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FROM THE EDITOR

This issue of *The Reporter* features articles penned by current and former Air Force Judge Advocate General School faculty members. Maj Tom Posch, who recently departed the Military Justice Division, provides us with a detailed analysis of *Crawford v. Washington*, a case that compels the Government to change the way it approaches some forms of hearsay. Yours truly has tackled the contentious issue of discovery in an effort to provide some basic guidance to counsel in the trenches. And finally, Maj Dan Olson of the Civil Law Division lays out the steps for determining the applicability of the independent contractor defense. You'll also find a generous helping of information from our regular contributors, as well as advice for future Air Force leaders from Lt Col Tim Cothrel. Finally, our beloved Commandant, Col Strand, is retiring from the Air Force. On behalf of the entire staff of *The Reporter*, we wish him all the best!

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

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The Commandant's Corner...

Col Thomas L. Strand

Farewell to Arms – Leaders and Law

The JAG and Paralegal team has historically presented an awesome leadership tandem to commanders, first sergeants and other clients. I've watched with pride and admiration over my 30 year JAG career at the contributions our legal family has made across the spectrum of duties from core responsibilities in military justice and the maintenance of discipline as "job one," to the unending myriad of additional jobs including the Combined Federal Campaign and Special Olympics.

Recently, I picked up my Webster's II standard issue dictionary, copyright 1984 – with the appropriate inked stamp indicating "Property of the GOV – ATC Randolph AFB." The three nouns that I wanted to compare were leader, lawyer and officer. I've always believed in my heart that these simple words make up a roadmap for the end state goals of my professional life. Lets look at what Webster had to say:

> Leader: "one that leads or guides; one who has the power to influence; the fore-most horse in a harnessed team"
>
> Lawyer: "one whose profession is to give legal assistance and advice to clients and represent them in a court or on other legal matters."
>
> Officer: "one holding an office of authority or trust in an organization; a licensed master."

These three words, which I will abbreviate as LLO. They are very powerful to me and incorporate the values of what I believe should be the goals and aspirations of our entire legal community – not just military, not just officers, not just active duty. All of us attorneys, paralegals, and direct support personnel; military and civilians as well as reservists, guardsmen and active duty are drawn to the law (like a moth to a flame). LLO's serve as guides through the maze of technical and complex information. They seek to help or represent the interests of others in matters of law. And, they work in positions of authority where they enjoy the trust of their customers.

But it's not enough to aspire to become or self actualize the dream of becoming an LLO. In these positions of great responsibility a truly successful LLO must adhere to specific values that direct their energies and give them genuine purpose.

Colonel Thomas L. Strand (B.A., Bowling Green State University; J.D., University of Toledo College of Law; L.L.M., George Washington University) is the Commandant of the Air Force Judge Advocate General School, Maxwell AFB, Alabama.

I advocate the following three specific values.

Value #1 – Integrity

I think that Mr. Warren Buffett, one of the world's most successful businessmen, got it right when he said "somebody once said that in looking for people to hire, you look for three qualities: integrity, intelligence and energy." If you don't have the first, the other two will destroy you sooner or later. In fact, if you hire someone to work with you who does not have integrity, you probably want them to be dumb and lazy!

Value #2 – Productivity

Productivity continuously improves beyond the status quo and often means we're getting more incremental return for the investment. It's a way of thinking, acting and energizing our legal offices. Mr. Jack Welch, former Chairman of the General Electric Corporation said this: "Productivity is the belief that there is an infinite capacity to improve anything . . . it is about the tapping into an ocean of creativity, passion and energy, that, as far as we can see, has no bottom and no shores."

Value #3 – Stewardship

Every legal leader is entrusted with resources: people, money and technology. You must manage these resources given to your care, with due regard for the rights of others. What each of us needs to focus on in the stewardship role is what processes and products we're going to leave behind; what enduring contributions we will make in the end. Not for the sake of the individual LLO, but for the sake of the organization.

Integrity, productivity and stewardship are the values that guide an organization such as our JAG Corps through good times and bad times and into a precarious future. They will ultimately control everything, and as an LLO, you can influence both trust and faith in our mission – the law.

Recommendations for improving leadership, lawyering and officership skill sets embedded in our training and education courses are eagerly welcomed at your Air Force Judge Advocate General and Paralegal School. Send them to 150 Chennault Circle, Maxwell AFB AL 36112 or e-mail me directly at thomas.strand@maxwell.af.mil.

Thomas L. Strand, Commandant

Editors note: After 30 years of service, Colonel Thomas L. Strand is retiring from the United States Air Force. This will be his last contribution to The Commandant's Corner. His leadership and wisdom will be greatly missed here at your Air Force Judge Advocate General School.

Hearsay and the Sixth Amendment Confrontation Clause After *Crawford v. Washington*

Major Tom Posch

On 8 March 2004, the Supreme Court announced a new rule affecting application of the Sixth Amendment *Confrontation Clause* to certain declarations offered into evidence by the prosecution in criminal cases. In *Crawford v. Washington*,[1] seven justices of the Supreme Court joined to rule that the *Confrontation Clause* prohibits admission of an unavailable declarant's statement to police—offered by the prosecution under the statements against penal interest exception to hearsay—where there had been no prior opportunity for the defendant to cross-examine the declarant. The Court's holding extends well beyond its ruling, stating that in the case of *testimonial* evidence, the *Confrontation Clause* "demands what the common law required: unavailability and a prior opportunity for cross-examination."[2]

Confrontation Clause problems are generally of two types: cases like *Crawford* involving the admission of an out-of-court statement by an unavailable declarant, and cases involving restrictions on the scope of cross-examination.[3] This article explores the former. It relies on the Court's profuse historical analysis and *dicta*, to offer an analytical framework for evaluating the application of the *Confrontation Clause* and hearsay rules to evidence offered against an accused. It concludes that pre-*Crawford Confrontation Clause* analysis is likely to remain the same, except in the case of *testimonial* evidence offered by the prosecution in trials by courts-martial.

At the outset, *Crawford* does not change two fundamental tenets of the *Confrontation Clause*: it has no bearing except in criminal prosecutions; and, it is the accused, not the prosecution, that enjoys the right of confrontation as a matter of constitutional law.[4] The *Confrontation Clause* has no applicability to non-criminal cases; and, according to one decision by the Court of Appeals for the Armed Forces, it may pertain to evidence offered by *either* the prosecution or the defense.[5] While the *Confrontation Clause* and hearsay rules both operate to ensure accuracy in fact finding, they serve different purposes: the *Confrontation Clause* is concerned chiefly with ensuring public confidence in adversarial fact-finding by requiring that certain prosecution witnesses are present at trial for cross-examination, whereas the hearsay rules are concerned with the reliability of evidence that is admitted for consideration by the fact finder.[6] The two are inextricably linked in cases like *Crawford*, where the admissibility of an out-of-court statement by an unavailable declarant is at issue.

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Non-Hearsay Offered under MIL. R. EVID. 801(d)

The *Confrontation Clause* is satisfied in most, if not all cases of evidence properly admitted under MIL. R. EVID. 801(d); and, this would appear to be true without regard to a statement's status as testimonial or not. This rule excludes from the definition of hearsay certain prior statements by a witness and admissions by a party-opponent. Evidence properly admitted under MIL. R. EVID. 801(d) is, by definition, non-hearsay, and may be considered as substantive evidence. That is, once compliance with the rule has been shown, the statement may be considered to prove the truth of the matter asserted even though the statement was made out-of-court and would, but for MIL. R. EVID. 801(d), constitute inadmissible hearsay.[7] A prior statement by a witness is admissible when the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement."[8] Since the declarant must be present and subject to cross-examination in order for the prosecution to use this rule of evidence, the *Confrontation Clause* is altogether satisfied. This is true even in circumstances where there was no opportunity to cross-examine the declarant at the time the prior statement was made.[9]

Similarly, if the prosecution offers an admission by a party-opponent under MIL. R. EVID. 801(d)(2), the *Confrontation Clause* should not operate as a bar, particularly if the admission is the accused's own statement: compliance with the rule of evidence should be sufficient for admissibility. There is no *Confrontation Clause* issue because the witness against the accused is the accused himself.[10] So-called "adoptive admissions" of a party-opponent where a declarant's statements are imputed to the defendant have been regarded

as raising no *Confrontation Clause* concerns when the defendant actively participates in the conversation and does nothing to contradict or deny the statements.[11] This threshold for admissibility mirrors the requirement found in the rule: "a statement of which the party has manifested the party's adoption or belief in its truth" is admissible if offered against a party.[12] Even co-conspirator statements made during the course and in furtherance of a conspiracy should not implicate the *Confrontation Clause*, though the rationale for this result differs. The *Crawford* majority opinion would seemingly rely on the fact that co-conspirator statements were historically, and are by their nature, non-testimonial,[13] while the concurring opinion would rely on the fact that statements in furtherance of a conspiracy "cannot be replicated, even if the declarant testifies to the same matters in court."[14] The *Confrontation Clause* should not operate to exclude evidence that is admissible under MIL. R. EVID. 801(d). That is to say, compliance with this rule of evidence, without more, should satisfy the constitutional requirement of confrontation.

Non-Hearsay Evidence Generally

If non-hearsay properly admitted under MIL. R. EVID. 801(d) does not implicate the *Confrontation Clause*, what of non-hearsay generally, that is, any statement offered for a purpose other than to establish the truth of the matter asserted? *Crawford* tells us in *dicta*, that the *Confrontation Clause* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[15] As a general rule, any statement not offered for its truth (whether it be testimonial *or nontestimonial*) is admissible without concern for violating the *Confrontation Clause*, according to federal circuit courts of appeal that have considered this issue.[16]

For example, in a court-martial alleging disobedience of a lawful order, an Airman may testify that she heard her commander give an order.[17] According to *Crawford*'s *dicta*, the order may be admitted for a non-hearsay purpose without concern for the *Confrontation Clause*. It may be relevant by virtue of it having been spoken regardless of its "truth."[18] The order may be admitted to show its contents, or its effect on subordinates that heard it. Similarly, in a prosecution for assault consummated by a battery, trial counsel might try to elicit from a bystander the fact that he heard the complainant say to the accused, "I took the money out of your wallet" immediately prior to the battery. This out-of-court statement would be relevant to establish a motive for the battery (i.e., to explain why the accused was the aggressor); that is, to show the effect the statement had on the accused. In both cases, the *Confrontation Clause* would not bar admission of these out-of-court statements if, for example, the commander and the complainant were unavailable to testify. In such cases, the Sixth Amendment would be satisfied by allowing cross-examination of the witnesses offering the statements.

Counsel should exercise caution, however, when offering out-of-court statements as non-hearsay. Courts have been inclined to find error when evidence admitted for a non-hearsay use, was nevertheless exploited for its truth or where the limiting instruction to the jury was inadequate.[19] It is also conceivable that under the particular facts of a case, an accused would have a constitutional right to confront the declarant of a non-hearsay statement.[20]

Non-Hearsay Offered to Impeach

By far the most common use of an out-of-court statement, not offered for its truth, is to impeach. That is, evidence is often admitted to attack a witness's credibility rather than to establish the truth of the matter asserted. Depending on the method of impeachment used by counsel, a witness may be impeached either by confrontation during cross-examination, or later through the use of extrinsic evidence.[21]

At first blush, *Crawford* seemingly sanctions the use of any out-of-court statement to impeach without concern for the *Confrontation Clause*. Again, *Crawford* tells us in *dicta*, that the *Confrontation Clause* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[22] In *Tennessee v. Street*, cited by *Crawford* for this proposition, the Supreme Court permitted the prosecution to introduce a confession obtained from a non-testifying accomplice for the purpose of contradicting the defendant's testimony that his own confession had been a coerced "copy" obtained when the Sheriff directed the defendant to say the same thing as the accomplice. Noting that the discrepancies in the two confessions cast doubt on the defendant's version of his interrogation, the Court ruled that the fundamental right of cross-examination was satisfied by the Sheriff's presence on the stand.[23] In other words, the accomplice's confession, admitted to show how it was different from the defendant's, not to prove the truth of the accomplice's assertions or what happened at the crime scene, was a legitimate non-hearsay use that raised no *Confrontation Clause* concerns.[24] Thus, even when extrinsic evidence is offered in rebuttal, the *Confrontation Clause* should not bar admissibility.

Once again, however, counsel should proceed with caution. The recent case of *United States v. Hall*,[25] is instructive. The appellant in *Hall* testified that her mother had sent her an herbal tea made from processed

coca leaves and offered this as a reason for her positive urinalysis for the cocaine metabolite, Benzoylecgonine. In rebuttal, the trial counsel called a special agent who had interviewed the appellant's mother. He testified that during this interview, the appellant's mother had denied giving her daughter any teas. The court reversed the appellant's conviction, holding that she was denied her constitutional right of confrontation.[26] The court found that the declarations attributable to the appellant's mother "were inescapably considered for the truth" and the military judge's limiting instruction was impossible to apply.[27] In other words, the right of confrontation was not satisfied by the agent's presence on the stand. Although *Hall* can be distinguished from *Street*, the distinction casts doubt on reading *Crawford's dicta* to say that in *all* cases, evidence offered to impeach need not satisfy the *Confrontation Clause*. In *Street*, what was at issue was the credibility of the Sheriff who obtained both confessions, and who was present and testified at trial; in *Hall*, however, at issue was the credibility of the appellant's mother, who was unavailable for cross-examination.

Ultimately, the best test of admissibility for an out-of-court statement offered to impeach is whether the statement is offered for the truth of the matter asserted. Classifying the purpose in offering the statement as "impeachment" is of no real value and clouds an otherwise lucid analysis: extrinsic evidence offered to impeach that goes to the truth of the matter asserted, as in the *Hall* case, must be tested for confrontation.[28] But, evidence offered to impeach that is not offered for its truth, as in *Street*, does not. Once again, counsel must avoid exploiting for its truth, a statement offered to impeach, and the bench must ensure limiting instructions to the court members are adequate.

