TIME: Tips for Handling Medical Malpractice Claims

Major Scott S. Driggs

Time is a luxury. That is especially true in the realm of medical malpractice claims. The Federal Tort Claims Act gives us just six months to pay, settle or deny administrative claims for medical malpractice.[1] Of those six months, the Air Force affords claims officers only 75 days to complete their reviews.[2] Too often, a claims officer has to wade through volumes of illegible notes laden with acronyms, symbols and terminology derived from Latin roots while trying to arrange interviews with busy physicians and distressed claimants. At the same time, the claims officer has a court-martial or two to try, legal assistance to provide, and four or five routine torts to investigate. But time well spent on medical malpractice claims can literally save millions of dollars down the road. That cannot be said for any of the other jobs on the claims officer's "To Do" list. Each year, the Air Force taps the Treasury for payment of medical malpractice damages totaling tens of millions of dollars. In one recent judgment alone, a federal district court judge entered judgment against the United States for almost forty-five million dollars.[3]

If nothing else, careful research of claims against the government makes us good stewards of taxpayer dollars. Federal money is better spent on jets, munitions, spare parts and Air Force people than on anti-government claims. Although Air Force attorneys can do little to directly prevent the rare cases of malpractice that arise in our medical treatment facilities, we play a major role in limiting liability and ensuring justifiable damages are paid without undue delay. Reviewing claims well at the base level makes it more likely the claim can be perfected, rather than reinvented, at higher levels. Moreover, the sooner Air Force attorneys complete each review, the less likely we are to have the case ripped from our control as claimants become plaintiffs in actions before federal courts.

There will never be enough time to perfect a medical malpractice review at the base level, but by prioritizing and focusing the claims officer's efforts there will be plenty of time for all levels of reviewers to get the job done right. When the Medical Law Consultant (MLC) office receives the claim, they waste valuable processing time if they have to "reaccomplish" the seven-point memorandum. Instead, the MLC should be building upon and polishing a professional product. Several of the sitting MLCs contributed to the following list of tips for base claims officers. These tips focus on those points that are most helpful in the processing of a claim after it leaves the base.

1. Obtain All Records: First and foremost, do not rest until every possible medical record has been located and accurate copies obtained. Within your MTF, several offices maintain independent records. For example, inpatient and outpatient records are separately maintained. OB/GYN sometimes maintains separate records for labor and delivery and other procedures. Fetal heart monitoring strips may be maintained separately. Physical therapy, occupational therapy and mental health also maintain independent records. Moreover, make sure to obtain copies of relevant x-ray, MRI and CT scan films.

In addition, claimants frequently have records at other base medical treatment facilities, VA facilities or civilian providers' offices. Inpatient and specialty records from Air Force facilities are normally not forwarded during a permanent change of station. Some records may even have been retired to storage.[4] The patient's consent will be required to obtain copies of civilian records. If a claimant or claimant's counsel refuses to provide consent, the claims officer should advise them that failing to provide relevant records will almost certainly lead to their claim being denied.

Also common is the claim where the claimant somehow came to possess his/her original Air Force medical records. Unfortunately, most of these claimants are reluctant to give them back. When that occurs, the claimant, or their counsel when represented, should be politely but firmly reminded that the records are government property and must be returned.

Every claim may present unique possibilities for additional records. For example, when an infant or child suffers a disability, they can be evaluated and receive therapy under the Individuals with Disabilities Education Act.[5] This federal program is funded to the states. The related records generally show the child's developmental age, progression, etc. It is important to contact claimant's counsel to request these records.

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Another important example is autopsy records. The local county coroner performs many, if not most, autopsies. Those records often contain a wealth of information and should not be overlooked.

In short, the foundation for deciding to pay, settle or deny a claim is made up of the facts of the case. Obviously, aspects of law always affect the decision, but the law can only be properly applied to a case if every relevant fact is known. Moreover, when a claim does go into litigation, the medical records will be the most accurate and trustworthy account of what actually occurred during episodes of medical care.

2. Interview Every Witness: Interview every person associated with the relevant care, especially the claimant. "Every person" includes assistant surgeons, nurses, physician's assistants, pharmacists, technicians and everybody else involved in the relevant care. When married, the spouse of the claimant should also be interviewed, if possible, to better assess any claim for loss of consortium. Too often, seven-point memoranda arrive at the MLC office without a single interview having been conducted at the base level. Other claims arrive with only an interview of the doctor deemed to be most involved. Next to gathering the records, interviewing witnesses is the most important role of the base claims officer.

