The Reporter

September 2003

OFFICE OF THE JUDGE ADVOCATE GENERAL

AIR FORCE RECURRING PERIODICAL 51-1, VOLUME 30 NUMBER 1

The Reporter

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FROM THE EDITOR

This issue is packed with useful information and tips to improve your base office practice. Our first feature article is a timely piece discussing the prosecution of identity theft cases in the Air Force. We follow that up with the second installment in the Litigating with the Law series outlining the testimonial immunity instruction. In the FYI section you will find a variety of interesting and informative articles on subjects ranging from pretrial agreements to tort claims and health law. This month on page 25, we provide a wonderful primer on the subject of bankruptcy. Our final article encourages our claims offices to proactively develop a hazard prevention program. We extend our sincere appreciation to the authors who submitted the pieces that appear in this edition. We also encourage our readers to submit articles to be considered for publication in future editions.

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

Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's 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)

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

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

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

Catch Me If You Can: Identity Theft Litigation in the Air Force

Major Kate Oler

On December 14th, 2002 the ever-growing problem of identity theft squarely faced the military community. On this day, the security of a TriWest Healthcare Alliance office was compromised, resulting in the theft of laptops and hard drives containing the personal files of more than half a million TRICARE beneficiaries.[1] The victims included dependent, active duty, and retired military members who suddenly discovered their important personal information, to include their names, dates of birth, and social security numbers, was now in the hands of unknown criminals. Identity theft is on the rise, both in our military community and throughout the country. According to the Federal Trade Commission, two people become the victims of identity theft every minute,[2] and the result will be a projected loss in the United States of $73.8 billion by the end of 2003.[3]

But does this type of complex and involved crime make its way into a military court room? Consider the following scenario: An airman working in the outbound assignments section at the base MPF gets personal information concerning military members as a part of her official duties. She then takes this information, in the form of a SURF (Form 3987), a document which contains your social security number, address, and date of birth and she gives your personal information to a petty criminal, who her civilian boyfriend has picked up off the street. She brings this criminal into the Pass and ID section, claims she knows him, and says he needs an ID card. Her friends who work in Pass and ID trust her because of their working relationship. The street criminal presents the SURF and is quickly the owner of a new, authentic military identification card containing his photograph, and a military member's (your) correct personal information. The rest is easy – trips to jewelry stores, banks, car dealers, and cell phone kiosks. Not possible, you say? In fact, this exact scenario took place at Langley Air Force Base just last year.[4]

Identity theft cases can be extremely complex and will probably involve more information and documents than any other case you will prosecute in your career. This article will outline some important investigative steps, some pitfalls to avoid, as well as tips for litigating an identity theft case once you get to trial.

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CHARGING

Once you receive the Report of Investigation from the OSI, you first need to decide how to charge your case. Some common charges in identity theft cases include: larceny, creating a false military ID card, conspiracy to commit larceny, solicitation, receiving stolen property, and obtaining services through false pretenses (theft of phone services). You can also take a look at the Federal Identity Theft Statute, 18 U.S.C. § 1028. Section (a)(7) of the statute prohibits the knowing transfer or use of "a means of identification of another person with the intent to commit, or aid and abet, any unlawful activity that constitutes a violation of Federal law…" 18 U.S.C. § 1028(a)(7). Depending on the facts of your specific case, you can assimilate this federal statute under Article 134, clause 3.

When it comes to charging, keep in mind the concept of aiding and abetting brings with it a very low threshold; in other words, it does not take a lot to demonstrate that your accused aided, abetted, counseled, commanded, or procured the commission of an act, or caused an act to be done. If a group of criminals worked together and one of them stole from a certain establishment, you can (and oftentimes should) charge your accused with the underlying offense of larceny.

Another theory of vicarious liability is conspiracy. A member of a conspiracy is responsible for the acts of the other co-conspirators. If your accused conspired with another to bring about an offense, you can charge your accused with that underlying offense, even if she did not physically steal the property. All that is required is an agreement to commit the criminal act, and an overt act by one or more of the co-conspirators performed in furtherance of the conspiracy. An accused can be a party to a conspiracy even though she does not know the existence of all the actors, or participate in all their acts.[5] Remember, you do not need to charge conspiracy to prove your case under a vicarious liability/conspiracy theory.[6]

INVESTIGATIVE STEPS

The successful prosecution of any identity theft case begins and ends with a good investigation. The OSI will begin your investigative work for you, but the investigative process must continue in the months preceding trial.

Witness interviews are an important component of any initial trial preparation process. I cannot stress the importance of taking 1168s from all interviewed witnesses. Although this may sound like an obvious step, it is not always accomplished. Let's say you have a witness who works at one of the jewelry stores your accused visited. The accused went to this store in uniform (yes, in uniform) and the OSI report indicates your witness remembers seeing a nametag with the accused's name on it. What if you have no 1168? A complex case can take one year or more to get to trial. If that information is not memorialized in writing, you are forced to rely on the memory of a civilian witness who may not want to cooperate with the government. If the information is reduced to writing, you can refresh her recollection, or in the event that doesn't work, you can offer the statement as a past recollection recorded and read it to the trier of fact (as we did in the case at Langley AFB).[7]

Once your case is referred to trial, your ability to dig into your accused's criminal life increases exponentially. With referral comes the government's subpoena power, and this is a powerful tool you should use early and often.[8] The first place to start is with the documents and records involving the charged offenses. If your accused is charged with stealing jewelry from Kay Jewelers, you need to subpoena all of the available account information. This account information will most likely include the actual handwritten application filled out by your identity thief. For whatever reason, many criminals fail to cover their tracks, and in an identity theft case, this is no different. Many times, the criminal will fill out the application and list an address or phone number that can be traced back to them. Be sure to check this information. If the handwriting looks as though it belongs to the accused, you may want to have the OSI take handwriting exemplars and then send the application off for handwriting analysis. At any rate, you need to get this account information as soon as possible! Different companies have varying policies on how long they maintain their records, but invariably, all companies will purge their database at some point. The last thing you want is to lose your evidence because you waited too long to execute a subpoena.