Defining "Testimonial" Evidence

Evidence admitted for a non-hearsay purpose is not likely to implicate the *Confrontation Clause*. Conversely, a statement offered to prove the truth of the matter asserted requires counsel to consider the effect that admitting the statement may have on the accused's right of confrontation. In the case of so-called "testimonial" evidence offered by the prosecution against an accused, the *Confrontation Clause* usually "demands what the common law required: unavailability [of the declarant at trial] and a prior opportunity for cross-examination."[29]

"Testimonial" evidence denotes at a minimum, prior testimony at a preliminary hearing, before a grand jury or at a former trial, and statements obtained from police interrogations.[30] Verbatim testimony preserved at an Article 32, U.C.M.J., investigation is akin to prior testimony at a preliminary hearing or grand jury and would qualify as testimonial. Summarized accounts of a witness's testimony that have been prepared by an Article 32 investigating officer are also testimonial in nature; however, because the former testimony exception to hearsay forbids anything short of a verbatim record, the application of the *Confrontation Clause* to summarized statements by an unavailable declarant that are offered for their truth will continue to be unresolved.[31]

Statements taken by police officers "in the course of interrogations" are testimonial "under even a narrow standard."[32] *Crawford* notes that "[i]nterrogation" is used by the Court in its "colloquial" rather than any "technical legal sense," and cites *Rhode Island v. Innis* by analogy, a case where the Court defined interrogation to mean express questioning by police or its "functional equivalent."[33] Perhaps *Websters'* definition, "To examine by asking questions, esp. officially or in a formal, systematic way," is what the Supreme Court envisions.[34] The facts of *Crawford* may be instructive: the out-of-court statement was obtained following a *Miranda* rights advisement while the declarant was in custody and suspected of complicity in the offense for which she was being questioned.[35] Often responding to leading questions, her statements were tape-recorded by police and offered to corroborate the defendant's confession.[36] *Crawford* rejected admissibility of the tape-recorded statement, noting that a "*recorded* statement, *knowingly given* in response to *structured* police questioning, qualifies under any conceivable definition [of "interrogation"]."[37] To what degree it matters whether police (1) hold the person being questioned in custody, (2) give *Miranda* warnings prior to questioning, (3) suspect the person questioned of committing an offense, (4) elicit responses in a structured versus a narrative manner, or (5) preserve a verbatim record of questions and responses, remains to be seen.

Also uncertain at the moment is whether testimonial statements elicited by law enforcement personnel encompass little more than confessions and admissions obtained during interrogation or its equivalent. With one exception, statements obtained from complainants and witnesses even in a police station setting do not squarely satisfy *Crawford's dicta* for labeling as *testimonial*, although they would appear to satisfy the Court's rationale for inclusion in this category, i.e., that juries, not judges, should decide the reliability of evidence.[38] The exception is a child's statement to police, which *Crawford* labels "*testimonial*," but does so by reference to a case "in tension" with its ruling.[39] Future cases will undoubtedly spell out whether responses given to police questioning are inherently testimonial or whether a statement's status as

"testimonial" is more narrowly dependent on the conditions of the interview or the status of the person questioned, i.e. as a suspect, accomplice, or juvenile on the one hand, or as a complainant or witness on the other.[40] Perhaps formal questioning, where police have identified a suspect and not just a mere "person of interest" will be the test. If one could hazard a guess, the Supreme Court will ultimately announce a bright-line rule, one that focuses as little as possible on the intent of the official who took the statement.

Regardless of the ultimate formulation employed by the Court, the fact that a statement obtained by police was unsworn does not seem to be of any consequence.[41] Similarly, it is the status of the interrogator as a government officer, not the fact that a police or law enforcement officer, especially, was involved in the questioning, that contributes to a statement's status as testimonial.[42] Even non-police questioning by government officials may be testimonial if produced "with an eye toward trial."[43] Consequently, questioning by commanders, first sergeants, and other military personnel who possess "an essentially investigative and prosecutorial function," are probably not outside *Crawford's* purview; however, obvious distinctions can be drawn.[44]

For now, we can discern what may be testimonial by what the Supreme Court suggests is not. Nontestimonial statements include most statements that do *not* constitute either prior testimony at a preliminary hearing, testimony before a grand jury, testimony at a former trial, or confessions and admissions obtained during an interrogation or its equivalent. A "casual remark to an acquaintance"[45] and "statements made unwittingly to an FBI informant"[46] are seemingly nontestimonial, as are "business records" and statements "in furtherance of a conspiracy."[47] For example, any statement made to a private citizen (as compared to one made to an agent of law enforcement) would likely constitute a nontestimonial statement. The same could be said for most statements made for purposes of medical diagnosis or treatment. In the case of *business* records, counsel should note that the Court almost certainly uses this term in its literal, non-governmental sense, not as it has been expansively defined in the commonly used hearsay exception that encompasses most records of any regularly conducted activity.[48] *Crawford*, even in *dicta*, does not go so far as to bar application of the *Confrontation Clause* to government records offered under MIL. R. EVID. 803(6)-(8) or (10), some of which may be testimonial in nature. Hence, admitting certain forensic laboratory reports prepared by government employees, without more, may deny an accused the right of confrontation even if the foundation for a hearsay exception is met.[49]

Exceptions to the Restrictions on the Use of Testimonial Evidence

Within the *Crawford* holding, the Supreme Court announced a key exception: the *Confrontation Clause* does *not* bar admission of a testimonial statement by an unavailable declarant if there has been "a prior opportunity for cross-examination."[50] Thus, if Crawford's wife had testified at a deposition and there had been an opportunity for meaningful cross-examination by the defendant, then subsequent use of her deposition and her earlier statements to police would seemingly not violate the *Confrontation Clause*, even if offered as substantive evidence, i.e. to prove the truth of the matters asserted. When trial counsel seeks to use an out-of-court statement as substantive evidence, however, in addition to satisfying the *Confrontation Clause*, the evidence must also satisfy the hearsay rules, MIL. R. EVID. 801-807. By way of illustration, prior recorded testimony of an unavailable declarant given at an Article 32 hearing, or deposition, is admissible as an exception to hearsay if there was an opportunity and similar motive for cross-examination.[51]

A second exception to the prohibition against use of testimonial statements for a substantive purpose concerns instances where the declarant is present at trial and is subject to cross-examination. *Crawford* notes that the *Confrontation Clause* "does not bar admission of a [testimonial] statement so long as the declarant is present at trial to defend or explain it."[52] Once again, compliance with the *Confrontation Clause* is one thing, but satisfying the hearsay rule, another. This is true even in cases where the prosecution seeks to have a witness testify to declarations she herself made out-of-court. Thus, if Crawford's wife had been available and testified at her husband's trial, then her earlier statements to police would not have been barred by the *Confrontation Clause*. The prosecution, of course, would have been required to lay a foundation for an exception to hearsay, or show that her statements to police were non-hearsay within the meaning of MIL. R. EVID. 801(d), if it wished to use these statements for the truth of the matter asserted.

A final exception on the substantive use of testimonial statements concerns hearsay exceptions that must be accepted as exceptions to the *Confrontation Clause* on historical grounds. Of these, however, only dying declarations clearly qualify.[53] *Crawford* does note that one case "arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial" is the case of *White v. Illinois*, involving, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations (excited utterances), and statements admitted under the medical examination

exception to hearsay.[54] Recent precedent aside, however, the soundness of *White*, post-*Crawford*, is in limbo at least with regard to statements obtained by police.[55]

Nontestimonial Evidence and the Confrontation Clause

Supreme Court decisions construing the *Confrontation Clause* pre-*Crawford* made no distinction, as *Crawford* does, between testimonial and nontestimonial evidence. Instead, since 1980, the rule had been that the Sixth Amendment does not bar admission of an unavailable declarant's statement against an accused so long as the statement bore "adequate 'indicia of reliability,'" that is, the statement either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[56] In *Crawford*, the Supreme Court repudiated this reliability test only in circumstances where *testimonial* evidence by an unavailable declarant is offered by the prosecution.

Nontestimonial statements, however, appear to be governed by pre-*Crawford* precedent. *Crawford* states, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law."[57] Two federal circuit courts of appeal that have considered the issue have reached this conclusion.[58] A nontestimonial statement would likely *not* violate the *Confrontation Clause* if it were admissible under pre-*Crawford Confrontation Clause* analysis, i.e. if the declarant were unavailable to testify at trial and the statement either fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness.[59] It is *only* where the exception is not firmly rooted that one has to examine the particularized guarantees of the statement's trustworthiness.[60]

Restated, when a declarant is unavailable at trial and the hearsay is *nontestimonial*, then the statement must either fall within a firmly rooted exception to the hearsay rule, or the reliability necessary to satisfy the *Confrontation Clause* can be established by showing that the out-of-court statement is supported by "particularized guarantees of trustworthiness."[61] Firmly rooted traditional hearsay exceptions such as present sense impression, excited utterances and statements for medical treatment or diagnosis have been held presumptively reliable for confrontation purposes.[62] If an exception to the hearsay rule is firmly rooted, then compliance with the evidence rule *alone* satisfies the *Confrontation Clause*.[63] The key factor in analyzing whether a statement meets the "particularized guarantees of trustworthiness" test is whether the circumstances of the declaration are such that the statement is so trustworthy that adversarial testing would do little to add to the statement's reliability. The trustworthiness of the statement must be shown only from the totality of the circumstances that surround the *making* of the statement.[64]

Waiver of Confrontation Rights?

Crawford left for another day, the issue of whether an accused, forced to chose between exercising a privilege—e.g. the marital privilege invoked by the defendant in *Crawford*—and confronting the witness, may be deemed to have waived confrontation rights by invoking the privilege.[65] It remains to be seen whether an accused is entitled to either the right of confrontation or the right to claim a privilege, but not both. Similarly, misconduct by an accused in procuring the unavailability of a witness "extinguishes confrontation claims on essentially equitable grounds."[66]

Conclusion

Counsel considering the application of the hearsay rules and *Confrontation Clause* need to have an analytical framework to evaluate the admissibility of such evidence. When offering evidence of an out-of-court statement, trial counsel must consider both the hearsay rules and the Sixth Amendment *Confrontation Clause*, especially when offering a testimonial statement by an unavailable declarant as substantive evidence. To preserve issues for appeal, defense counsel must consider objecting to the admission of such evidence on grounds of hearsay as well as denial of the accused's right of confrontation. This is especially important in situations where a statement is ultimately determined to have been testimonial in nature and was nevertheless admitted against the accused without benefit of confrontation. Even statements that appear nontestimonial at time of trial may be found to have been testimonial as cases interpreting *Crawford* are litigated and resolved on appeal.

[1] *Crawford v. Washington*, 124 S. Ct. 1354 (2004).
[2] *Crawford*, 124 S. Ct. at 1374.
[3] *See, generally*, *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985). *But see*, *Maryland v. Craig*, 497 U.S. 836 (1990) (constitutionality of courtroom procedures designed to prevent a child from facing a defendant in open court).
[4] The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. CONST. amend. VI., cl. 5.
[5] When the defense offers extrinsic evidence to impeach a witness and is deprived of this opportunity, "it may deny confrontation rights to exclude it." *United States v. Bins*, 43 M.J. 79, 84 (C.A.A.F. 1995) (holding that appellant's rights to cross-examine the witness against him and to present his defense were improperly limited). Note, however, that denial of the appellant's fundamental *due process* right to present a defense is an adequate rationale for the court's decision and is more congruous with other cases interpreting the