The claims officer is in the best position to judge the credibility of the claimant and the witnesses. The claims officer is also in the best position to sit down with records in hand to interview a doctor or nurse involved in the care. The interview can be used to decipher illegible entries in the records or to understand important medical terminology. During the interview, it is helpful if the claims officer examines and handles medical equipment that may have played a role in a relevant procedure. By including descriptions or diagrams of the equipment in the seven-point memorandum, future reviewers can more easily grasp what actually occurred.

Whenever possible, include a paralegal when you conduct an interview. The paralegal can take notes, but more importantly, will often make observations that the attorney is too involved or too inexperienced in life to make. For example, a claims officer who has no children would be wise to take a paralegal who has children to interview a mother about injuries to her child. In fact, the attorney would be even wiser to discuss proper questions with the paralegal before conducting the interview. The paralegal should be asked specifically to observe body language, attitude, interactions between spouses or parents and children, credibility, and other nonverbal aspects that may affect the claim.

Moreover, it is imperative that the claims officer obtain a permanent address and telephone number for each witness during the interview. The claim review and potential litigation will more than likely cover a span of years. The time saved by a good witness locator list is well worth the minimal effort required to assemble it.

After the interview, the claims officer should prepare a careful summary, but should not ask the witness to review or sign it. The more involvement the witness has in preparing the summary, the less likely it is to be deemed attorney work product.

3. Draft a Thorough, Chronological Fact Section: Prepare a careful, chronological fact section by scrutinizing the records and interviews. This is the most painstaking part of crafting a quality seven-point memorandum. Done correctly, it cuts days and weeks out of subsequent reviews.

The fact section of a seven-point memorandum should be devoid of slant, tone, or opinion. It should not be viewed as an opportunity to persuade; instead, it is should be considered a platform for laying out black and white facts to create an understanding of what exactly did, or did not, occur. As such, every sentence should be supportable by an entry in a medical record or a statement of fact by a witness. Every statement, therefore, should have a citation to its source. The citation, however, may be placed at the end of a short paragraph for every fact contained in the paragraph, rather than after every sentence.

If editorial comment is essential to truly understanding a fact from the records, put the comment in a footnote. This will ensure future readers will understand your slant on a fact without believing the records contain actual proof of the statement.

4. Double Check 1 – 3: Once you have gathered records, interviewed witnesses and prepared a thorough fact section for the seven-point memorandum, double check to ensure all sources of information have been exhausted. If nothing else is done besides these three fact-centered tasks, the base level review will be worth every minute spent on it. Subsequent reviewers can do legal research and rearrange the records, but they will be hard-pressed to gather facts from afar. Everything else done on a claim is of little value if complete and accurate facts are not known.

5. Gumshoe Damages Research: Do some fundamental research on the range of appropriate damages. The Personal Injury Valuation Handbook is only one of the sources you should consult. Discuss your claims with the Assistant U. S. Attorney responsible for your base's litigation. Get their opinion about the settlement value of the claim. Find out whether they know anything about claimant's counsel or expert witness. If you know civilian attorneys who practice on

either side of medical malpractice cases, call them and speak hypothetically about your case. Ask how much plaintiffs can reasonably expect for the type of injury involved in the claim. If you don't know any local attorneys, tap the rich resource of the reservists assigned to your office. Many of them practice in local law firms or government offices and can either give you guidance or point you to someone who can. By speaking with members of the local bar, you will get a feel for the personal injury atmosphere in the local federal courts. Pass that information along in your seven-point memorandum.

6. Actually Read the Law You Cite: There is much to be learned from actually reading the Federal Tort Claims Act[6] and *Feres v. United States*.[7] An equally productive use of time is to read the law cited in your own seven-point memorandum. It is common practice for claims officers to pass along seven-point memoranda from prior claims. Too often, the cases are irrelevant, overruled, or inaccurately cited. Don't rely on the law contained in hand-me-down seven-point memoranda.

Instead, take the time to research the law for each case of malpractice. Case law is formed by the facts of each case. Every case has different facts. The cases cited in the slip and fall claim at the commissary will probably not be the same cases you want to cite for a claim involving failure to diagnose a cholesteatoma. Admittedly, not every jurisdiction will have malpractice cases with facts similar to the claim before you, but cases from other jurisdictions may be persuasive.

7. Don't Make Copies of Every Case: Copying routine cases for placement in Tab J of the claim file wastes time and money. In the era of Nexis-Lexis, upper level reviewers can easily look up a case if it needs to be reviewed. Instead, provide accurate citations of the relevant cases, but copy and highlight only the most relevant portions of the most significant cases. There's no need to submit the state supreme court case that says the analysis of negligence focuses on duty, breach, causation and damages. However, when a state has a statutory cap on damages in medical malpractice cases and the state's supreme court recently upheld the statute, the statute and interpretive opinion might be worth copying and highlighting.