Many stores also use video surveillance equipment as a security measure. Once again, each company has a different practice concerning how long these tapes are maintained before they are recycled and taped over. I can imagine little that has better evidentiary value than a videotape of the charged offense being committed. Be sure to ask for this information as early as possible – well before referral. If the company refuses to provide the tape without a subpoena, ask them to hold it for you until you have subpoena power.

If the OSI did not conduct a photo line-up, you should do one. Invariably, your accused and her co-conspirators will visit local stores and banks and will come into contact with witnesses. The sooner you can meet with these witnesses and show them a proper line up with your accused, the better your chances are of them making an identification. Be sure your photos look alike (similar-sized photo, same demographic background, same general appearance).[9] Also be sure to bring a paralegal with you to witness the process – that person may become a witness at trial.

Some of the most important evidence you can collect in an identity theft case are phone records. In the case at Langley, the accused and her co-conspirators opened up cell phone accounts using the stolen identities of various military members. We started our work only knowing the stolen cell phone number. You first need to find out who the service provider is. There are several ways to figure this out: 1) call a popular local provider and ask them whether this is one of their numbers, and if it is not, which carrier owns it; or 2) contact the FBI – they have a database containing all this information. Once you have determined the service provider, serve them with a subpoena for the phone records. When you receive these phone records, be sure to look up as many of the numbers as you can.[10] This is extremely time consuming, but is well worth the effort. Finally, you should also be sure to subpoena the initial application that was filled out in order to open the account. Once again, be sure to look at this application closely. Do you recognize any of the accused's information? Does this application look anything like the other applications you have already received? Your hard work in comparing all of these documents can help you to trace the accused's criminal activity.

Be sure you don't limit yourself to stolen cell phones – after all, your case may not involve the theft of services. An absolute must in an identity theft trial (and arguably, in any trial) is obtaining the accused's personal cell phone records. (You can usually get her phone number from the unit). These records lend an amazing amount of insight into your accused's life. You immediately know who her friends are, how often she calls, and sometimes depending on roaming charges, where she is calling from. I was surprised to find that the accused in my case used her personal cell

phone to call many of the establishments that she and her co-conspirators stole from. In fact, she called them just days before several of the larcenies or attempted larcenies took place. That was outstanding circumstantial evidence of her intent. It also clearly defined her role as a co-conspirator/aider and abettor.

Another important set of documents to subpoena are credit reports. You should immediately obtain a credit report on your accused through Experian. This will tell you where your accused has lines of credit and where she banks. In addition, ask your victim(s) for permission to subpoena their credit reports as well. (Please note, this implicates the Right to Financial Privacy Act.)[11] These credit reports not only tell you about lines of credit that have already been established, but they also show you all the inquiries that were made into your victim's credit history. This information can serve as the basis for a charge of attempted larceny. For instance, I knew my accused had attempted to create a fake military ID card with the last name "White." The credit report told me that three days before this false ID card was attempted, one of the financial institutions listed on the charge sheet inquired into the credit history of this same military member. In other words, the accused planned this scheme to such a degree that she prearranged a larceny, even before the fake ID card was created. Once again, this evidence helped demonstrate the accused's complete involvement with a conspiracy to steal and defraud.

Bank records are another must. Obtaining the accused's bank account number is a simple procedure – just visit Finance and ask for her most recent LES. Then send a subpoena off to the bank. These records can show any unusual withdrawals and deposits. Additionally, because so many people use their ATM/debit cards instead of a credit card, you can also trace your accused's foot steps during her criminal activity. Just as with phone records, I would encourage prosecutors to subpoena bank records in *every case you prosecute*, not just in an identity theft case.

In addition to documents that you obtain through subpoena, you may also learn more about your case by conducting handwriting and fingerprint analyses.[12] In the case at Langley, the OSI found a victim's LES in the accused's car. We sent this document off for fingerprint testing, and the accused's prints were discovered on the document. However, this same document also contained some hand-written numbers, so at our request the OSI brought her in to conduct handwriting exemplars and then sent the documentation off for analysis. In short, the handwriting on the document belonged to the accused. Why bother with the handwriting when we already had her prints? While I can think of a reason that the accused's prints could innocently be on this document (her co-conspirator boyfriend was driving her SUV at the time), I can think of no possible innocent explanation for the fact that she wrote on this same document. A subsequent subpoena to CitiFinancial verified that this same LES, with the accused's handwriting on it, was submitted as part of a loan application to a local CitiFinancial branch office. As you can see from this example, handwriting and fingerprint evidence can go a long way in helping you prove your case at trial.[13]

Understandably, much of the investigative work in an identity theft case will fall upon the prosecutor. Short of issuing either a DoD-IG subpoena (which is only available before preferral of charges), or a search warrant, the OSI does not have subpoena power when conducting their investigation. Use your imagination, and get as many documents as you can to learn as much about your case and your accused as possible.

TRIAL

The biggest challenge for the prosecutor at trial involves witnesses and evidence. You will need to line up your witnesses, as well as organize the massive amount of information and evidence you have accumulated, and present it to the trier of fact in a coherent, meaningful way. One good way to present complex information is through the use of demonstrative aids.

If you have 500-1000 pages of phone records, the military judge/jury will appreciate a chart cataloguing the important numbers, when these numbers were called, and how many times. This type of demonstrative aid can be admitted substantively as a prosecution exhibit (summary of voluminous records, MRE 1006).

Demonstrative evidence used solely for demonstrative purposes (marked an as appellate exhibit) is especially important in a complex trial. You should create as many demonstrative charts as your evidence permits. Some ideas include: blow up of a fingerprint ID diagram; enlarged portions of the accused's handwriting exemplars; enlarged segments of the accused's incriminating cell phone records; photos of the crime scene(s); a map to show the geography of the accused's crimes; a calendar depicting the accused's criminal activity.