Confrontation Clause.
[6]*See, United States v. Martindale*, 36 M.J. 870 (N.M.C.M.R. 1993), for an excellent discussion.
[7]Hearsay as defined by MIL. R. EVID. 801(c), is inadmissible, absent an exception or a categorical exclusion from the definition: "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
[8]MIL. R. EVID. 801(d)(1).
[9]*See, Crawford*, 124 S. Ct. at 1369 n.9 ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the *Confrontation Clause* places no constraints at all on the use of his prior testimonial statements…[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it").
[10]*See, e.g., United States v. Woods*, 301 F.3d 556, 561 (7th Cir. 2002). Note: in joint trials, however, the *Confrontation Clause* can limit admissibility of a co-defendant's confession against *other* defendants notwithstanding a limiting instruction. *See, generally, Cruz v. New York*, 481 U.S. 186, 189-90 (1987).
[11]*See, United States v. Kehoe*, 310 F.3d 579, 590-91 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048, 123 S. Ct. 2112, 155 L. Ed. 2d 1089 (2003); *and, generally, United States v. Woods*, 301 F.3d 556 (7th Cir. 2002).
[12]MIL. R. EVID. 801(d)(2)(B).
[13]*Crawford*, 124 S. Ct. at 1367. This was the rationale relied upon by the Eighth Circuit in a case decided three weeks after *Crawford*. *See, United States v. Reyes*, 362 F.3d 536, 540-41 (8th Cir. 2004) ("When a statement satisfies the requirements for a co-conspirator statement under *Federal Rule of Evidence 801*, both the Rules of Evidence and the *Confrontation Clause* allow the government to introduce the statement through a witness who heard the statement, even if the government cannot show that the co-conspirator is unavailable").
[14]*Crawford*, 124 S. Ct. at 1377 (Rehnquist, C.J., concurring), *quoting, United States v. Inadi*, 475 U.S. 387, 395 (1986). *See, also, Bourjaily v. United States*, 483 U.S. 171, 183-4 (1987) ("we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)"). *See, also*, Major Frederick L. Borch III, *The Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility*, 124 MIL. L. REV. 163, 163-4 (1989) ("*Inadi* and *Bourjaily* in concert end the need for co-conspirator hearsay proffered under Rule 801(d)(2)(E) to be analyzed in terms of the sixth amendment's right to confrontation").
[15]*Crawford*, 124 S. Ct. at 1369 n.9, *citing, Tennessee v. Street*, 471 U.S. 409, 414 (1985).
[16]*See, e.g., Martinez v. McCaughtry*, 951 F.2d 130, 133 (7th Cir. 1991) (holding, in part, that the statements, "Don't make me do this to you," "you're a dead man," and "you're going to die," were offered to show that the declarant made them and the defendant heard them, and therefore raised no *Confrontation Clause* problem); *see, also, United States v. Trenkler*, 61 F.3d 45, 61-2 (1st Cir. 1995) (ruling, to the extent the district court admitted non-hearsay evidence of the defendant's state of mind, the defendant's *Confrontation Clause* challenge lacked merit).
[17]This example is based on one found in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed), App 22 at A22-53.
[18]Orders are analogous to words of contracting and are admissible as non-hearsay verbal acts.
[19]*See, e.g., Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (remanding and finding that the prosecutor's subsequent improper use of a non-testifying codefendant's testimony not offered for the truth undid the effect of the limiting instruction). *See, also, Douglas v. Alabama*, 380 U.S. 415 (1965).
[20]If, e.g., the trial counsel offered the verbal order of a non-testifying commander to show some *knowledge* or *belief* of the commander giving it, then perhaps an accused's only fair recourse would be to cross-examine the officer under oath.
[21]Extrinsic evidence is admissible to impeach under MIL. R. EVID. 608(c) (evidence of bias, prejudice, or motive to misrepresent), MIL. R. EVID. 609 (impeachment by evidence of conviction of crime), and MIL. R. EVID. 613(b) (prior inconsistent statement of witness). Extrinsic evidence is also admissible to impeach by contradiction. *See, generally, United States v. Banker*, 15 M.J. 207 (C.M.A. 1983), and subsequent cases.
[22]*Crawford*, 124 S. Ct. at 1369 n.9, *citing, Tennessee v. Street*, 471 U.S. 409, 414 (1985). Note: the analysis that follows is applicable regardless of whether the statement is testimonial or nontestimonial.
[23]*Street*, 471 U.S. at 414.
[24]*Id. See, also, United States v. Rynning*, 47 M.J. 420 (C.A.A.F. 1998).
[25]*United States v. Hall*, 58 M.J. 90 (C.A.A.F. 2003).
[26]*Id.* at 94.
[27]*Id.* Of note, considering the holding, it is doubtful that an adequate limiting instruction could have been given.
[28]*See, also, United States v. Trimper*, 28 M.J. 460, 468 (C.M.A. 1989) (extrinsic evidence admissible in rebuttal to impeach the accused's credibility and to rebut his character evidence).
[29]*Crawford*, 124 S. Ct. at 1374.
[30]*Id.*
[31]"A record of testimony given before…proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record." MIL. R. EVID. 804(b)(1).
[32]*Crawford*, 124 S. Ct. at 1364 (also noting, "Police interrogations bear a striking resemblance to examinations by justices of the peace in England").
[33]*Id.* at 1365 n.4, *citing, Rhode Island v. Innis*, 446 U.S. 291, 300-1 (1980) (holding that the term "interrogation" under *Miranda* included any words or actions on the part of the police that the police should know were reasonably likely to elicit an incriminating response).
[34]*New Webster's Dictionary of the English Language: Deluxe Encyclopedic Edition* (1984).
[35]*Crawford*, 124 S. Ct. at 1357, 1372.
[36]*Id.* at 1357-8.
[37]*Id.* at 1365 n.4 (emphasis added).
[38]*Id.* at 1370.
[39]*Id.* at 1368 n.8 (stating, without deciding, that a child victim's statement to an investigating police officer is testimonial), *citing, White v. Illinois*, 502 U.S. 346, 365 (1992).
[40]At least three sitting Supreme Court Justices seem poised to join the Chief Justice and exclude from the designation, *testimonial* evidence, statements obtained by police from a complainant or witness that were not the result of an interrogation or its equivalent. *See, Crawford*, 124 S. Ct. at 1376 (citing, with approval, historical authority that sworn statements of "accusers and witnesses" could be admitted into evidence if the declarant was unavailable) (Rehnquist, C.J., and O'Connor, J., concurring); *and, White v. Illinois*, 502 U.S. 346, 365 (1992) (noting one "possible formulation" is to include within *Confrontation Clause* consideration "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or *confessions*." (Thomas, J., and Scalia, J., concurring) (emphasis added).
[41]*See, generally, Crawford* at 1364-5 ("statements [elicited by police] are not *sworn* testimony, but the absence of oath was not dispositive").
[42]*Id.* ("The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace").
[43]*Id.* at 1367 n.7.
[44]*Id.* at 1365. Arguably, e.g., questioning about a mere "civil" matter, as contrasted with a criminal investigation, would not implicate

the *Confrontation Clause*, even if the statement were later used in a trial by court-martial.
[45]*Id.* at 1364 (contrasting this with a "formal statement to government officers").
[46]*Id.* at 1368 (noting that prior cross-examination was not an "indispensable requirement"), *citing*, *Bourjaily*, 483 U.S. at 181-4.
[47]*Crawford*, 124 S. Ct. at 1367.
[48]*See*, *e.g.*, MIL. R. EVID. 803(6), which defines *business* to include "*the armed forces*, a business, institution, association, profession, occupation, *and calling of every kind*, whether or not conducted for profit." (emphasis added). *Crawford* calls into question the constitutionality of parts of this definition as may be applicable to the facts of a particular case. *But see*, *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring).
[49]*See*, *e.g.*, *United States v. Broadnax*, 23 M.J. 389 (C.M.A. 1987) (ruling that the accused was prejudiced by not being able to confront the document examiner who prepared a laboratory report that was admitted at trial as a public records exception to hearsay).
[50]*Crawford*, 124 S. Ct. at 1374.
[51]MIL. R. EVID. 804(b)(1).
[52]*Crawford*, 124 S. Ct. at 1369 n.9 ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the *Confrontation Clause* places no constraints at all on the use of his prior testimonial statements").
[53]*Id.* at 1367 n.6.
[54]*Id.* at 1368 n.8, *citing*, *White v. Illinois*, 502 U.S. 346 (1992).
[55]*Crawford* notes, "we need not definitively resolve whether it [*White*] survives our decision today." *Id.* at 1370.
[56]*Ohio v. Roberts*, 448 U.S. 56, 66 (1980).
[57]*Crawford*, 124 S. Ct. at 1374.
[58]*See*, *e.g.*, *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004) ("Crawford draws a distinction between testimonial and nontestimonial hearsay and applies only to the former"); *and*, *United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004).
[59]*See*, *United States v. Hughes*, 48 M.J. 700 (A.F. Ct. Crim. App. 1998), *citing*, *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).
[60]*Idaho v. Wright*, 497 U.S. 805, 816-17 (1990).
[61]*See*, *United States v. Robles*, 53 M.J. 783, 795 (A.F. Ct. Crim. App. 2000) (citing cases).
[62]*White v. Illinois*, 502 U.S. 346 (1992).
[63]*See*, *e.g.*, *United States v. Ureta*, 41 M.J. 571 (C.A.A.F. 1996).
[64]*Wright*, 497 U.S. at 820.
[65]*See*, *Crawford*, 124 S. Ct. at 1359 n.1.
[66]*Id.* at 1370 ("the rule of forfeiture by wrongdoing").
[67]As noted in the majority's concluding paragraph, "our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo." *Id.* at 1374.

Out of Court (Prior) Statement made by a Declarant and Offered by the Prosecution

↓

The Declaration is a prior statement by a witness? Mil. R. Evid. 801(d)(1) →Yes→ Admissible. Since the witness *must be present* at trial and available for cross-examination in order for this hearsay exclusion to apply, the *Confrontation Clause* is satisfied.

↓No

The Declaration is an admission by a party opponent, e.g. by an accused (to include a statement by a co-conspirator made during the course/in furtherance of a conspiracy)? Mil. R. Evid. 801(d)(2) →Yes→ Admissible. The *Confrontation Clause* "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford* at 1369 n.9. It includes all admissions by a party-opponent to include, and especially, statements by co-conspirators made during the course of, and in furtherance of, a conspiracy. *Crawford* at 1364, 1367.

↓No

The Declaration is offered as non-hearsay, e.g., to impeach, not to prove the truth of the matter asserted →Yes→ Admissible. The *Confrontation Clause* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford* at 1369 n.9.

↓No

The Declaration <u>is</u> offered to prove the truth of the matter asserted

↓

Is the Declaration Testimonial? E.g.:
- Prior testimony at a preliminary hearing?
- Prior testimony before a grand jury?
- Prior testimony at a former trial?
- Police interrogation?

Crawford at 1365 n.4, 1374. *See*, note 1. →Yes→ Is the Declarant unavailable (at trial) but there was a prior opportunity for cross-examination by the defense? *See*, note 2. →Yes→ Admissible (if a hearsay exception applies). *Crawford* at 1374. E.g., the former testimony hearsay exception, Mil. R. Evid. 804(b)(1), satisfies *Crawford*: prior recorded testimony of an unavailable declarant given at an Article 32 hearing, or deposition, is admissible if there was an opportunity and similar motive for cross-examination.

↓No

No ↓ Is the Declarant present at trial to defend/explain the statement (defense cross-examination)? →Yes→ Admissible (if a hearsay exception applies): "[W]hen the declarant appears for cross-examination at trial, the *Confrontation Clause* places no constraints at all on the use of his prior testimonial statements." *Crawford* at 1369 n.9.

↓No

↓ Dying Declaration? →Yes→ Admissible. *Crawford* at 1367 n.6.

↓No

No ↓ Excited Utterance or Statement Made for Medical Diagnosis/ Treatment (and the declarant is unavailable)? →Yes→ Maybe Admissible. *Crawford* notes that one case arguably in tension with its ruling is *White v. Illinois*, 502 U.S. 346 (1992) [child victim's statements admitted as hearsay exceptions]. *See*, *Crawford* at 1368 n.8. *Crawford* notes, "we need not definitively resolve whether it [*White*] survives our decision today." *Id.* at 1370.

↓No

No ↓ The Declaration is inadmissible: Where testimonial evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford* at 1374. *See*, note 3.

↓

The Declaration is Nontestimonial. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford* at 1374. The Supreme Court has not overruled existing cases when the statement is non-testimonial. I.e. pre-*Crawford Confrontation Clause* analysis has not been overruled. *See*, note 4. Non-testimonial statements include, e.g.:
- A "casual remark to an acquaintance." *Crawford* at 1364 (*see*, note 5)
- A statement made "unwittingly to an FBI informant." *Crawford* at 1368
- "business records." *Crawford* at 1367
- Statements in furtherance of a conspiracy. *Crawford* at 1367

↓

The Declarant is Available? →Yes→ Admissible (if a hearsay exception applies). If the declarant testifies (is available) and the declaration is offered under the residual hearsay exception, Mil. R. Evid. 807, then the military judge *may* look beyond the circumstances surrounding the declaration and consider other evidence to determine if the declaration is sufficiently trustworthy to be admitted. *United States v. Johnson*, 49 M.J. 467, 471 (C.A.A.F. 1998) (citing cases).

↓No

The Declarant is Unavailable. *See*, note 2.

↓

The Declaration falls under a "Firmly Rooted" Hearsay Exception? *See*, cases. E.g.:
- Present sense impression
- Excited utterance
- Then existing mental, emotional, or physical condition
- Statements made for purposes of medical diagnosis or treatment

→Yes→ Admissible. Firmly rooted hearsay exceptions such as present sense impression, excited utterance, and statements for medical treatment or diagnosis, have been held "presumptively reliable for confrontation purposes." *White v. Illinois*, 112 S.Ct. 736 (1992). Compliance with the evidence rule alone satisfies the 6th Amendment. *United States v. Ureta*, 41 M.J. 571 (A.F. Ct. Crim. App. 1994). I.e., the military judge has a purely evidentiary, non-*Confrontation Clause*, decision to make: applying the rules of the relevant hearsay exception to the circumstances surrounding the declaration in order to determine its admissibility.

↓No

The Declaration has particularized guarantees of trustworthiness? →Yes→ Admissible (if a hearsay exception applies). When the declarant is unavailable, the trustworthiness of the statement must be shown only from the totality of the circumstances that surround the *making* of the statement (not extrinsic evidence).

↓No

The Declaration is inadmissible.

Notes:

1. Testimonial evidence applies "at a minimum" to these four circumstances. The Supreme Court "leave[s] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford* at 1374. "Interrogation" is used in its "colloquial" rather than any "technical legal sense." A "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Crawford* at 1365 n.4.
2. In addition to the criteria for unavailability in Mil. R. Evid. 804(a), trial counsel must exercise "good faith efforts" to secure the presence of a necessary witness. *United States v. Wind*, 28 M.J. 381 (C.M.A. 1989). "[F]orfeiture by wrongdoing" will also defeat *Confrontation Clause* claims. *Crawford* at 1370.
3. Even testimonial statements that fall under a firmly rooted exception to hearsay are likely barred by the *Confrontation Clause*: "[T]here is scant evidence [in the historical record] that [hearsay] exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case." *Crawford* at 1367 (emphasis supplied). Testimonial evidence will likely not satisfy the 6th Amendment when offered under the residual hearsay exception, Mil. R. Evid. 807.
4. "[W]e considered reliability factors…when the hearsay statement at issue was not testimonial." *Crawford* at 1368 (dicta) (citing cases).
5. Most if not all declaration made to non-government/non-law enforcement personnel are probably nontestimonial. *Crawford* at 1367 n.7.

PRACTICUM

M.R.E. 412 APPLIES TO MORE THAN NON-CONSENSUAL SEXUAL ACTS

In order to encourage victims of sexual misconduct to disclose their victimization, and institute and participate in legal proceedings against alleged offenders, Federal Rule of Evidence 412 was adopted. M.R.E. 412 is modeled after the Federal Rule. Both Rules were intended to protect alleged victims against invasion of privacy and embarrassment related to public disclosure of intimate sexual details while preserving the constitutional rights of an accused to present a defense. By its terms, M.R.E. 412 pertains to "nonconsensual sexual offenses," however; service courts had disagreed on whether the Rule applies only when there is an alleged victim of a nonconsensual sexual offense.

The Coast Guard Court of Criminal Appeals, in *U.S. v. Stirewalt*, 53 M.J. 582 (CG Ct. Crim App 2000), found that M.R.E. 412 only applied when there is a victim of a nonconsensual sexual offense. The Air Force Court of Criminal Appeals reached a contrary decision in *U.S. v. Banker*, 57 M.J. 699 (AF Ct. Crim App 2003). The Court of Appeals for the Armed Forces (hereinafter "the Court") considered these divergent conclusions in *U.S. v. Banker*, 60 M.J. 216 (2004). The Court concluded that an alleged victim need only be a victim of "alleged sexual misconduct" and that such alleged sexual misconduct does not have to be nonconsensual for M.R.E. 412 to apply.