8. Coach the Records Clerk: Pay attention to the copying and numbering of the medical record. An illegible or blurred copy is of little value to the MLC or subsequent reviewers. Although the legal office doesn't control the quality of the MTF staff responsible for copying records, you can do a lot to guide their efforts. This is a perfect opportunity to use your sharp paralegals in the medical malpractice review process. An experienced claims paralegal can sit shoulder to shoulder with the MTF staff to train them on how the records should be copied and assembled. Bottom line—the medical records are critical so don't settle for an inferior product.

9. Talk to Your MLC: Good claims officers maintain an open line of communication with their MLC. Apprise your MLC as soon as a claim is filed and keep them up to date about the claims progress as necessary. When questions arise during the drafting of a seven-point memorandum, contact the MLC for guidance.

10. Put it on the Line: ALWAYS give your opinion about whether the claim should be paid, settled or denied. When you recommend settlement, ALWAYS recommend a settlement amount. Your qualifications don't matter. Judges are people. It helps to get the opinions of other people about settlement value. Although those opinions may vary, your opinion helps upper level reviewers narrow down the spectrum. When a claims officer defers the opportunity to recommend a specific dollar figure for a claim, they bypass an opportunity to lawyer. Lawyering is what we are all about!

CONCLUSION

Seventy-five days isn't much when it comes to reviewing claims for medical malpractice, but that's all the Air Force can afford to give.[8] When Congress waived sovereign immunity for the negligent acts of its employees, it apparently didn't give much thought to the nature of those claims in the twenty-first century. Otherwise Congress would have afforded a lot more time for the administrative review process. It seems inordinately unfair that we have to review highly scientific medical cases in the same amount of time as fender-benders, but that's the way it is.

Medical malpractice claims may not be considered "Job 1" in Air Force legal offices, but everybody understands the value of money, especially when the budget is tight. Every penny of the millions of dollars that get pulled from the deep pockets of the Treasury should be justified by the facts of the claims. The claims officer bears the significant responsibility of identifying, gathering, and arranging those facts. Once the facts are accurately and completely determined, only then can the law be properly applied. The above tips can help claims officers prioritize their efforts to produce the best, most useful claims package enabling timely processing of medical malpractice claims.

[1] 28 U.S.C. § 2675(a)

[2] AFI 51-501, paragraph 1.16.3.

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The Role of the Paralegal in Base-Level Medical Malpractice Reviews

Staff Sergeant Linda M. Burns

Now that my days spent working as a Medical Law Consultant (MLC) Paralegal are numbered, I find myself wondering, "What advice could I give to improve the processing of medical malpractice claims at the base level?" Pay attention to detail! Pay attention to detail! Pay attention to detail!

Throughout the scores of medical claims I have perused over two and one-half years, it's easy to distinguish a medical claim that reflects the attention to detail necessary to facilitate timely processing. It becomes immediately apparent when a base-level legal office put forth the effort of producing a quality product. The claim will be easily processed throughout all levels of the Air Force, from the base, to MAJCOM, the Tort Claims & Litigation Division and the Surgeon General's Office. This is crucial since 28 U.S.C. §2675(a) allows only a short six months for these claims to be paid, settled, or denied.

As a paralegal, the following key items will help ensure that your office's medical claims show the attention to detail reflected in a professional product. The list is not all-inclusive, but is a short sampling of the information to focus your attention towards when processing a medical claim.

1. Ensure Medical Records Are Sequestered. Immediately upon notification of a claim or a potential claim from your Risk Management Office at your Medical Treatment Facility (MTF), ensure that all medical records for the individual are sequestered. Complete an actual, physical check of the sequestered materials; don't assume that it has been accomplished. To facilitate this, having a good working relationship with the Risk Management Office and the Medical Records section of your local MTF is essential. Know the individuals who work there and visit them regularly. They play a crucial role in helping your office develop a complete claim file and preventing long delays gathering needed records after the claim has been shipped to the Medical Law Consultant.

2. Copying of Medical Records. A specific function of claims personnel is to copy and assemble medical records as they are organized in the original medical record. The records also need to be copied on only one side of each page. Number each record in the lower right corner, from the oldest to the most recent.[1] This is another area where having a good working relationship with the Medical Records section of your MTF is essential. Very often the copies of the records are made by MTF staff who may need your training to know how to copy the records in the appropriate order. When copies are made of the medical records, try to sit shoulder to shoulder with the hospital records custodian. This is an excellent way that you can improve upon any deficiencies noted in the copying of records. Always remember that claims personnel have the overall responsibility for the medical record copies that are included in the claims package.