Depending on the amount of evidence in your particular case, you may have upwards of 50 witnesses on your witness list. In most instances, many of these witnesses will be civilians requiring a subpoena before they will appear and testify in court. Be sure you serve them with a subpoena in advance of trial along with their $40 witness fee (without the check, you cannot compel their presence at trial). Invariably, there will be one or two witnesses who are uncooperative. How-

ever, I have never seen a witness refuse to comply with a federal subpoena. The civilian witness who worked at Kay Jewelers told me she would not comply with the subpoena, and I was convinced she would not show up. On the day of trial, she did come into the legal office, as directed. However, when I tried to interview her before she testified, she ripped up her subpoena and threw it at me. She correctly told me that the subpoena meant she had to show up and testify, but did not mean she had to talk to me before taking the stand. This same witness was the person who saw the accused in uniform and read her nametag. You can imagine that without the 1168, she never would have given me the information I needed at trial.

You can eliminate many of the witnesses on your list due to recent changes in federal and military law. On 1 June 2002, the changes to FREs 803(6), 902(11) and 902(12) became applicable to their corresponding Military Rules of Evidence. The new and improved version of MRE 803(6) – the business records exception - states the evidentiary foundation must be "shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) (domestic records), Rule 902(12) (foreign records), or a statute permitting certification." (emphasis added) Now, so long as the government provides the defense with notice of intent to use a certificate, and provides the defense with contact information concerning the records custodian, there is no requirement to call the witness during trial.[15] Keep in mind this practice will work for simple records that do not require any explanation. If the document is complex, you will still want to call the witness to explain it.

SENTENCING

It is easy to focus exclusively on the extensive amount of information required to prove your case during the findings portion of trial. Keep in mind that if you have done your job properly, you will reach sentencing, and will have the opportunity to show the fact finder the staggering effects of the accused's crimes. It is easy to overlook sentencing in a complex case like this – DON'T. Be sure to talk to your victims about the impact these crimes had on their everyday lives. Do you have a mom and pop business owner who never got reimbursed for his loss? If you do, think about calling him during sentencing. Keep in mind, no one may particularly care about a huge corporation losing a couple thousand dollars, but if the business is small and family run, it is a different story entirely.

Have your victims been turned down for credit? Do they trust military members with their social security numbers anymore? Did they worry about finances while deployed? Was their spouse left to handle this financial mess while they were away? If the answer to this last question is yes, think about putting the spouse on the stand.[16]

One of the victims in the Langley case testified about his solid economic background, how he prided himself on paying his bills on time, and how important it was to have access to a line of credit, in case he ever needed a loan. He described a recent trip to Radio Shack where he found himself admiring a $400 keyboard. He filled out the paperwork to buy the keyboard on credit, but when the sales associate ran his credit history, his application was denied. He had been trying to straighten out his credit for more than one year, and as of the date of trial he could not get a loan, even for $400. This is compelling evidence of victim impact when this same witness had such a good credit history before the accused's criminal activity, that he successfully financed a house.

You should also examine whether the accused's conduct continued past the charged timeframe? If it did, you may be able to present this evidence during sentencing as evidence of her continuous course of conduct. Take a look at the case *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001)[17] and see if it applies to your particular circumstances.

Just as demonstrative aids can be an effective means of conveying important points during the findings portion of trial, they can also help you to reach out to your judge or jury during sentencing argument. The same calendar referenced earlier in this article can be an effective tool to argue a lack of rehabilitative potential due to the repetitive nature of the accused's conduct. You could also create a chart which lists the total monetary amount stolen from each victim, and how much time each person spent trying to salvage their credit. Keep in mind that while it is generally impermissible to argue the accused's status as a matter in aggravation, if she worked in the MPF and used her position to commit this criminal activity (which is oftentimes the case in an identity theft trial), the reference is fair game.

It is easy to get wrapped up in the findings portion of a complex trial. Be sure you spend the time preparing a comprehensive and effective sentencing case. After interviewing your victims, it will become apparent that you can present powerful victim-impact evidence for your judge or jury's consideration during sentencing.

CONCLUSION

The military victims of identity theft cases often lose more than just money. They lose their trust and faith in an establishment that was supposed to hold their

utmost confidence. Even after all the fraudulent activity has been reported, the victims are left to contend with a negative credit history that will follow them for years to come. With identity theft cases on the rise, odds are that your base will see one of these trials in the not-so-distant future. As a prosecutor, it is your job to try to correct the injustice that your victims have experienced. A conviction during findings coupled with an appropriately firm sentence is a step in the right direction towards deterring others within the military community from committing similar offenses. These cases are often complex and time consuming. They require excellent organizational skills and a lot of time and effort. But if you start early, and conduct the necessary investigative steps, your prosecution should be a successful one.