Staff Sergeant Banker was convicted of sodomy with a child on divers occasions, indecent acts with a child on divers occasions, indecent acts on divers occasions, and adultery on divers occasions. His misconduct involved the babysitter for his children. She was 14 years old when she began working for the Banker family. Banker initiated sexual contact about one year later. He groomed her slowly into acts including oral and anal sodomy and sexual intercourse. She became upset with him after learning that Banker had a preoccupation with taking females' virginity. Eventually, she told a friend and the friend convinced her to tell her mother. The babysitter's mother notified authorities. At trial, the babysitter testified that she considered the relationship to be consensual.

Banker sought to introduce evidence of the babysitter's alleged sexual behavior with his son in an attempt to prove the girl had a motive to fabricate allegations against him. Banker's theory on appeal was that the evidence that the babysitter allegedly molested his son approximately 60 times was relevant to show that the alleged victim lacked credibility and accused him to protect herself from allegations of sexual misconduct involving his son. The military judge held a closed hearing to determine admissibility and subsequently held the evidence was not relevant.

On appeal, the defense argued that the Air Force Court of Criminal Appeals erred when it held M.R.E. 412 applied to consensual sexual misconduct. Alternatively, the defense contended the military judge erred by excluding the evidence of the babysitter's alleged sexual behavior because it was constitutionally required. The Court held that neither the Air Force Court of Criminal Appeals nor the military judge erred.

The Court noted 1998 amendments to M.R.E. 412 changed the focus of the rule's applicability from the nature of the alleged sexual misconduct to the status of the person against whom the evidence is offered. Thus, the issue is whether the person is a victim of alleged sexual misconduct, not whether the alleged sexual misconduct is nonconsensual. The Court further concluded that M.R.E. 412 is not limited to nonconsensual sexual offenses, but applies to proceedings involving alleged sexual misconduct, and requires a threshold determination of whether the subject of the proffered evidence was a victim of alleged sexual misconduct. Banker claimed the sexual activity was consensual based upon the babysitter's testimony. The Court, however, differentiated between factual and legal consent. Noting they had failed to adopt a per se rule for certain forms of sexual activity such as sodomy and indecent acts, the Court found the babysitter was a victim because she was not capable of legally consenting to Banker's conduct.

Having concluded that the babysitter was a "victim," the Court held the defense's proffered testimony fell within the scope of M.R.E. 412. At this point, the inquiry shifted to admissibility in light of relevance and balancing test requirements.

The Court noted that M.R.E. 412 is a rule of exclusion designed to protect alleged victims of sexual offenses from undue exposure of their sexual histories. The rule is designed to exclude evidence of sexual propensity as well as evidence of other sexual behavior. There are three exceptions to the rule. First, evidence of specific instances of sexual conduct may be admitted to prove a person other than the accused was the source of semen, physical injury, or other physical evidence. Second, evidence of specific instances of sexual conduct with the accused may be admitted to prove the alleged victim's consent. Third, evidence is admissible if exclusion would violate the accused's constitutional rights of confrontation or the right to a fair trial. An accused must demonstrate why the general prohibition of M.R.E. 412 should be lifted and how the evidence fits within one of the exceptions of

the rule. Under the third exception, the defense must detail a theory of relevance and constitutional necessity to justify admitting the evidence.

To overcome the exclusionary purpose of the rule, the accused must demonstrate how evidence of sexual behavior of the alleged victim fits within one of the exceptions to the rule. The military judge holds a closed hearing to consider whether the general prohibition in M.R.E. 412 should be lifted to admit the evidence. The alleged victim must be given the opportunity to be heard at the closed hearing.

The military judge uses a two-part review to determine admissibility. First, the judge determines relevance under M.R.E. 401. If relevant, the judge then applies a balancing test. When the proffered basis for admissibility is the "constitutionally required" exception, the analysis under M.R.E. 412(b)(1)(c) requires evidence to be "relevant, material, and favorable to the defense" to be admitted. The relevance portion of this analysis is the same as M.R.E. 401, but the judge must then determine whether the evidence is "material and favorable," and thus whether it is "necessary."

In determining whether the evidence is favorable (considered synonymous with "vital"), the military judge uses the M.R.E. 412 balancing test, which differs in two respects from that of M.R.E. 403. The rules take contradictory views concerning presumption of admissibility. Under M.R.E. 403, a rule of inclusion, there is a presumption of admissibility. The opponent has the burden to show inadmissibility. Under M.R.E. 412, a rule of exclusion, the presumption is inadmissibility and the proponent has the burden to demonstrate admissibility. Further, M.R.E. 412 analysis looks at unfair prejudice to the privacy interests of the alleged victim, as well as other traditional M.R.E. 403 factors, when weighed against the probative value of the evidence.

In Banker's case, the defense counsel suggested the proffered testimony concerning the babysitter and his son went "directly to [her] credibility and motive to fabricate." Beyond that, defense counsel did not articulate any specific theory or motive why the babysitter might have fabricated the allegations. The Court noted evidence of a motive to fabricate is generally constitutionally required to be admitted, but there must be sufficient articulation of such motive for the military judge to assess whether it is relevant. Banker's defense failed to articulate the relevance. Accordingly, the Court held the trial judge did not abuse his discretion in refusing to admit the evidence.

In a concurring opinion, Judge Effron noted evidence under M.R.E. 412 is a developing area of law that is highly fact-dependent. He notes that there are many unresolved interpretative matters in this area, particularly when relevant evidence otherwise excluded under the rule must be admitted to protect the constitutional rights of the accused.

To ensure justice is done, counsel for either party must know the standards that are employed in reaching a decision on admissibility and properly advocate for their client. Moreover, counsel must properly develop the record to facilitate proper and meaningful review of the trial judge's evidentiary decisions.

WHAT'S WRONG WITH THIS SCENARIO?

The convening authority is ready to take action on a special court-martial case. The accused was convicted and sentenced to four months confinement, reduction to the grade of E-1, and to be discharged with a bad conduct discharge. Prior to trial, the convening authority approved a pretrial agreement proposed by the defense and supported by the Staff Judge Advocate. Appendix A contained the following sentence limitations:

1. The convening authority will approve no con finement in excess of five months;
2. If a bad conduct discharge is adjudged, said bad conduct discharge will be disapproved;
3. The convening authority will defer any ad judged fines and forfeitures of an amount greater than $700 until action, and upon action waive execution of the part of the sentence extending to adjudged fines or forfeitures of an amount greater than $700, and direct payment of the waived fines and forfeitures to the accused's spouse, for the benefit of herself and the accused's dependent child; and
4. Reduction in rank will be deferred for the term of confinement, or release from confinement, whichever is sooner.

The pretrial agreement did not restrict the convening authority's ability to approve other forms of an adjudged sentence. Take another look at the agreement. Can you identify the multiple problems? Can you identify the proper action for the convening authority?

Taking the wrong action at the wrong time could result in an appellate court setting aside the findings and sentence because the pleas are considered involuntary under the reasoning developed in *United States v. Perron*, 58 M.J. 78 (2003) and *United States v. Mitchell*, 58 M.J. 251 (2003). Of course, an appellate court would not automatically review cases not involving either a punitive discharge or confinement for more than one year. An appellate court would not automatically review this case if the convening authority's action would be consistent with the terms of the pretrial agreement. However, another reviewing authority could set aside the findings and sentence be-

cause the pleas could be improvident, unless the action comports with the expectations of both sides when the agreement was consummated.

First, the limitations of the pretrial agreement ensured that there would not be mandatory forfeitures as a consequence of the sentence. Mandatory forfeitures under Article 58b, UCMJ, occur when a special court-martial sentence includes confinement for more than six months, or confinement for six months or less and a bad conduct discharge. Taking action pursuant to the pretrial agreement would eliminate the possibility of mandatory forfeitures. As a result, there would be no mandatory forfeitures to grant a waiver for the benefit of dependents at the time of the action.

Second, fines may not be deferred. Reduction in grade and forfeitures may be deferred until the convening authority takes action. [Article 57(a)(2), UCMJ.] A fine does not take effect until approved in the action. [Article 57(e), UCMJ.]

Third, fines can't be "waived" for the benefit of dependents. Forfeitures otherwise required by Article 58b(a), UCMJ, may be waived for the benefit of dependents under Article 58b(b), UCMJ. But if a sentence of a service member who would forfeit pay (and allowances, in a general court-martial) as a result of Article 58b(a), UCMJ, is set aside or disapproved or, as finally approved, does not provide for mandatory forfeitures, the member must be paid what they should have been paid, except for the forfeiture, for any period in which the forfeiture was in effect. [Article 58b(c), UCMJ.]

Fourth, a reduction in "rank" is an inappropriate term of art. The correct term is a reduction in "grade." The convening authority cannot defer a reduction in "rank" (grade) for the term of confinement, or until the member's release from confinement, whichever is sooner, unless action will not occur until the confinement period was complete or the action only approved confinement served up to the date of action. The reason for this is a deferment of reduction in grade may only be effective until the date of the action, not beyond. [Article 57(a)(2), UCMJ.]

Finally, the agreement is somewhat ambiguous. The agreement calls for deferment of any fines or forfeitures greater than $700 until action, and upon action, to waive forfeiture greater than $700 for the benefit of the accused's dependents. Appellate courts would construe the monetary limitation as a one-month forfeiture. From the agreement, that would appear to be the intent. However, if the intent was for a limit of $700 forfeitures per month, or to allow $700 to be taken before action (as automatic forfeitures, before the deferment) and an additional $700 to be taken before a waiver would take effect, the agreement is unclear.

Taking all of these factors into account, how could a base law office draft an action for a convening authority that comports with the intent of the pretrial agreement, and ensures monetary conditions intended to provide support for an accused's family are met?

The convening authority can comply with the agreement's first two provisions by disapproving the adjudged bad conduct discharge and approving the adjudged four months confinement.

The third and fourth provisions of the pretrial agreement are a little more complicated. The impact that forfeitures and reduction in grade have on this agreement is significant. Although there were no adjudged forfeitures to defer, the adjudged sentence would initially trigger mandatory forfeitures fourteen days after sentence is announced. To comply with the provision to waive adjudged fines and forfeitures, the convening authority could waive mandatory forfeitures beginning at the fourteenth day after sentence was announced but only until the date of action. Upon action, no further waiver is possible due to the first two provisions of the agreement. This could necessitate taking action at the completion of the term of confinement in order to satisfy the pretrial agreement waiver terms. Notwithstanding the provisions of Article 58b(c), UCMJ, DFAS has treated the waiver to dependents in such circumstances as constructive receipt by the member.

Legal advisors to convening authorities must remember that a waiver of a fine is not authorized, either before or after action. If a fine had been adjudged, the only way to comply with the pretrial agreement would be to disapprove the fine. That action would result in no money ever being due or collected by virtue of a fine.

A deferment of both the adjudged reduction in grade and the mandatory forfeitures results in paying the accused at his or her current pay grade/amount until the Article 60, UCMJ action. A written request from the accused is required to defer the reduction and mandatory forfeitures. Assuming the dependents have access to the accused's account, this would ensure their receipt of financial support as contemplated by the pretrial agreement at the time contemplated, but only until the time of action.

The fourth provision is extremely problematic. Deferment of reduction in grade throughout the period of confinement, as required in the agreement, can only occur if action is delayed until all confinement has been served or the action approved only the amount of confinement that had been served as of the date of action. A second way the convening authority could comply with the agreement would be to defer reduction and mandatory forfeitures until action and then

disapprove the reduction in the action. That would ensure the accused would receive all pay at the pretrial pay grade and amount throughout the term of confinement. Both methods discussed would ensure money goes to the accused, and is available for his family. In all circumstances, approving a waiver providing for payments after action is impossible, assuming the action complies with the other agreement terms.

The bottom line is that the convening authority's action must comply with the enforceable terms and intent of the parties in entering into the agreement. Here, the intent was to prohibit a punitive discharge, limit confinement to a period of five months, and provide total financial support to the accused's family at his current pay grade for the duration of any confinement (beyond a $700 forfeiture of pay). Although some terms are without any legal efficacy, the intent of the provisions can still be satisfied by taking action at either a proper time or by eliminating certain portions of an adjudged sentence. On the other hand, complicated legal maneuvers to shore up questionable pretrial agreement conditions can be avoided if the defense counsel and the legal advisor to the convening authority consider the implications of the agreement beforehand.

CAVEAT

SHOW ME THE MONEY

In *United States v. Stevens*, ACM S30170 (A.F. Ct. Crim. Appeals, 20 Jul 2004), a major issue before the Air Force court was whether the evidence presented by the government was sufficient to support the accused's conviction of fraudulent enlistment. In its decision, the court made it clear that this case would definitely not serve as a model for how courts-martial should be conducted. It appeared to the court to have been rushed to trial, and it also appeared that the government was "ill-prepared" to prove the fraudulent enlistment charge.

In setting aside the conviction, the Air Force court found that the government had failed to prove the element of the offense requiring "[t]hat the accused knowingly concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment." Specifically, the government offered no evidence to prove that the accused's misrepresentations concerning pre-service drug use would have barred her enlistment. To prove the element, the government could have either offered evidence on the issue or even asked the military judge to take judicial notice that the use of ecstacy was the kind of drug use that was disqualifying under Air Force Instruction 36-2002, the Air Force directive that sets forth the conditions that make applicants ineligible to enlist. The government did neither.

In passing, the court noted it was possibly most surprised by the fact that the government took no steps to prove that the accused had received pay and allowances, the gravamen of the offense of fraudulent enlistment since it was long ago incorporated into Article of War 54. Although the "no harm, no foul" rule applied in this judge alone case--the judge was presumed to know the law and had before her facts indicating when the accused's enlistment began--the court emphasized that its conclusion would not necessarily have been the same had this case gone before members in the same evidentiary posture.