3. Determine Which Providers Are Significantly Involved in the Claim. Who are the key providers surrounding the claim? Normally, they are the individuals listed by specific medical providers in their Quality Improvement Reviews. A Quality Improvement Review is simply a review completed by a specific individual in a certain medical department who assesses the quality of care and lists the providers found to be significantly involved in patient care. With your attorney's approval, you can monitor and track the progress of your MTF's Quality Improvement Reviews. The reviews are also a key indicator in determining who your claims attorney will probably interview regarding the claim. Also ensure that all providers listed as significantly involved in the review have a DD Form 2526, Case Abstract for Malpractice Claims, prepared by the Risk Management Office. Look very closely at this form, as it is often incomplete.[2]

4. Volunteer to Sit in on Witness Interviews. Once your claims attorney has all the records, Quality Improvement Reviews, and DD Forms 2526, he or she will have the information necessary to begin the witness interview process. Accompanying your attorney on witness interviews will be extremely helpful to you as a paralegal, as it will help you to meld all aspects of medical malpractice claims into a total learning experience. Always be prepared for the interview. Ensure you have a notebook and pens or pencils. Take a camera along; you may not use it, but if needed, it will be

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available. Use the opportunity you have to observe all aspects of the witness, including appearance and overall demeanor. If you are in an individual's home, take the time to view and document the surroundings. Is the area neat and clean? If there are children present, do they appear to be well cared for? These questions are especially important in claims where a claimant is seeking to recover for loss of consortium. Also look for nonverbal clues about witnesses. Are they open and forward or are they reserved and subdued? Any information you can provide to your attorney may be helpful. Immediately upon your return to the office, document your findings. This is a task you always want to complete while the information is fresh in your mind.

5. Obtain Local Operating Instructions. Although Air Force Instructions (AFIs) in the 40, 41, 44, 46 and 47 series direct the overall guidance for medical issues, always remember that each MTF has its own set of Operating Instructions (OIs) with specific rules governing its facility. Work with your Risk Management Office and include complete copies of all local OIs and sections of AFIs that deal with related issues involved with the claim.

6. Ensure the File is in Proper Order. The Quality Improvement Reviews and DD Forms 2526 are always placed in Tab M of the claims file. Although Tab M is listed in the claims file as Miscellaneous Correspondence, this tab is crucial to the Surgeon General's Office. Also remember that MAJCOM and the Air Staff will review your base's Quality Improvement Reviews and DD Forms 2526. Taking the time to ensure the base MTF's documentation is complete will reflect favorably on your office and spare you the time and effort it may take to reaccomplish taskings.

7. Proofread. Always review the entire claim file before forwarding. Has the 7-point memorandum been signed? Are the dates involving the claim correct? Have you read through the entire 7-point memorandum to check for spelling and grammatical errors? Check through the memorandum one page at a time. Are all of the pages included? Are the paragraph numbers and subparagraph letters in chronological order? Has a copy of the 7-point memorandum on diskette been included with the original copy of the claim? These things can be time consuming, but they are well worth the effort spent.

Compiling a complete medical claim at the base-level legal office is crucial to overall processing and can also be very rewarding for you as a paralegal. The more your attorney lets you become involved in the processing of the medical claim, the more trust he or she has in your paralegal abilities. Having a great attitude and the willingness to do what's necessary to help your attorney with the claim is important. If the file is incomplete, sloppy or difficult to discern, it will ultimately affect the processing of the claim. Always remember who your customers are: the MTF providers, the claimants and the many levels of Air Force reviewers. By providing all of the information necessary to conclude a fair and impartial review, your office is ensuring both customer satisfaction and timely adjudication of the claim.

[1] AFI 51-501, *Tort Claims*, para 1.16.2
[2] AFI 44-119, *Clinical Performance Improvement*, Attachment 22, spells out what items each office is required to accomplish.

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[3] A panel of the Fifth Circuit later reduced the judgment to an amount not to exceed twenty million dollars, the amount demanded in the administrative claim, in accordance with 28 U.S.C. § 2675(b). *Dickerson v. United States*, 280 F.3d 470, 479 (5th Cir. 2002).
[4] After a certain number of years, two years for inpatient records and five years for outpatient records, inactive records are retired to the National Personnel Records Center in Saint Louis, Missouri. Requests must be made in accordance with AFI 41-210, paragraph 2.13, to retrieve them. Because of the time involved in retrieving these records, requests should be made as early as possible. You or your sharp claims paralegal should work with your hospital records custodian to get this done.
[5] Codified at 20 U.S.C. 1401 *et seq*.
[6] Recommended reading includes 28 U.S.C. §§ 1346(b), 2402, 2671-2672, and 2674-2680.
[7] *Feres v. United States*, 340 U.S. 135 (1950).
[8] AFI 51-501, paragraph 1.16.3


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
UNITED STATES AIR FORCE