[1]*Act Fast if You Suspect Identity Theft*, Prime Times (Publication of TriWest Healthcare Alliance), Vol. 6, issue 4.
[2]Mike Lazorchak, *ID Thieves Impersonate IRS to Reach Victims*, A.F. TIMES, June 11, 2003.
[3]Jon Surmacz, *Losses from Identity Theft to Total $221 Billion Worldwide*, CSO Online, May 23, 2003.
[4]The case at Langley Air Force Base, *United States v. Taisha T. Bivens*, went to trial in November 2002. I worked with two trial counsel during the prosecution of this court-martial: Major John Taitt, Chief Circuit Trial Counsel, Eastern Circuit, Bolling Air Force Base, Washington DC, and Captain Michelle Kasperek-Said, assistant staff judge advocate, Langley Air Force Base, Virginia.
[5]*United States v. Sims*, 808 F. Supp. 620, 1992 U.S. Dist. LEXIS 16299 (N.D. Ill. 1992); *United States v. Castro*, 629 F.2d 456, 464 (7th Cir. 1980).
[6]See *United States v. Browning*, 54 M.J. 1 (C.A.A.F. 2000); *United States v. Washington*, 106 F.3d 983, 1011 (D.C. Cir.), cert. denied, 522 U.S. 984 (1997); *United States v. Galiffa*, 734 F.2d 306, 313 (7th Cir. 1984).
[7]MRE 803(5) explains that a past recollection recorded should be read into evidence, and not published as a substantive exhibit.
[8]See the sample subpoena attached at the end of this Article.
[9]See *Neil v. Biggers*, 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972). A photographic lineup is unlawful and unreliable if it is "so suggestive as to create a substantial likelihood of misidentification." Military Rules Evidence 321(b)(1), Manual For Courts-Martial, United States (2002 ed.). "Testing for a substantial likelihood of a mistaken identification requires a two-step analysis: First, was the pretrial identification unnecessarily suggestive and second, was it conducive to irreparable mistaken identification?" *United States v. Rhodes*, 42 M.J. 287 (C.A.A.F. 1995); quoting *United States v. Webb*, 38 M.J. 62, 67 (C.M.A. 1993).
[10]The best search engine I have used is Lexis. Go to Public records and then click on P-Track person locator - nationwide; click on "new search" and then "restrict search using document segments"; choose "telephone" under "select a segment" and then click add and run your search.
[11]A subpoena for the accused's financial records does not trigger the Right to Financial Privacy Act (RFPA) because an exception applies. However, if trial counsel wants to subpoena a witness's financial records the Act contains a notice requirement, which requires the witness be informed of the request for his financial records and how to challenge their release. For a detailed discussion of the RFPA, go to the JAJG web page under "litigation support."
[12]The Navy Lab in Norfolk, Virginia is an excellent lab and will provide you with a quick turn around on your work. Their contact information is: (757) 444-8615, DSN 564-8615; USACIL is also an outstanding Lab that has a variety of services available to trial counsel. Their email address is mail131@usacil-acirs.army.mil, and their commercial phone number is (404) 469-7107.
[13]For a direct examination of a fingerprint and a handwriting expert, see the JAJG web page.
[14]The certifying official should state that the record (1) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (2) was kept in the course of the regularly conducted activity; and (3) was made by the regularly conducted activity as a regular practice. There is also required language that must be present in order for the certificate to comply with the law: "I declare/certify/verify/state, under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".
[15]Keep in mind that the victim witness assistance program (VWAP) can and should be utilized to help victims of financial fraud. Be sure your VWAP representative provides your victims with information on procedures to correct their financial problems. The Federal Trade Commission (FTC) has an excellent web site located at http://www.consumer.gov/idtheft/. This site, and in particular the article entitled "ID Theft: When Bad Things Happen To Your Good Name" http://www.ftc.gov/bcp/conline/pubs/credit/idtheft.htm both contain valuable information concerning how identity theft happens, and what victims can do to repair the damage. Also, be sure to look at JACA's identity theft web page: https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jaca/identitytheft.htm. This site contains useful links and information that can help military identity theft victims to repair their credit.
[16]This case addresses the evolving definition of what constitutes evidence in aggravation, pursuant to R.C.M. 1001(b)(4). This rule allows the government to present "evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). In *Nourse*, the accused stole boxes of rain ponchos from a local Sheriff's Office. He pled guilty to this offense at trial, and during sentencing the government sought to introduce evidence of uncharged misconduct that the accused had stolen other property from the Sheriff's Office in the past. The military judge admitted the evidence, stating that it was "part of a course of conduct involving similar crimes perpetrated upon the same victim." Id. at 230. The Court of Appeals for the Armed Forces affirmed the accused's conviction holding that the uncharged larcenies were part of a continuing scheme to steal, and were admissible to show the full impact of the accused's crimes. Id. at 232.

SUBPOENA DUCES TECUM

The President of the United States, to [insert company name and address].

You are hereby summoned to deliver evidence by [insert date and time] at _____ Air Force Base, [insert state], for a General Court-Martial of the United States of America, appointed by [name of convening authority] in Special Order A-1, dated [insert date of convening order], in the matter of *United States v. Accused*. The evidence required is a copy of records pertaining to the cellular phone registered to [insert name], telephone number [insert number], for the period of [insert date range].

Failure to produce the required evidence is punishable by a fine of not more than $500 or imprisonment for a period of not more than six months, or both. 10 U.S.C. § 847. Failure to produce the required evidence may also result in your being taken into custody and brought before the court-martial under a Warrant of Attachment (DD Form 454). Manual for Courts-Martial R.C.M. 703(e)(2)(G): 10 U.S.C § 846.

Subscribed at _____ Air Force Base, [insert state], this day of 2003.

_____
Trial Counsel Signature Block

You are requested to sign one copy of this subpoena and return the signed copy to the person serving the subpoena.

I accept service of the above subpoena.

_____ _____
Signature of Records custodian of Records Subpoenaed Date

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, _____ who, being first duly sworn according to law, deposes and says that at _____, on _____, 2003, he or she delivered to _____ in person a duplicate of this subpoena.

_____ _____
Grade Signature

Subscribed and sworn before me at _____, this _____ day of _____, 2003.

_____
Grade

_____ _____
Official Status Signature

LITIGATING WITH THE LAW II: AN INTRODUCTION TO THE TESTIMONIAL IMMUNITY INSTRUCTION

Major John E. Hartsell

Your witness may be a convict. Your witness may be a criminal. Your witness may be a liar. Your witness may hate all prosecutors. In fact, there is also a good chance your witness may steal, cheat, abuse others, and/or use drugs, but believe it or not he or she might help you win your case. How can a menace to society possibly help society? A witness who is soiled by misconduct and who may have little or no believability, nevertheless has the ability to inject potent credibility and evidentiary value into a potentially weak prosecution so long as the trial counsel understands how to effectively employ the "Witness Testifying Under a Grant of Immunity or Promise of Leniency" ("Testimonial Immunity") instruction.[1]

The "testimonial immunity" instruction,[2] like the "false exculpatory statement instruction,"[3] is a powerful tool in any prosecutor's arsenal and it is a shame that few prosecutors understand how to employ it effectively. Unfortunately, many young trial counsel surrender the issue of credibility and allow a witness to be evaluated solely upon the witness' performance while on the stand. The power of the "testimonial immunity" instruction[4] rests with its ability to strengthen a horribly poor witness and inject them with credibility throughout the trial. The key to using the instruction properly is preparation. Trial counsel needs to study the instruction, prepare their witness, and prepare their case. This article seeks to help young trial counsel prepare their case by discussing how to use the instruction in the courtroom and by providing a number of "ready-made" examples of voir dire, direct examination, and closing argument.