In addition to the foregoing problems, another charge in the case was dismissed because if was improperly drafted. Moreover, the judge entered a finding of not guilty on a subsequent iteration of the same charge due to a complete failure of proof.

It is hoped that this case will serve as an example of the necessity for the exercise of care and precision in the drafting of charges, together with an awareness by counsel of the essential elements of the offenses involved and the burden of proof.

TERMS OF ART

The accused received a sentence that included confinement and forfeitures of $500 per month, both for eight months. Six days after trial, he asked the convening authority to "defer the adjudged forfeitures" and "waive the automatic forfeitures." Three days later the convening authority "waived" all the adjudged forfeitures and "deferred" until action the mandatory forfeitures. Three months later, she took action approving confinement and the forfeitures. There was no mention of waiver of mandatory forfeitures, and the accused complained on appeal that his family did not receive the waived forfeitures.

In *United States v. Leber*, ACM S30241 (A.F. Ct. Crim. Appeals, 17 Aug 2004), the court addressed the incorrect usage of terms used as if they were interchangeable. Automatic forfeitures can be deferred or waived *before* action. Adjudged forfeitures, however, cannot be *waived*, but may be *deferred* before action. Looking at what the convening authority did, it is unclear what she intended to do. Although she probably wanted to approve the waiver of mandatory forfeitures, she actually approved a deferral of mandatory forfeitures and a waiver of adjudged forfeitures. The action resulted in a "latent ambiguity" and prejudicial error that deprived the accused's family of income (waived forfeitures) from the date of convening authority action to the accused's release from confinement.

Latent ambiguities are our objective. Terms of art

are our weapons. We secure most of these objectives, but sometimes earn purple hearts in the process. *Caveat verba!*

ADMINISTRATIVE LAW

SUPPORT FOR NON-FEDERAL ENTITIES

As those of you at the base level probably well know, it is not unusual for non-Federal entities (NFEs) or civic groups to request assistance from the military. While the request is almost always in support of a worthy cause and there may be a temptation to try to support the request, there is a requirement to comply with specific direction found in Air Force and Department of Defense Directives. Many of the rules in this area are based upon two basic principles of public service found in the Joint Ethics Regulation (JER):

Employees shall protect and conserve Federal property and shall not use it for other than authorized purposes (5 CFR 2635.101(b)(9)); Employees shall act impartially and not give preferential treatment to any private organization or individual (5 CFR 2635.101(b)(8)).

Put another way, Congress appropriates funds to ensure the protection of our nation and to carry out military operations in support of national defense interests. Ordinarily, this mission does not include lending assistance to private entities or functions, even for what are considered to be worthwhile activities or charitable events, except where Congress or the Department of Defense have approved specific exceptions. Depending upon the organization making the request and the nature of the assistance requested, NFE issues may be closely tied to a host of other ethics issues (e.g. gifts, travel, off-duty employment, fundraising, etc.).

Recently, we were asked about the legality and appropriateness of providing military escorts for a state debutante social function. Even assuming the request could withstand JER § 3-211 analysis, which it does not, Department of Defense Directive (DoDD) 5410.18, *Public Affairs Community Relations Policy*, paragraph 4.2.16.[1] explicitly prohibits the use of DoD personnel for "escort type" duties. Similarly, Air Force Instruction (AFI) 35-101, *Public Affairs Policies and Procedures*, paragraph 8.6.3.2.4.[2] tracks the restrictions of DoDD 5410.18 and while it notably omitted the term "escorts," it is axiomatic that a service instruction cannot expand or otherwise contradict a controlling Department of Defense Directive or Instruction. Placing “volunteers” on TDY orders to perform this “duty” or paying them per diem while performing this “duty” is clearly not appropriate.

Air Force members who wish to support NFEs in their personal capacity may be granted ordinary leave and must bear all costs associated with attendance. The wear of the military uniform in conjunction with an NFE event must comply with AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel (*requiring a commander's authorization to wear the uniform in support of NFEs and describing the conditions for its proper wear). Additional questions, comments, or concerns may be directed to Lt Col Bill Druschel, DSN224-4075.

[1] DoDD 5410.18, paragraph 4.2.16. provides: "Demeaning or Menial Use of DoD Personnel. Community relations activities shall not employ military personnel in uniform in such capacity as ushers, bag handlers, guards, escorts (to include escorts or other forms of support for beauty pageants, modeling, or similar events), messengers, parking lot attendants, or in similar capacities during public events conducted off military installations.

[2] AFI 35-101, paragraph 8.6.3. Participation Criteria -- Support.
8.6.3.2. Disapproved
8.6.3.2.4. Involve the use of active duty, Air Guard, Reserve, or ROTC personnel in uniform outside military bases as guards, parking lot attendants, runners, messengers, baggage handlers, for crowd control, or in any unlawful or inappropriate capacity.

TORT CLAIMS AND HEALTH LAW

RES GESTAE

The 2004 Medical Law Mini-Course was held from 25-29 October 2004 at Travis AFB, California. Some 50 attendees came to the one-week intensive course offered by the medical staff at David Grant USAF Medical Center, and guests from AFLSA/JACT Medical Law Branch, AF/SGJ, AFMSA/SGOC, and Surgeon General’s Commodity Council. Topics included the medical specialties and where things can go wrong, standard of care determinations, informed consent, defenses to malpractice cases, bioethics, damage analysis, and quality assurance. The course is offered annually.

VERBA SAPIENTI

It is wise to review with your hospital commanders the criteria for entertaining adverse clinical actions against providers in their facilities. In some occasions, administrative, and even military justice issues are presumes per se to constitute grounds for removal of a provider’s privileges.

Adverse clinical privilege action can and should be taken when there is evidence of incompetent practice, professional misconduct and/or impairment that may have a detrimental effect on the safety of welfare of the patient population or staff. In some cases, the mat-

ter is a fairly clear one, such as continuing demonstrations of a failure to meet standards of care, assault upon a patient, etc. Some are also fairly clear in not meeting the appropriate criteria, such as administrative punishment for poorly kept uniform or grooming, or perhaps military justice action based on adultery where there is no evidence of a physician/patient relationship. Needless to say, there are many gray areas where it is medical treatment facility Commander's role to discern the nature of the problem and its effect on the facility/patients per se. Great care should be taken in assessing these matters in order to avoid appellate challenges.

ARBITRIA ET IUDICIA

The importance of timely completion of medical records was the focus of a settled claim involving a patient who had a significant surgical procedure related to a heart condition. The surgeon, who had performed the procedure correctly, waited over two weeks before dictating the operative report. When he did so, he confused the case at hand with a similar one he had done two days later, and thus reported certain complications and anomalies that were not present in the original case. When the patient saw the records later on, she was extremely upset, went for further surgical evaluations, and had additional tests done. Fortunately, the surgeon in question, learning of the patient's anxiety, reviewed his records, and discovered his documentation error. The claim was still settled for emotional distress, and costs related to additional tests and evaluations. Medical personnel are busy people, but delays in documentation, regardless of reason, puts them and the facility at risk for negligence.

The first Guilty Verdict (plea) has been rendered with regards to HIPAA involving wrongful disclosure of individually identifiable health information. For more information, please refer to the following site, which offers a summary of the case: http://www.usdoj.gov/usao/waw/press_room/2004/aug/gibson.htm.

A MESSAGE FROM THE EDITOR:

Have you worked an interesting issue in a recent court-martial? Have you found a great technique or approach that could help other base level attorneys or paralegals? Write a short article about it and submit it to *The Reporter*!

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 Corps. Send your submissions to *The Reporter*, CPD/JA, 150 Chennault Circle, Building 694, Maxwell AFB, AL 36112, or e-mail Capt Christopher Schumann at chris.schumann@maxwell.af.mil.

Why Can't We All Just Get Along? The Discovery Process and You

Captain Christopher M. Schumann

"A plague on both your houses." So go the last words of a dying Mercutio. I know what you're thinking, another vague reference to Shakespeare in an article that has nothing to do with either the bard or his work. Well, you're wrong. The quote at the beginning of this article comes, of course, from Shakespeare's Romeo and Juliet. For those of you who haven't caught the Leonardo DiCapprio version lately, a refresher might be helpful. In the play, the Montagues and Capulets are feuding families, and Romeo, a Montague, and Juliet, a Capulet, have fallen in love and secretly married. When Tybalt, nephew of Sir Capulet, spots Romeo on the street he challenges him to a duel and draws his sword. Romeo, who now considers Tybalt family, although he cannot say as much, refuses to fight. Romeo's dear friend Mercutio takes up the sword in his stead, and is slain by Tybalt. As Mercutio dies, he utters this curse, damning both families for their bitter feud.[1]

The relationship between trial and defense counsel could, I suppose, be compared to the relationship between the Montagues and the Capulets. Both trial and defense counsel are part of the same family, but there are often conflicts that often lead to disharmony among these particular family members. These conflicts generally revolve around that adversarial process known as the court-martial, and arguably one of the greatest sources of conflict in that process is discovery. Ask any circuit trial or circuit defense counsel what the one issue is that usually causes them to want to choke the life out of their opponent and they will probably tell you discovery.

Many of these conflicts could be resolved through better communication between the parties, along with a better understanding of how the discovery process works. Attention to the discovery process should begin early, and both sides should make every effort to avoid misunderstandings that can later turn into shouting matches, allegations of misconduct, and lengthy motion practice. The goal of this article is to get you focused on discovery and provide you with some practical advice so that you will hopefully avoid the drama and bloodshed akin to a Shakespearean play.

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DISCOVERY: WHY DO WE BOTHER?

Discovery is a pretrial device used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial.[2] The purpose behind the discovery rule is to promote full discovery to the maximum extent possible consistent with the legitimate need to prevent disclosure of non-discoverable material and to eliminate "gamesmanship" from the discovery process.[3] Counsel's initial reaction to the prospect of discovery may be one of hesitation. "Do I really need to turn over this material? After all, it's pretty devastating to my case. Am I giving the other side more than I have to? I don't want to make it too easy for them." But providing broad discovery at the early stages has many benefits. First and foremost it reduces the prospect of pretrial motion practice. Counsel often spend hours of valuable prep time putting together pages of motions demanding access to discovery that really should have been turned over in the first place. This is obviously time that could be spent on other endeavors, such as preparing your star witness for testifying. Counsel often lose sight of the fact that "discoverable" does not necessarily mean "admissible" and subsequently withhold information that really should not be withheld.

Open discovery also avoids the ugliness associated with a delay in the trial due to unfair surprise. While it may be fun to spring that key piece of evidence on the other side right in the middle of the dramatic testimony of the victim, doing so may result in a delay in the case, a scolding by the judge, or exclusion of evidence at trial. From a practical standpoint, disclosing that critical piece of information earlier in the process leads to better informed judgment about the merits of the case and just might result in early decisions regarding withdrawal of charges, motions, pleas, and composition of courts-martial.[4] Experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of military justice because assembling the military judge, counsel, members, accused, and witnesses is fre-

quently costly and time-consuming.[5] Trial counsel often goes to great lengths to work with all parties in trying to coordinate a trial date. Having to start that process over again from scratch due to a discovery related delay would not make your SJA very happy.

All that being said, discovery is not a blank check. Absent a mandatory duty to disclose, there needs to be some showing of relevancy and materiality to justify the release of information. Trial counsel must essentially ask three questions. First, does the requested information even exist? If not, then it will be difficult to provide it. If the information does exist, the second question to ask is whether or not trial counsel is going to use the information at trial. If so, turn it over to the defense. And finally, even if trial counsel is not going to use the information at trial, is the requested information material, relevant and necessary?[6] It cannot be stressed enough that neither side should play "hide the ball" with discovery. As pointed out above, such behavior will not result in a tactical advantage but might rather lead to the suppression of evidence or other sanctions by the court.

THE RULES

It is imperative that counsel become familiar with the discovery rules and the obligations those rules attach to both sides. The rules covering the discovery process come from several sources. For example, Article 46 of the Uniform Code of Military Justice states, "trial and defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence."[7] While this sets the stage for discovery practice, the bulk of the heavy lifting is outlined in R.C.M. 701 (the Rule). Here you will find the specific responsibilities assigned to both trial and defense counsel. The Rule specifies that the trial counsel's initial obligation to produce discovery is triggered by the service of charges under R.C.M. 602,[8] and that additional discovery obligations kick in once the defense has made a request for discovery. Can the trial counsel provide discovery prior to the service of charges? Nothing appears to prevent such action, but doing so may not be wise if the case is still being investigated or if the decision to prosecute has not yet been made. That being said, providing defense counsel an opportunity to review the reams of evidence against their client early in the process just might be the catalyst they need to persuade him to make a deal. The preferred practice is to give discovery as early as possible. By allowing defense counsel to evaluate as much of the case as possible early on, it puts the defense counsel and the accused in a better position to schedule trial dates and negotiate potential pleas. Having said all this, there may be times when releasing information too early may jeopardize the investigation into your case or related cases. The safe bet is to always check with your chief of military justice and SJA before disclosing information.