> *"A witness who is soiled by misconduct and who may have little or no believability, nevertheless has the ability to inject potent credibility and evidentiary value into a potentially weak prosecution..."*

VOIR DIRE

Voir dire is a live opportunity to collect data on your court members. It is not a time to argue your case. Your intent should be to educate yourself, not necessarily educate the members. You need to present the members with ideas and then solicit their views and feelings about those ideas. Keep in mind the prescribed goals of voir dire:

> The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case.[5]

Accordingly, you should use voir dire to find out how your members will react to an immunized witness so that you can exercise logical challenges to the ones who may react adversely.

One of the better methods of introducing the subject of immunized testimony during voir dire was developed shortly after Monica Lewinsky became a well-known name in the media.[6] The method is simple and comprehensible and it is incorporated into the following voir dire questions:

"There will be a number of witnesses presented during this trial and you will have an opportunity to hear them and evaluate their credibility. How many of you believe it is important to consider a witness' credibility?"

"In considering a witness' credibility, how many of you believe you will think about and examine the reason why each witness is willing to testify?[7]

"One of the United States' witnesses, Captain Durte Kirtis, has what is called "testimonial immunity" for what he says in this courtroom. Do each of you have a general idea of what it means to be granted immunity?"

"How many of you have ever heard of Monica Lewinsky?"

"How many of you heard about her lawyers trying

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to secure immunity for her from Kenneth Starr?"

"How many of you are generally familiar with the Constitutional right to remain silent?"

"Do each of you understand that without immunity, a witness might have a right to remain silent?"

"Do any of you believe that the right to remain silent is unfair and witnesses should not be allowed to invoke their rights on the witness stand?"

"You are going to learn that the convening authority, Lt Gen Doright, granted immunity to Capt Kirtis and ordered him to testify. How many of you knew that the United States can grant immunity to a military person and then order them to testify?"

"Do any of you think that it's unfair for the United States to find a witness who knows about a crime and grant them immunity and order them to testify?"

"Would any of you hold it against the United States if you learned we found one of the Accused's buddies, gave him testimonial immunity, and ordered him to testify truthfully in this case?"

"How many of you knew that if the United States only grants a witness **testimonial** immunity, instead of **transactional** immunity, then the United States can still prosecute that same witness for their crimes—we just can't use any of their in-court testimony against them in the prosecution?"

The above example accomplishes a number of things. It allows you to measure the experience of your court members and determine how many are familiar with the concept of immunity by using a well-known media individual as a reference (*i.e.* Monica Lewinsky). The questions also allow you to find out which, if any, members are troubled with a witness' right to remain silent or are troubled with the fact that a witness would require immunity in order to testify. The questions also allow you to find out if any members are disturbed or uneasy about the United States ordering friends to testify against each other. Finally, the last questions allow you to distinguish testimonial immunity from transactional immunity and discover who might think your immunized witness is receiving leniency as a result of testifying. The above voir dire is only an example, it is not the only way to question members about their feelings and trial counsel should adapt the questions to fit their case, their circuit, and their judges.

DIRECT EXAMINATION

There are multiple ways your witness can inform the court members that they are testifying under a grant of immunity. Some trial counsel ask the witness about immunity at the outset of direct examination, some ask the witness at the end of direct examination, and others save the topic of immunity for re-direct examination in an effort to rehabilitate the witness—a dangerous endeavor if there is no cross-examination. Regardless of when you elect to discuss the topic of testimonial immunity, you must make sure the members observe how immunity affects the witness.

The members need to understand the nature of testimonial immunity and the most effective way to educate the members is through the immunized witness himself or herself. The immunized witness must be prepared to convey the fact that immunity is a powerful tool which reveals the absolute truth, and the way to present this idea is fairly simple. You must first let the members know your witness has been a criminal in the past; it will give the witness some instant credibility. Think about it, you are providing them with a pseudo-expert in the accused's criminal behavior. You must also associate your witness directly with the accused so the members appreciate the fact that the witness is the accused's buddy, not yours. You also want the witness to tell the members what immunity is and how it only applies to admissions they've made as a witness; it does not apply to earlier admissions they may have made to investigatory agents as a suspect. You also want the members to understand that the witness is reluctant to testify and had to be ordered; if they appear too eager to testify the members may question their motives. Finally, you must hammer home that the witness will not be receiving any leniency; they are still going to be prosecuted. Each of these items is designed to work in conjunction with the "testimonial immunity" instruction[8] and enhance the witness' credibility and deflect accusations of improper motives. The goal is to present a criminal witness, who associates with the accused, who is reluctant to testify, and who is going to be prosecuted for the same crimes as soon as the accused's trial is completed. You can succinctly cover all these areas with the following questions:

Q: Capt Kirtis are you currently a suspect for "xyz" crime?
A: Yes Sir.
Q: Do you know who the Accused is?
A: Yes Sir.
Q: If he is present in the courtroom could you please identify him?
A: That's him over there, next to the defense lawyer.
Q: Before I ask you about your knowledge of the Accused, I'd like to ask you a few questions about your testimony alright?
A: Yes Sir.
Q: Can your testimony today be used against

you in the future?
A: No Sir.
Q: Why not?
A: I was given immunity.
Q: What is your understanding of immunity?
A: It means whatever I say in here can't be used against me unless I commit perjury.
Q: So what is the difference between the things you've said while under immunity and the things you've said before you were given immunity?
A. Well, the stuff I told the cops can be used against me, but my testimony today can't be used against me.
Q: When did you receive immunity?
A: Last Monday
Q: Who gave you immunity and ordered you to testify?
A: General Doright.
Q: Did you go to the General and volunteer to be a witness?
A: Oh no, Sir.
Q: Why are you testifying?
A: General Doright ordered me to testify and I have to follow that order.
Q: How did he order you to testify?
A: In writing.[9]
Q: Are you still subject to prosecution?
A: Unfortunately yes.