The Rule lays out in general terms the materials the government must provide to the defense as part of the discovery process. These materials include papers that accompanied the charges when they were referred, the convening order, and any sworn or signed statements in the government's possession.[9] Once the defense has provided a discovery request, the government must also "permit the defense to inspect" books, papers, documents, photographs, and other tangible documents in the possession of the government that are material to the preparation of the defense.[10] The government must also produce the results or reports of physical or mental examinations and of scientific tests or experiments in the custody or control of the government, which are material to the preparation of the defense, or are intended for use by the trial counsel at trial.[11]

What is meant by "material?" Generally speaking, material evidence is evidence which is either exculpatory or would fall into the category of impeachment evidence.[12] The Rule also makes reference to the terms "relevant and necessary" and relates those terms to the production of witnesses and evidence.[13] How do we define those terms? The application of these terms, along with "material," is very similar. The answer to whether information is "material" can be answered by asking whether or not there is a reasonable chance that the evidence in question may be offered at trial. Since all admissible evidence must also be relevant, the question of materiality/relevance is essentially the same as relevance under MRE 401.[14] On the other hand, necessity is determined on a case-by-case basis.[15]

Furthermore, the government must provide to the defense material it plans to present during the sentencing phase of the trial including the names and addresses of potential witnesses the trial counsel plans to call in sentencing.[16] The government must also notify the defense of the names and addresses of any witnesses the trial counsel intends to call in the government's case in chief, and to rebut any defense of alibi, innocent ingestion, or lack of mental responsibility.[17] The government must also notify the defense, prior to arraignment, of any prior convictions of the accused that trial counsel may use on the merits.[18] Most significantly, the government has a duty to disclose to the defense the existence of evidence that reasonably tends to negate the guilt of the accused, reduce the degree of guilt, or reduce the punishment.[19]

The Rule makes reference to documents and other materials "within the possession, custody, or control of

military authorities."[20] Our courts have interpreted this phrase broadly, and trial counsel needs to be aware of this. Your search for discoverable material should not begin and end with the OSI. The trial counsel must search beyond simply the law enforcement records and look to investigative files in any related cases that may be maintained by an agency closely aligned with the prosecution, as well as any files designated in defense discovery requests that involve a specified type of information within a specified entity.[21] Bottom line, if the county dogcatcher was involved in the investigation, their records may very well be deemed "within the control of military authorities" and therefore potentially discoverable.[22] Trial counsel should also remember that the discovery obligation is on going. Simply because the lab has responded to your discovery request 6 months before trial does not necessarily mean you have everything. If the lab discovers additional relevant material after your initial discovery request has been responded to, its unlikely they will forward that information to you without an additional request. Be sure to follow up with these types of agencies in order to ensure you have up-to-date discovery.[23]

What about the defense? Do they have any obligations here? They certainly do, as the discovery process is a two-way street. First and foremost, the defense is required to notify the government of the names and addresses of all witnesses the defense counsel intends to call at trial, and to provide sworn and signed statements known to have been made by the witnesses in connection with the case.[24] While the Rule states that such information needs to be disclosed "before the beginning of trial on the merits," defense counsel should not wait until the eve of trial to disclose their witnesses. Although there are times when this cannot be avoided, for example when a witness comes to the defense's attention late in the game, if you know who your witnesses are ahead of time, do not spring this information on the government at the last minute. Doing so will likely result in a delay in the case and not a tactical advantage for the defense. It may also result in a bad reputation or ill will between counsel.

Because many of the defense counsel's discovery obligations kick in after receiving a discovery request from the government, trial counsel should have "send the defense a discovery request" at the top of their checklist. Many a circuit trial counsel have walked into the base office a few days before trial only to discover that the government never sent a written discovery request to the defense. Another common problem is the fact that many base office trial counsel have a previous working relationship with the area defense counsel, and sometimes feel it is unnecessary to get bogged down with all the formalities of the discovery process. "Capt Eisenhower and I have an excellent working relationship. If I need discovery, I just give him a call." While that sounds like a super idea, in reality you are only setting yourself up for some strained relations and serious conflict at trial. If a discovery dispute arises and you don't have the documentation to support your position, the military judge will find it difficult to resolve the matter, and the bounds of your friendship with opposing counsel will truly be tested. You must keep detailed records of all discovery matters you have provided by listing each document as an attachment to your cover letter or by keeping a detailed list maintained by your paralegal. You should also maintain copies of all discovery documents in the base legal office until the appellate review is complete. This is often the only way the government can certify the precise materials served on the defense when an appellant claims a discovery violation.[25]

Once the defense counsel has received the trial counsel's discovery request, defense counsel must provide the names and addresses of any witnesses the defense intends to call during sentencing, as well as permit the government to inspect written material that will be presented by the defense during the sentencing proceeding.[26] After receiving the trial counsel's reciprocal request, the defense must produce any documents or tangible objects in their possession that they intend to introduce during the case in chief, as well as the results or reports of any examinations or experiments within the defense control which the defense intends to introduce at trial.[27] Furthermore, if a defense expert has prepared a report and plans to testify relying on that report the defense must also provide this to the government.[28]

Defenses and the obligation to disclose certain defenses are often a major source of conflict during the discovery process. The defense counsel has a duty to disclose to the trial counsel their intent to offer the defense of alibi, innocent ingestion, lack of mental responsibility, or expert testimony regarding the accused's mental condition.[29] Trial counsel should be aware that the defense obligation goes beyond merely notifying the government of their intent to raise these issues. The defense must provide specific details regarding alibi and innocent ingestion defenses including places, persons and circumstances surrounding the claimed defense. Again, delayed disclosure of this information will likely only result in a delay of the trial while the government is given an opportunity to investigate the defense. Trial counsel should be particularly aware of the distinction between "innocent ingestion" and "unknowing ingestion." Defense counsel has no

obligation to provide the same type of information under an "unknowing ingestion" defense as they do under an "innocent ingestion" defense. Bottom line, if the defense intends to offer a specific alternative theory as to how drugs got into the accused's system, they are offering an innocent ingestion defense and the requirements of the Rule apply. If their defense is simply "we have no idea how this got into his system," the requirements do not apply.

As mentioned above, discovery obligations are continuing duties assigned to both sides. If at any time either party discovers additional information that should be disclosed under the Rule, that party needs to notify the other side and provide the material.[30] The Rule also provides for adequate opportunity and access to witnesses and evidence for both sides. Neither side should impede the access of another party to witnesses or evidence.[31] One issue that often comes up is the extent to which the defense is entitled to "access" the evidence. The Rule allows for the right to "inspect" certain documents that are discoverable, and states that "inspect" includes the right to photograph and copy.[32] But what are the rules when the defense requests copies of materials that are considered contraband?

This most frequently occurs in child pornography prosecutions. While it would be odd for the defense to request their own working copy of say, cocaine, defense counsel are beginning to routinely request their own copy of their client's computer hard drive containing the alleged child pornography so that they can have it examined by their own expert. While child pornography is clearly contraband,[33] trial counsel should work very closely with the OSI to ensure that both sides have appropriate opportunities to examine such evidence. Copies of child pornography or computer hard drives containing such material should only be released pursuant to a judge's order.[34]

One final rule that both sides should heed and thereafter consider themselves warned is TJS-2, AF Rules of Professional Conduct and Standards for Civility Attachment 1, Rule 3.4(d) – Fairness to Opposing Party and Counsel. This Rule addresses one of the main allegations counsel level against each other during discovery practice: the frivolous discovery request. The Rule states, "[a] lawyer shall not, in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party." While most counsel do not abuse the discovery process, perceptions by either side often lead them to conclude otherwise. Late discovery requests or delays in responding to discovery often have legitimate reasons behind them. Counsel should make every effort to communicate with opposing counsel and discuss the reasons behind these late requests and responses. And of course, no counsel should ever use discovery as a tool to frustrate or irritate the other side.

THE RULES: WHERE ELSE TO LOOK?

Counsel should be familiar with the other sources of discovery guidance and not limit themselves to the Rules for Court-Martial. For example, there are numerous discovery cases on a number of topics covering everything from the continuing duty to disclose to discussions of materiality and relevance. The trial counsel desk book (available on the JAJG website) is an excellent source for cases on a number of topics, including discovery. Counsel should also be aware of the fact that discovery is not only addressed in R.C.M. 701 but is in fact covered throughout the Rules, as well as the Military Rules of Evidence (M.R.E.), specifically in the area of what constitutes mandatory disclosures. These additional rules range in topics from prior statements of witnesses (R.C.M. 914) to disclosure of information relating to immunity (M.R.E. 301 (c)(2)). The guidance is there for both sides to learn and comply with, and it is incumbent upon counsel to educate themselves.

Speaking of case law and mandatory disclosures, what about *Grill* matters? Is the defense still required to provide notice of *Grill* matters? The answer is no, however, doing so may be the safest way to go. Prior to January 2003, the Uniform Rules of Practice Before Air Force Courts-Martial (Rules of Court), Rule 8.3: Unsworn statement by the accused, stated that an accused could make an unsworn oral statement from the witness stand or other location approved by the military judge. The unsworn statement could contain any matters allowed by law or precedent. The Rules of Court also required the defense to provide notice of any matters that might not be admissible as evidence that may be contained in the unsworn statement.[35] This later requirement came to be known as a reference to *Grill* matters, based on *United States v. Grill*, 48 M.J. 131 (1998). In *Grill*, the Court held that the unsworn statement may contain references to any matters, including inadmissible evidence. The 2003 Rules were amended to remove reference to the "*Grill* notice" requirement, thereby removing the requirement that defense give notice of these matters prior to sentencing. As a matter of good practice, defense counsel are encouraged to continue to provide the notice, as trial counsel is likely to get a delay in the trial to address such matters if they are in fact raised during the accused's unsworn statement.

THE GOVERNMENT DISCOVERY REQUEST

As already noted, one of the first steps trial counsel

should take after being assigned a case that has been referred is to serve a discovery request upon the defense counsel. Remember that the defense obligation to provide the trial counsel with presentencing witness information as well as affording trial counsel an opportunity to inspect presentencing written material is triggered by a discovery request by the government.[36] Counsel should avoid boilerplate discovery requests and tailor the request to fit the facts of your case. Be sure to include references to affirmative defenses, notice requirements, statements made by the accused, as well as other relevant discoverable information. Remember to provide your discovery request in a timely manner. This will afford the defense an opportunity to fully respond, and will also allow time for motion practice should discovery disputes arise.

When requesting discovery, be sure to include references to the appropriate legal authority that supports your request. For example, a request for notice of certain defenses should include a reference to R.C.M. 701 (b)(2). Remember that case law also supports requests for certain types of discovery. Always include a certification indicating a discovery request has been served on opposing counsel. This could include a statement attached to the discovery request certifying that the request was hand delivered or faxed to opposing counsel. Include the date the discovery was served along with a signature certifying the delivery. Be sure to save fax confirmation reports. Evidence that a discovery request was in fact served upon opposing counsel will hopefully eliminate questions concerning whether or not a discovery request was made should a dispute later arise. If opposing counsel fails to respond to a discovery request in a timely manner, a second written request should be sent. Make efforts to first determine the basis for opposing counsel's failure to respond to discovery, beginning with a phone call to your counterpart asking why discovery has been delayed. If there is still no response or the explanation provided seems a bit inadequate, trial counsel should consider filing a motion to compel discovery.[37]

THE DEFENSE DISCOVERY REQUEST AND THE GOVERNMENT'S RESPONSE

Trial counsel, upon receipt of a defense discovery request, should first examine the request closely and determine whether or not the requested information even exists. Remember, trial counsel is not obligated to create records simply to satisfy a defense request for them.[38] Trial counsel should then determine whether or not any of the requested information will be introduced at trial. Finally, trial counsel must determine whether or not the information requested is material, relevant and necessary.[39] Remember that relevant evidence includes evidence that is not cumulative and would contribute to a party's presentation of their case in some positive way on a matter in issue.[40]

Some information provided during discovery may become the subject of motion practice later as either side may want to prevent the finder of fact from considering the information for a variety of reasons. Trial counsel must also realize that discovery is the obligation of counsel, not the OSI, the commander, the unit, the hospital, etc. You should never place the discovery burden upon outside agencies, nor should you permit these agencies to provide discovery directly to opposing counsel without first going through you or your office. Ensuring that all discovery material goes through you decreases the chances that opposing counsel will obtain material without your knowledge and will also lessen the likelihood of disputes related to undocumented discovery.

In the discovery response, the government should avoid responses such as "provided," "not applicable," or "will be provided later." The government's discovery response should be a freestanding document. You should be able to review the document and on its face be able to determine what specific information was requested by the defense, what was provided, and what is forthcoming. The response should state when the information was provided or if it was provided previously and should give an estimate as to when information will be provided if it is not available at the time of the response. If you just aren't sure whether or not certain requested material is discoverable, seek the advice of your chief of justice, SJA, or circuit trial counsel. If you feel there are valid grounds to support withholding the information, you may also wish to consider seeking a ruling from the military judge.[41]

OSI, MENTAL HEALTH, AND OTHER ISSUES

Issues often come up with regard to requests for information from the OSI, particularly requests for information relating to OSI practices, techniques, and instructions. Trial counsel should be familiar with the case file and be aware if issues such as the use of confidential informants or references to AFOSI instructions are at play. Law enforcement organizations have a general interest in protecting certain regulations and internal documents from indiscriminant disclosure because sensitive law enforcement or investigative techniques or procedures become compromised if they attain public notoriety.[42] Requests for derogatory data pertaining to AFOSI agents or personnel must be forwarded to AFOSI/JA and should include the trial date and the names of the personnel expected to testify.[43] After receiving a discovery request seeking OSI materials, trial counsel should personally sit down with the

OSI case agent and go through the case file. Remember that the agent will not always know what material is discoverable and what material isn't, and simply turning over the ROI isn't going to cut it. You need to be personally involved in the collection of this material to ensure that all required discovery is provided. Once you have reviewed the case file and identified the requested discoverable materials, make a copy for both you and the defense counsel. This is the best way to ensure that all parties are on the same page and have received the same material. Again, be sure to keep a good record of what information was provided to the defense in case of a future dispute.

Mental health records also present a challenge, and the process surrounding the release of such records is often mired in confusion. First and foremost, any request for mental health records should be as specific as possible to determine the relevancy of the requested records. Unfortunately, counsel often times do not know what exactly is in the records, and therefore cannot fully articulate what it is they are specifically looking for. Counsel need to be aware of the psychotherapist-patient privilege and how that privilege affects the release of mental health records. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and their psychotherapist. The privilege applies only in cases "arising under the UCMJ" involving communications made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.[44]

There are several exceptions to this rule, most notably that the privilege does not apply if the patient is dead, when the communication is evidence of spouse abuse, child abuse, or neglect, or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse.[45] These exceptions are important during the investigative stage of the case, as OSI agents routinely request mental health records along with other medical records. The agents are required to articulate what specific exception applies anytime they request mental health records, and mental health personnel are required to review the records to further determine whether or not an exception applies.[46] If no exception applies and a dispute arises concerning the release of mental health records, the SJA needs to be contacted. Keep in mind that if the records are released to the OSI when they should not have been, it will be difficult to argue to the judge that the defense isn't entitled to equal access. Counsel need to become very familiar with the procedures for obtaining mental health records as laid out in M.R.E. 513(e).