The direct examination does not have to be lengthy; in fact, it shouldn't be long at all. The value of the witness' testimony rests with their knowledge of the facts, not their knowledge of the law. You want to spend direct examination dwelling on the crime and you want to limit the amount of time explaining testimonial immunity.[10] Tell the members about immunity, set up the instruction, and then move on. More often than not, the defense counsel will want to dwell on the topic of immunity and they will imply that the witness is receiving, or anticipates receiving, some type of leniency. You should expect nothing less from the opposition; however, if your witness is prepared they will easily deflect the accusations of fabrication. Thereafter, a concise re-direct examination can clarify any confusion regarding leniency; additionally, it can also demonstrate that being an immunized witness isn't an enviable experience.

Q: Captain Kirtis, are you still subject to prosecution for providing "xyz" to the Accused?
A: Yes Sir.
Q: Prior to this crime, what was your relationship with the Accused?
A: We were best friends; we always hung out together.
Q: How would you describe your relation ship now?
A: We don't even make eye contact now.
Q: In this case, how much leniency have you received from the Defense Counsel?
A. None
Q: How much leniency have you received from them during cross-examination?
A: (Nervous laugh) It sure didn't feel like I got any leniency.
Q: How much leniency have you received from the United States?
A: None
Q: How much leniency do you expect you will receive from the United States?
A: None.
Q: Capt Kirtis, you have testimonial immu nity, you can take it all back if you want, you can change your statements, you can say you made it all up, do you want to change any of your testimony?
A: No Sir.

Direct and re-direct examination should center around the facts and circumstances of the charged offenses; the facts and circumstances surrounding immunity are of secondary importance. Hence, trial counsel's questions regarding immunity should be thought out, well in advance of trial, and they should be presented as efficiently as possible. Direct examination is not the primary forum to discuss all the implications of testimonial immunity; save your energy for closing argument.

CLOSING ARGUMENT

Closing argument is a special moment in the trial. It's the opportunity to assemble your entire case and present it in a viewable, comprehensible, and persuasive fashion. It is not the time for spontaneity or unnecessary brevity. Trial counsel who "just let the facts speak for themselves" don't generally experience the sentencing portion of the trial; instead, they spend a lot of time blaming members for not "understanding" the facts. Trial counsel who diligently prepare for closing argument are the most feared adversaries in the courtroom. The most powerful argument a trial counsel will ever make is one that has extracted the critical facts from the case, married them to the law, presented them in a persuasive manner, and done it with such exacting diligence and preparation that it appears, to the listener, as if it were simply "off the cuff." A trial

counsel who uses an immunized witness must marry the concept of immunity to the law to help build a convincingly persuasive argument.

The first step is to educate the court members on the law. You should read the "testimonial immunity" instruction[11] to them. Reading the instruction educates them, completely, about the law before you argue the facts. It also injects credibility into your argument because the judge will be repeating the very same instruction. In fact, when you read the instruction, you may want to consider standing between the court members and the judge and silhouette yourself with the bench—rather than with the accused. As always, keep your remarks succinct; don't waste words.

> *On Tuesday we witnessed the defense lawyer attack Capt Kirtis and suggest that he's lying. That absurdly and illogically, Capt Kirtis is trying to trade in his old crimes for the brand new one of perjury. The defense lawyer desperately wants you to believe that Capt Kirtis' testimony is founded on nothing more than deals and immunity letters. That of course is ridiculous because Capt Kirtis has no deal; no deal! Not only that, Capt Kirtis implicated the Accused months before he was ever granted immunity. Capt Kirtis did not have immunity until last week and that fact makes your job a whole lot easier. Immunity means Capt Kirtis is free to tell the truth without any consequences whatsoever. Immunity exposes the truth, it doesn't conceal it. Immunity isn't a crime; it's a status and the military judge will tell you all about it. I suspect in a few moments, the military judge will instruct you of the following,* ***(read the instruction).*** *So here's the bottom line: Capt Kirtis is testifying because he was ordered to and he can reveal every dirty, salacious fact and it can't be used against him, unless he lies. Testimonial immunity is the next best thing to a truth serum.*

It is imperative that the court members understand and appreciate that your immunized witness is credible. Trial counsel must give them every reason to accept that the witness is believable and since the law cannot be impeached you must strive to associate your witness with the law.

Once you have associated your witness with the uncontroverted judicial instruction, you must demonstrate how the law of immunity operates. You must show, through logic and practical examples, how immunity works. The law can be confusing; therefore, you must educate the members on testimonial immunity by weaving logic into the law.

> *Capt Kirtis can expose everything; he just can't lie. He could have looked us in the eye, said everything he said in the past was all a lie, that he made it all up, and he could have laughed at us, and we couldn't do anything about it. Immunity means that his testimony today cannot, in any way, be used against him at his own trial. Capt Kirtis could have changed his testimony today; he could have admitted to being the "Kingpin" of these crimes; for that matter he could have admitted to being the real Unabomber and nothing would have happened to him. But he didn't do that. The law told him, "We only want the truth," and he told us the truth: warts and all.*

There are times when overly aggressive defense counsel will unwittingly prove the veracity of your immunized witness. For example, defense counsel, during cross-examination, will sometimes dwell on the witness' participation in the crime. The cross-examination may include some pretty embarrassing and humiliating facts and invariably your witness may suffer through those answers. Some observers might believe the zealous defense counsel is impeaching the witness; however, the witness' willingness to answer tough questions truthfully simply proves that the grant of immunity worked.