Rebuttal evidence is another area of great confusion. If the evidence is "material to the preparation of the defense," it is discoverable.[47] Furthermore, with respect to statements or other types of evidence, "if there is a reasonable prospect that the statement might be offered in evidence during the trial, then disclosure is required."[48] Defense counsel often cite *Trimper* as justification for their discovery request for **all** rebuttal evidence the government intends to introduce at trial. Does all rebuttal evidence have to be automatically disclosed? The answer is no, but counsel should proceed with caution. If the evidence is material to the preparation of the defense or might be offered in evidence during the trial, disclosure is warranted.

Defense counsel will often request access to a witness PIF or UPRG. The same relevancy rules apply to the information contained within a witness' personnel files or medical record. Defense counsel must first request the information and provide a proper showing of relevancy. Once relevancy has been established, contact the witness and inform them that information from their personnel files has been requested. If there is no objection, document this fact and provided the relevant material. If the witness does object, explain to them that under the discovery rules the information may need to be provided despite their objection.

If the defense has met the relevancy burden and requests an opportunity to review a witness PIF or medical record, give them an opportunity to review this material at the base legal office, but do not permit the defense counsel to take the records out of the legal office. If defense counsel wishes to make copies of information, and there is no objection, allow them to make the copies. If you do have an objection based on relevancy, you may need to file a motion and have the military judge determine whether or not the information should be released to the defense. As for the accused's records, the military justice section should collect the accused's PIF, UPRG and medical records as soon as the case has been preferred. Defense counsel should be given an opportunity to review this material at the legal office, but these documents should not be taken out of the legal office. The defense should be permitted to make copies of the entire record if they wish to do so.

CHARACTER LETTERS

Defense character letters offered in sentencing have long been a source of tension between trial and defense counsel. These letters are often provided to the trial counsel on the eve of trial, giving the trial counsel little if no time to contact the individuals who wrote the letters and interview them regarding the foundation for their opinion. Sometimes there are legitimate reasons as to why the defense decided to wait before pro-

viding the government copies of the letters. Sometimes there is not. The main remedy for the trial counsel is a delay in the case so that they can interview the witness. This remedy, however, is usually not desired either by the NAF or the SJA. Communicate early with defense counsel regarding character letters. If character letters are received on the eve of trial but are dated weeks or months earlier, address this issue with the military judge. Request a short delay to interview the witness, as often times defense counsel is hoping that you will be lazy and not make the call. You must interview all such witnesses who have provided character letters on behalf of the accused. Consider calling the witness in rebuttal if the foundation for their opinion appears weak or if other potential bias can be exploited.

CONCLUSION

Discovery is a critical aspect of trial process that cannot be ignored. It is certainly not the area of trial practice where counsel should skimp or ignore the details. The very best approach to take is early, open and ongoing discovery. Communicate often with your opposing counsel in order to avoid misunderstandings or wrongly perceived abuses of the discovery process. Neither side should ever manipulate the discovery process in an effort to frustrate or irritate the other side. By making serious efforts to reduce the tension associated with discovery practice, both sides will benefit greatly. On the contrary, by engaging in tooth and nail combat regarding the release of that one witness statement or by dumping reams of discovery on your opposing counsel the night before trial, you are more likely to impact your reputation, credibility and quality of your case than gain any tactical advantage by your actions. By spending a significant amount of time arguing about a minor discovery issue, you may just miss the big picture. Recall the story of the two lawyers who were out hunting when they came upon a couple of tracks. After close examination, the first lawyer declared them to be deer tracks. The second lawyer disagreed, insisting they must be elk tracks. They were still arguing when the train hit them.

[1]William Shakespeare, Romeo and Juliet act 3, sc. 1.
[2]Blacks Law Dictionary, 6th Edition.
[3]Rules for Courts-Martial (R.C.M.) 701, MCM, Analysis, pg A21-32.
[4]R.C.M. 701, MCM, Analysis pg A21-32.
[5]Id.
[6]Of course, this would also include "evidence favorable to the defense" as outlined in R.C.M. 701(a)(6).
[7]Article 46, UCMJ.
[8]R.C.M. 701(a)(1).
[9]R.C.M. 701(a)(1)(A)-(C).
[10]R.C.M. 701(a)(2)(A).
[11]R.C.M. 701(a)(2)(B).
[12]*See generally* United States v. Bagley, 473 U.S. 667 (1985); [13]United States v. Figueroa, 55 M.J. 525 (A.F.Ct.Crim.App. 2001); and United States v. Watson, 31 M.J. 49 (CMA 1990).
[14]R.C.M. 703(b) and (f).
[15]M.R.E. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")
United States v. Mougenel, 6 M.J. 589 (AFCMR 1978).
[16]R.C.M. 701(a)(5)(A); R.C.M. 701(a)(5)(B).
[17]R.C.M. 701(a)(3).
[18]R.C.M. 701(a)(4).
[19]R.C.M. 701(a)(6); *See also*, Brady v. Maryland, 373 U.S. 83 (1963).
[20]R.C.M. 701(a)(2)(A).
[21]United States v. Williams, 50 M.J. 436 (1999).
[22]United States v. Mahoney, 58 M.J. 346 (2003)(The government has a duty to learn of any favorable evidence known to those acting on behalf of the government. Failing to disclose favorable evidence is a due process violation, regardless of good faith of the prosecutor.)
[23]United States v. Figueroa, 55 M.J. 525 (A.F.Ct.Crim.App. 2001)(Urinalysis case, the defense counsel requested all derogatory data from the Air Force drug testing lab about lab personnel. The trial counsel requested the data from the lab and provided it to the defense. After delay in the trial, information that one lab technician was suspended and decertified for failing to maintain proper documentation became available to the lab. The lab did not tell the trial counsel about this information. The court held the information was discoverable and it was the government's obligation to obtain it, stating "[t] he prudent prosecutor should take steps to make sure that necessary information is collected properly, and that it is still current and complete after a delay."); *See also*, United States v. Jackson, 59 M.J. 330 (2004). Many laboratories have many relevant records that you must request before they will be released. If any type of laboratory is involved in your case, you should request all of their records as early as possible.
[24]R.C.M. 701(b)(1)(A).
[25]United States v. Huberty, 53 M.J. 369, 372 (2000).
[26]R.C.M. 701(b)(1)(B).
[27]R.C.M. 701(b)(3) and (4).
[28]R.C.M. 701(b)(4).
[29]R.C.M 701(b)(2).
[30]Id.
[31]R.C.M. 701(e).
[32]R.C.M. 701(a)(2) and (h).
[33]18 U.S.C. 2252, 2252A; New York v. Ferber, 458 U.S. 747, 756-59 (1982).
[34]United States v. Kimbrough, 69 F.3d 723 (5th Cir 1995); United States v. Horn, 187 F.3d 781 (8th Cir 1999); *See also*, Gray v. Mahoney, 39 M.J. 299 (1994)(Rules do not require government to provide copies of sensitive evidence to defense—enough that they be allowed to view the evidence.)
[35]Uniform Rules of Practice Before Air Force Courts-Martial, Rule 3.1(D) and 8.3 (1 May 2000).
[36]R.C.M. 701(b)(1)(B).
[37]R.C.M. 905(b)(4).
[38]United States v. Birbaeck, 35 M.J. 519 (AFCMR 1992).
[39]R.C.M. 701(a)(2).
[40]R.C.M. 703(f), Discussion; *See also* M.R.E. 401 concerning relevance.
[41]R.C.M. 701(g) covers the regulation of discovery, including the time, place and manner as well as the issue of protective and modifying orders. This Rule also provides guidance concerning a party's failure to comply with discovery and the potential consequences of such action.
[42]*See* United States v. Branoff, 38 M.J. 98 (CMA 1993), for an excellent discussion concerning a defense request for access to an AFOSI instruction covering OSI tradecraft.
[43]For guidance regarding a variety of AFOSI/JA discovery matters, visit the AFOSI/JA website at https://aflsa.jag.af.mil/AF/OSI/
[44]M.R.E. 513.
[45]M.R.E. 513(d).
[46]AFI 44-109, para 2.2; Under the Health Insurance Portability and Accountability Act (HIPAA), law enforcement personnel are required to submit a letter requesting certain medical records including a justification for the release of such records. A copy of the HIPAA letter required by law enforcement personnel detailing the specific requirements of the request can be found on the JACT web page at https://aflsa.jag.af.mil.
[47]United States v. Trimper, 28 M.J. 460 (CMA 1989).
[48]United States v. Callara, 21 M.J. 259, 263 (CMA 1986).

The Independent Contractor Defense: Practice Pointers

Major Daniel A. Olson

Under the Federal Tort Claims Act (FTCA), the federal government can be held liable for torts committed by federal employees acting within the scope of their federal employment.[1] The government cannot, however, be held liable for the torts of independent contractors.[2] The employee/contractor distinction is crucial because of its enormous impact on the outcome of anti-government tort claims.[3] Most Judge Advocates learn this basic FTCA framework in JASOC and again in CTLC.[4] Unfortunately, in the field, the distinction between a government employee and an independent contractor is often uncomfortably murky. As a practical matter, this ambiguity often arises as a result of claimants' efforts to characterize tortfeasors as government employees rather than as independent contractors.[5] Because the employee/contractor distinction hinges on the facts of each case, claims attorneys must ensure that their investigations contain the factual background (and supporting evidence) necessary for higher headquarters to determine whether the government can reasonably rely on the defense in litigation.[6] With this in mind, the following practice pointers will assist claims officers in developing complete claims investigations in cases involving independent contractor issues:

1. Analyze each and every possible defense, even if there's a seemingly strong independent contractor defense. When an apparent independent contractor defense appears at the outset, it may be tempting to take short-cuts in the remainder of the investigation. But suppose the independent contractor defense doesn't persuade the United States District Court judge in subsequent litigation?[7] The base-level claims officer must explore every reasonable defense in anticipation of such a possibility. A thorough and complete investigation is also important because the government can reduce the likelihood of a claimant litigating a denied claim by citing several reasons for denial, rather than simply asserting an independent contractor defense. In a medical malpractice claim, for example, the government can reduce the likelihood of litigation by informing the claimant that his or her physician complied with medical standards in addition to informing the claimant that the physician was a government contractor.[8] In short, the claims officer should conduct a thorough claim investigation, amply exploring every opportunity for defending the claim, even if an independent contractor defense seems to develop early on in the base-level investigation.

2. Take the time to notify the claimant (in writing) that the alleged tortfeasor is a government contractor, not a government employee. This is important for several reasons. First, it alerts the claimant that he or she should consider filing against the tortfeasor within the relevant statute of limitations period. Second, the claimant's response (if any) to this notification will shed light on the claimant's counter-argument (if any) to the government's purported contractor defense.[9] Third, in some cases, the claimant, realizing that the government has a viable contractor defense, will withdraw the claim against the government. Alternately, the claimant will not be surprised when the claim is denied, and, having preserved his or her recourse against the tortfeasor, may decline to pursue litigation in United States District Court.

3. Obtain and preserve the underlying documents that establish the apparent government/contractor relationship.[10] Sequester the original underlying contract, and place a copy in the claim file. If the contract is too voluminous, place copies of the relevant portion(s) of the contract in the claim file, while sequestering the original in its entirety. Sequester the records in a safe yet accessible location. Many offices have a safe available for their most sensitive documents, but a simple, locked file cabinet will also suffice.[11] If the office responsible for the contract refuses to release the original for sequestering, obtain copies, and then place a note on the contract reflecting that it should not be destroyed without prior approval from the legal office. Obtaining the actual contract is imperative because courts place great emphasis on the plain language of the contract in resolving employee/contractor issues.[12] After the documents have been sequestered, review them for pertinent language. Does the contract expressly provide that any professional services rendered pursuant to the contract are rendered in the capacity of

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an independent contractor? Does the contract stipulate that the government retains no control over the professional aspects of the services involved in the contract? Does it otherwise state or imply the intent of the parties to form a government/contractor relationship?[13] Although not completely dispositive in most circuits, the express language of the underlying contract is an important factor in determining whether a particular tortfeasor is an employee or contractor, and as such, the underlying documents are invaluable and should be included in every claim file involving a potential independent contractor defense.

4. Ask the witnesses how the relationship between the tortfeasor and the government works on a daily basis. This practical, everyday relationship is crucial because despite clear-cut language in the contract, the real test focuses on the degree of control and supervision that the government exerts over the tortfeasor's physical performance of contractual duties.[14] In other words, regardless of how the parties characterize their relationship in the contract, courts have concluded that if the government exercises too much control and supervision over the tortfeasor's day-to-day performance, then the relationship is really one of employer/employee.[15] Thus, it's vital, when interviewing the (apparent) independent contractor, to ask how much control and supervision the government really exercises over the contractor's performance (obtain concrete examples). For example, ask whether the (apparent) contractor performed the required work in the presence of an Air Force supervisor, or whether the (apparent) contractor worked alone, unsupervised.[16] Also ask whether the government controlled the details of the work, or focused instead on the "big picture."[17] Perhaps the witness will answer that he or she simply comes to the base, does his or her job of grounds maintenance, and goes home, without any real supervision at all. Alternatively, the witness might state that an active duty officer is constantly looking over his or her shoulder, with additional, detailed instructions and guidance. Perhaps, as in the case of most contract physicians, the answer lies somewhere in between; the physician is subject to multiple general rules and regulations regarding the safe and effective provision of healthcare,[18] but is otherwise free to carry on his or her medical practice without much supervision.[19] As a practical matter, it is worthwhile to ask who sets the tortfeasor's duty hours and schedule, and who owns the equipment that the tortfeasor uses.[20] Also, determine whether the tortfeasor contracts with other, non-federal entities and whether the tortfeasor has a permanent, private office in government facilities with government-provided secretarial support.[21] In short, it is important to obtain evidence, from the key witnesses (including "supervisors" and "co-workers"), regarding the actual degree of control and supervision that the government exerts over the contractor because courts place great emphasis on these facts when resolving employee/contractor issues.