> *In fact, the defense lawyer himself showed us precisely how powerful testimonial immunity is during a laboratory experiment of sorts.[12] Do you remember when the defense lawyer really went after Capt Kirtis and asked him those embarrassing and humiliating things? Remember when he asked, "You're just a rotten criminal aren't you?" It must have been downright painful for Capt Kirtis to sit there and say, "Yes Sir, I am." But see, that answer, that degrading answer proved precisely how powerful testimonial immunity is. No one would want to admit to being a "rotten criminal," but Capt Kirtis didn't have a choice, he had to answer and he had to tell the truth. The scientific formula they demonstrated is: "question + testimonial immunity = truthful answer." You can vary the degree of humiliation, but it always equals the truth. Like it or not, it was the defense that proved for you that testimonial immunity forces people to tell the truth. Capt Kirtis told us the truth.*

Trial counsel should give every immunized witness one last chance to change their testimony and flex the awesome power of testimonial immunity in front of the entire courtroom—the room will go silent if the

question is asked well. Invite the witness to change their testimony if it's not the truth and when they refuse to recant they reinforce their credibility.[13]

> *And finally, on re-direct I reminded Capt Kirtis of his immunity and I gave him a way out; I gave him a chance to recant. I told him he could change his testimony if it wasn't the truth, but he never wavered. Capt Kirtis told us he's a criminal, and he told us the Accused is one too.*

You can also demonstrate the credibility of the witness by illuminating all the allegations that the witness did not make. Illustrate for the members that the witness is truthful because they did not embellish and did not exaggerate. Prove the witness is truthful by highlighting the self-deprecating admissions and by arguing all the spurious allegations the witness could have made, but did not. The idea is to show the members what a storyteller would say versus what your witness actually said.

> *Now the defense has been beating their hollow war drums to try to make you believe Capt Kirtis is so evil that even the law of immunity won't sway him. Well they may not like the truth, but they do have to face it. Think about it, if Capt Kirtis was truly that diabolical, if for some unknown reason he wanted to frame the Accused, he could have made the Accused look worse. He could have said the Accused would brag about how he committed crimes like this in the past and how he always beat the rap; but Capt Kirtis never said such a thing. Capt Kirtis could have tried to make himself look better and said the Accused forced him to commit these crimes. He never said that either. Capt Kirtis could have said the Accused was a terrorist who wanted to commit more crimes, wanted to burn the flag, wanted to spit on the commander, wanted to sell dope in schools, wanted to stalk women, wanted to steal from his parents, and wanted to sell secrets to the highest bidder, but he never said any of these things either. Capt Kirtis, from day one, has simply said the Accused and he committed "xyz" crime together. To buy into the Defense's theory that Capt Kirtis made up this self-deprecating, highly incriminating confession, that could have made himself look better and could have made the Accused look far worse, defies all logic and commonsense. Capt Kirtis told you the ugly truth, the immunized truth, and even though he had every opportunity in the world to throw in a gratuitous allegation or a self-serving denial he never did either; he did not exaggerate.*

Trial counsel can sum up their immunity argument by reminding the members of all the factors that prove the power of testimonial immunity. These factors can be read off a page like a laundry list, they can be written down on a chalkboard, they can be mounted on a poster, or they can simply be argued. Regardless of how one presents their argument, they must convey to the members that the overwhelming, unmistakable, unimpeachable, universal point is there is only one conclusion: immunity guarantees truthful testimony.

> *A mountain of law, evidence, and common sense demonstrates, with excruciating clarity, that Capt Kirtis is telling the truth. The order to testify truthfully proves the truth, the law of testimonial immunity proves the truth, the consistency of the facts proves the truth, Capt Kirtis' rejection of the opportunity to recant proves the truth, his rejection of the opportunity to make himself a victim proves the truth, his rejection of the opportunity to paint a far, far uglier picture of the Accused proves the truth. Members, we've taken you into the dirty little world of the accused and shown you what he does outside of this courtroom, and the power of truthful, testimonial immunity made it possible. Listen to the judge's instruction and remember, testimonial immunity does not conceal the truth; it reveals the truth.*

CONCLUSION

A trial counsel should not shy away from using an immunized witness. An immunized witness generally has first-hand knowledge of the crime and an immunized witness can be presented to court members as a witness whose credibility is enhanced by the law. The above examples were drafted so that they can be used in virtually any case involving an immunized witness. A trial counsel can take each example and plug it into their trial preparation. The modular nature of each example is intentional; any trial counsel can use these modular blocks to assist in trial preparation or to enhance their permanent trial notebook (which they may be building as their career progresses). There's no need to reinvent the wheel every time you have an immunized witness.[14] Use these examples and also take the time to craft even more for use later on. The examples in this article can easily be married up to the "testimonial immunity" instruction[15] to substantially increase the credibility of your witness with the unimpeachable power of the law. If you don't ordinarily save your copy of *The Reporter*, or don't cut resourceful articles out of it to file away for later use, you

should probably start with this very issue.

[1]U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 7-19, notes 2 & 5 (1 Apr. 2001), [hereinafter BENCHBOOK].

> (*Name of witness testifying under grant of immunity*) testified under a grant of immunity. This means that this witness was ordered to testify truthfully by the convening authority. Under this grant of immunity, nothing the witness said, and no evidence derived from that testimony, can be used against that witness in a criminal trial. . . .If the witness did not tell the truth, the witness can be prosecuted for perjury. In determining the credibility of this witness, you should consider the fact this witness testified under a grant of immunity along with all the other factors that may affect the witness' believability.

The complete "testimonial immunity" instruction also contains language which applies when a witness is granted transactional immunity or is promised leniency. This article will focus only on the language which applies when a witness is granted testimonial immunity.

[2]BENCHBOOK, *supra* note 2.

[3]*See generally* Hartsell, John E**.,** *Litigating with the Law: An Introduction to the False Exculpatory Statement Instruction*. THE REPORTER. Mar. 2002.

[4]BENCHBOOK, *supra* note 2.

[5]MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 912(b)(3), Discussion.