5. Gather the evidence necessary to negate any ostensible agency arguments. Where there's clear contract language establishing an independent contractor relationship, and the government does not control the day-to-day operations of the contractor, the claimant may argue that the he reasonably believed the tortfeasor to be an employee of the government, invoking an ostensible agency or equitable estoppel argument. Some courts have recognized these doctrines in FTCA litigation. For example, in Gamble v. United States, 648 F.Supp. 438 (N.D. Ohio 1986), the court estopped the government from asserting an independent contractor defense where an allegedly negligent anesthesiologist had held himself out to be the Chief of Anesthesia for the Veterans Administration Medical Center (VAMC). The VAMC had also held itself out as providing full medical services, including anesthesia, creating the appearance that hospital employees, not independent contractors, had provided the claimant's care. Thus, when interviewing witnesses, ask what the tortfeasor's badge (if any) looked like[22] and how the tortfeasor introduced himself or herself to the claimant.[23] In the medical malpractice setting, determine whether there was a separate check-in procedure for appointments with contract physicians, and inquire as to what other distinctions there were, if any, between services rendered by employees and services rendered by contractors. Of note, some courts have been less accepting of this ostensible agency/equitable estoppel exception to the independent contractor defense, requiring some sort of affirmative misrepresention or misconduct by the government that would have caused the claimant to think that the tortfeasor was a government employee.[24] Whether or not a particular jurisdiction embraces this doctrine, it's best to obtain the evidence necessary to rebut any such arguments by claimants well in advance of litigation in federal court.

6. Finally, include a comprehensive brief of the relevant law for your jurisdiction.[25] If using a standard ("canned") brief, take time to make sure the law is still current. It is helpful to preview the applicable law at the outset of the investigation (as soon as the issue arises) so that you'll know what facts your particular circuit considers to be important. If the facts warrant it, take the time to address any subtleties that may have an impact on your case: non-delegable duty concerns,[26] ostensible agency issues, and any possible impact of your jurisdiction's borrowed servant doctrine. Blending a thorough law brief with the detailed

facts and circumstances of the case will provide higher headquarters with the information required to determine whether the government should rely on the independent contractor defense, or if better defenses lie elsewhere.

In closing, the independent contractor defense is well-recognized, but the distinction between a government employee and an independent contractor can be ill-defined, especially when claimants are seeking to tap into the "deep pockets" of the federal government, despite an apparent independent contractor defense. The issue hinges on federal law and on the facts and circumstances of each case. Only by thoroughly developing the facts pertinent to this particular issue can base claims officers give higher headquarters a product that will be truly helpful in determining whether the government should rely on the independent contractor defense.

[1]28 U.S.C. §§ 1346(b), 2671-2680 (2000).
[2]28 U.S.C. §§ 1346(b), 2671 (2000).
[3]The contractor defense is a *complete* defense.
[4]Judge Advocate Staff Officer Course and Claims and Tort Litigation Course, respectively.
[5]These claimants are usually seeking to take advantage of the federal government's "deep pockets."
[6]For non-environmental FTCA claims over $25,000, bases must forward the claims to higher headquarters (HQ AFLSA/JACT) for denial. *See* AFI 51-501, ¶ 2.2. Under the FTCA, claimants can file suit in United States District Court if their claims are denied. *See* 28 U.S.C. § 1346(b). Under the Military Claims Act, bases must similarly forward claims over $25,000 to higher headquarters for denial, although claimants have no judicial remedy. *See* AFI 51-501, ¶ 3.2; 10 U.S.C. §§ 2733, 2734.
[7]In other words, what if a judge determines that the apparent independent contractor relationship is merely a façade, and the relationship is really that of employer/employee?
[8]Claimants view independent contractor and statute of limitations defenses as mere "technical" defenses, but they (often) perceive substantive defenses (no breach) as more legitimate.
[9]The claimant may, for example, respond that, under the circumstances, it was reasonable to believe that the tortfeasor was an employee, not a contractor, such that an ostensible agency theory applies. *See* discussion *infra.*
[10]Most likely, the terms of an underlying contract will establish a government/contractor relationship. But the relationship may also arise from a Memorandum of Understanding or other document. For example, in cases involving military physicians providing medial care in civilian settings, look for a Training Affiliation Agreement, as required by AFI 41-108. In these cases, obtain the agreement and try to take advantage of the state's borrowed servant doctrine. This is not a true independent contactor defense, but it is related. Under this doctrine, when one party (the government, for example,) loans its servant to another (a civilian hospital, for example), such that the servant performs services under control of the latter, the servant, for anything done in that "employment," may be regarded as the servant ("employee") of the party to whom he/she is loaned. *See, e.g.,*Halkias v. Wilkoff, 47 N.E. 2d 199 (1943).
[11]If your base has a Medical Law Consultant, he or she may have secure storage facilities available for evidence in medical malpractice cases. Alternately, the medical group's Risk Manager may have secure storage facilities for medical records in malpractice cases.
[12]*See, e.g.*, Lurch v. United States, 719 F.2d 333 (10th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984); Broussard v. United States, 989 F.2d 171 (5th Cir. 1993).
[13]Such intent might be implied by contract provisions obligating the contractor to provide his or her own insurance, providing payment per job rather than per hour, or requiring the contractor to provide his or her own equipment. *See Claims Report*, 1996 ARMY. L. REV. 51, 54 (1996).
[14]*See, e.g.*, United States v. Orleans, 425 U.S. 807 (1976); Logue v. United States, 412 U.S. 521 (1973).
[15]*See Orleans*, 425 U.S. at 814 (a key factor in distinguishing an employee from a contractor is the power of the government to control the "detailed physical performance of the contractor"). *See also Broussard*, 989 U.S. at 175; *Logue*, 412 U.S. at 528.
[16]*See Claims Report*, 1996 ARMY. L. REV. 51, 54 (1996).
[17]*Id.*
[18]Of note, the fact that the federal government retains authority to inspect the contractor to ensure contract compliance does not, by itself, give rise to an employee/employer relationship. Nor does the fact that a contractor is subject to generally applicable rules and regulations. A higher degree of control and supervision is required to give rise to an employee/employer relationship. *See generally Orleans*, 425 U.S. 807 and *Logue*, 412 U.S. 521.
[19]Given the fact that physicians exercise independent judgment in the provision of healthcare, it would be an exceptional case where a contract physician was deemed by a court to actually be an employee under the control test. *See Lurch*, 719 F.2d at 337 ("by strictly following the traditional control test it is doubtful whether a physician could ever be found to be a federal employee under the FTCA"). But watch out for ostensible agency arguments. *See* discussion *infra.*
[20]*See* Lilly v. Fieldstone, 876 F.2d 857 (10th Cir. 1989).
[21]None of these factors is dispositive in and of itself, but courts often look to these factors to support their conclusions. *See generally Lilly*, 876 F.2d. 857 (10th Cir. 1989).
[22]Did the badge read, "Dr. Smith, USAF," for example? Or was it clearly a government contractor badge?
[23]Did the physician introduce himself as, "Dr. Smith, Chief of Anesthesia for the Keesler Medical Center"?
[24]*See, e.g.*, Kramer v. United States, 843 F.Supp 1066 (E.D. Virginia 1994).
[25]AFI 51-501, ¶ 1.8.5.6. Note that this issue is a matter for federal, not state, law, and may vary (somewhat) from circuit to circuit. *See, e.g.*, Duncan v. United States, 562 F.Supp 96 (E.D. La. 1983); Thomas v. United States, 204 F.Supp 896 (E.D. Vt. 1962).
[26]*See, e.g.*, McCall v. Dep't of Energy, 914 F.2d (9th Cir. 1990) (claimant arguing that the government's duty was non-delegable).

Seven Pillars for Building Tomorrow's Air Force Leaders

Lieutenant Colonel Timothy Cothrel

Alexander the Great once said, "I do not fear an army of lions, if they are led by a lamb. I do fear an army of sheep, if they are led by a lion." Like all of us, he recognized the tremendous importance of leadership in military success during both war and peace. And, as the technological and political arenas in which we operate become even more complex, leadership becomes even more important. That is why so many Air Force (and other) senior leaders frequently remind us that the ultimate function of any leader is not to attract more followers, but rather to create more leaders.

In spite of this, we rarely analyze leadership. We may have a gut instinct that helps us recognize good or bad leadership when we see it, and a sense of what is leading versus following, but we generally do not deconstruct the leadership role or process sufficiently to identify the specific value a leader adds to unit mission accomplishment.

As a result, we may understand enough about leadership to practice it ourselves, but in order to teach it, to create and educate that next generation of leaders, we must dig to the very bedrock of its definition. While the seven principles below are in no way the complete or final word on leadership, they hopefully provide at least some insight.

LEADERSHIP IS SOMETHING YOU DO

As Donald H. McGannon, former CEO of Westinghouse Broadcasting, observed "Leadership is action, not position." This is illustrated by Sacagawea, the Indian woman who guided the Lewis and Clark expedition through the Dakotas and beyond. While Lewis and Clark were technically in charge of the group, she was the one actually leading it—she was deciding where the group would go, when it would go, and how it would get there.

LEADERSHIP CREATES PROGRESS

Progress is more than mere activity—it is activity with direction. No matter how much effort you exert or how good your intentions may be, if in the end the group is no closer to your organizational goal, you failed to lead it effectively. In Sacagawea's case, the goal was a physical destination. For many Air Force leaders, the goal may be performing the mission better or faster or cheaper or with higher morale. No matter what the goal may be, as a leader your job is to find or create the right route to reach it, then guide your people along the way.

LEADERSHIP RESPONDS TO THE NEEDS OF THE FOLLOWERS

"Battles are sometimes won by generals; wars are nearly always won by sergeants and privates," wrote scholar F.E. Adcock. Also, General George S. Patton, Jr. said, "One of the most frequently noted characteristics of great men who have remained great is loyalty to their subordinates." Yet, there is sometimes a temptation among civilian and military leaders to regard their followers as resources at their disposal.

In truth, as Dee Hock, founder and former CEO of VISA International observed, "If you don't understand that you work for your mislabeled 'subordinates,' then you know nothing of leadership." To lead people, then, is to help them achieve their successes; that, in turn, requires that you understand their objectives, the obstacles they face in reaching those objectives, and the action necessary to remove those obstacles.

Obstacles to progress are not necessarily the mountains or rivers Lewis and Clark needed to cross—they are anything that may become an excuse for failure, including lack of training, lack of equipment or materiel, and lack of motivation.

LEADERSHIP INSPIRES ENTHUSIASM

Manipulating behavior is not necessarily leadership. After all, with a whip and a chair, a lion tamer can get a 400-lb. man-eater to sit up and beg, but nobody characterizes him as a leader.

In fact, five-star general and President Dwight D. Eisenhower defined leadership as "the art of getting someone else to do something you want done because he wants to do it." Similarly, Peter F. Drucker, a pioneer in the scientific study of management, defined leadership as "lifting a person's vision to higher sights,

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the raising of a person's performance to a higher standard, the building of a personality beyond its normal limitations."

In the long run, you cannot rely on fear or intimidation to achieve progress. Creating the hunger to succeed requires that you provide the group with instruction, encouragement, vision, communication, and, most importantly, an example.

LEADERSHIP REQUIRES STANDARDS

Discipline is an essential element of leadership. Bestselling author H. Jackson Brown said, "Talent without discipline is like an octopus on roller skates—there's plenty of movement, but you never know if it's going to be forward, backwards, or sideways."

There are individuals in the Air Force who are unwilling or unable to make the journey with the rest of the group. Allowing them to continually impede progress or jeopardize success would be unfair to the group. As a leader, you must live up to the unpleasant responsibility of dealing with those individuals in a swift, fair, and effective manner. However, no leader can expect her followers to uphold standards unless she is willing and able to do likewise, and then some. As the Chinese philosopher Lao Tzu observed, "Mastering others is strength. Mastering yourself is true power."

LEADERSHIP OPPORTUNITIES ARE EVERYWHERE

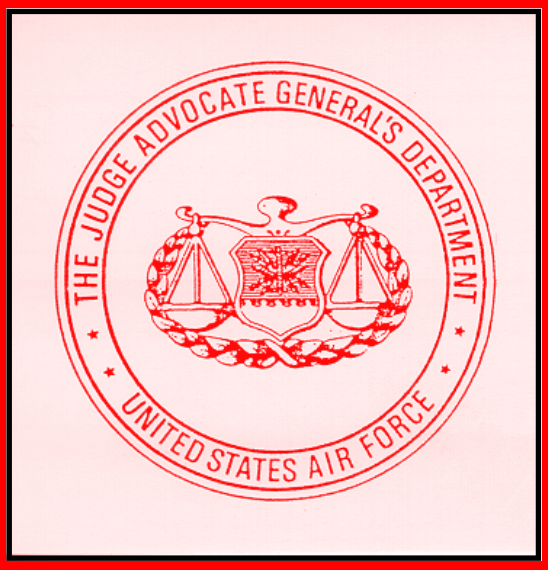
As the first principle states, being a leader is not a matter of having a certain rank or job title. Everyone can exercise leadership simply by taking responsibility for the welfare of other people, making decisions and taking actions that contribute to their progress, or passing on knowledge to them. You can seize the opportunities to be a leader at work, home, church, or school, in a club, a team, or a family. More importantly, you can help your subordinates find opportunities in their own lives where they can practice the leadership skills they will one day need to accomplish the Air Force mission.

LEADERSHIP PERSEVERES

Like many things, leadership must to a large extent be learned through painful experience rather than taught through essays or articles. Along the way, disappointments and setbacks may slow leaders down, but they never keep them down. To function as a leader, you must remain focused on your destination, your plan, and your people, and soldier on in the face of any adversity.

Legendary football coach Vince Lombardi summed it up perfectly when he said, "Leaders aren't born; they are made. And they are made, just like anything else, through hard work. And that's the price we'll have to pay to achieve that goal, or any goal." The Greek philosopher Aristotle said, "We are what we repeatedly do; excellence then is not an act, but a habit."

When Vince Lombardi and Aristotle agree on something, it has to be worth noting—good leaders may change course, but they never quit.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