[6]The voir dire reference to Monica Lewinsky originated with Lt Col Bruce Lennard, former Chief Circuit Trial Counsel, Pacific Circuit. The reference was used in the successful prosecution of an E-7 whose defense was focused on discrediting an immunized witness.

[7]The first two questions in this voir dire are important because they allow you to explore the topic of witness credibility. Some defense counsel may object and argue that discussing testimonial immunity is merely an attempt to improperly bolster witness credibility before it is attacked. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 608a (2002). Therefore, you want to establish that your court members believe credibility is an important consideration and that they will be, throughout the trial, thinking about the reason a witness is willing to testify. Once your court members agree that credibility and motive to testify are important items that they will think about during trial, you can explore the topic of testimonial immunity and evaluate their impressions and feelings about it.

[8]BENCHBOOK, *supra* note 2.

[9]Some trial counsel take this opportunity to introduce the order into evidence as a prosecution exhibit.

[10]In fact, many trial counsel don't even discuss immunity in their opening statement.

[11]BENCHBOOK, *supra* note 2.

[12]References to science are often helpful to a trial counsel who may have to prove a case with nothing but circumstantial evidence. Science involves firm answers and positive conclusions that are often uncontroverted. A trial counsel can effectively buttress a circumstantial case by using scientific analogies, metaphors, and references.

[13]Trial counsel better know the answer to this question before they ever ask it in front of court members. Preparation is the key.

[14]Trial counsel can still build new "modular" examples for use in other trials. They should not be limited to the examples provided in this article. Additional modular examples can focus on immunity and they can focus on other topics: circumstantial evidence, reasonable doubt, an accused's testimony, confinement, punitive discharge, etc. Modular components can be built, tested, refined, and re-used during virtually any part of the trial (*i.e.* voir dire, opening, direct exam, cross exam, closing, sentencing, etc.). Obviously, the more you build, the more unpredictable you become, and the more you refine, the more you can memorize and will be able to employ during any portion of the trial at a moment's notice. Finally, the more you prepare, the less likely you will say or do something that will reverse your case on appeal.

[15]BENCHBOOK, *supra* note 2.

PRACTICUM

PRETRIAL AGREEMENTS MAY AFFECT PROVIDENCE OF PLEAS WHEN CONTAINING LANGUAGE INVOLVING REQUIRED WAIVER OF FORFEITURES

An accused and the convening authority may have concerns of how a conviction may impose hardships on the accused's family. One way to address this concern is to guarantee some financial support will go to the family by including a provision in a PTA. Since the effective date of Article 58b, UCMJ, this desire can be accomplished through deferment and/or waiver of mandatory forfeitures in cases with qualifying sentences. Problems arise, despite good intentions, when the accused is ineligible or becomes ineligible to receive pay either before trial or during a confinement period when payment was anticipated.

A criminal defendant has the right to receive the benefit of his or her bargain in a plea agreement when that defendant performs as required under the agreement. *See Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in* any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled.").

Based upon this principle, the United States Court of Appeals for the Armed Forces (CAAF) reviewed a line of cases questioning the providence of pleas entered pursuant to a pretrial agreement when performance of a term of the agreement was thwarted. *See e.g.,States v. Hardcastle, 53 M.J. 299, 302 (C.A.A.F. 2000);United States v. Williams, 53 M.J. 293, 296 (C.A.A.F. 2000).* These cases involved an agreement that included a provision to waive mandatory forfeiture of pay and allowances for the benefit of an appellant's dependents. Waiver was impossible because the accused had entered a non-pay status, therefore, there was no pay subject to mandatory forfeitures and, concomitantly, no pay available for waiver.

In *U.S. v. Smith, 56 M.J. 271 (2002), the CAAF set aside a conviction based upon* pleas of guilty pursuant to a pretrial agreement. It held the plea was improvident due to a material misunderstanding by both parties of a term in the agreement requiring waiver of mandatory forfeitures. The accused had agreed in part to plead guilty in exchange for suspension of any adjudged confinement in excess of forty months (if a punitive discharge was adjudged) and forfeitures and/or fine for one year after trial; deferment of automatic forfeitures until action; and waiver of those forfeitures for the benefit of his dependents for a period of six months. The adjudged sentence was a dishonorable discharge, confinement for five years, and reduction to the lowest enlisted grade.

All trial participants, including the military judge, overlooked the accused's pay status and the impact it would have on the pretrial agreement. The accused's enlistment had expired and he was in a legal hold status when his sentence was adjudged. His pay was terminated as of that date under applicable regulations. There was no pay to forfeit or protect for the benefit of his dependents. The military judge's inquiry concerning the agreement contributed to the misunderstanding.

The misunderstanding of the accused's pay status continued until after trial when the defense counsel sent notice to the trial counsel and later submitted a clemency request. Base personnel determined there was nothing that could be done to provide the financial support requested. Thereafter, the defense counsel's clemency submission requested suspension for one year of all confinement in excess of eighteen months. The request to suspend the confinement was based upon the failure to receive pay and allowances via the waiver despite the agreement to suspend and later waive them.

The SJAR acknowledged the clemency request but misadvised the convening authority because it didn't discuss the substance of the request or its relationship to the terms in the pretrial agreement. The SJAR also misadvised the convening authority about automatic forfeitures having taken effect and it failed to properly describe the agreements deferment and waiver provisions.

The convening authority's action approved the sentence as adjudged with one modification: he suspended confinement in excess of thirty-six months for twelve months (with an automatic remission provision). Neither the action nor the SJAR provided a rationale for the four-month reduction of confinement below the PTA cap.

Prior case law held where there is a misunderstanding as to a material term in a PTA, the remedy is either specific performance of the agreement; an opportunity for the accused to withdraw from the plea; or the Government may provide alternative relief if it achieves the objective of the agreement. *See United States v. Mitchell, 50* M.J. 79 (1999); *United States v. Olson, 25 M.J. 293, 298-99 (CMA* 1987). The Court noted the convening authority and the accused may also enter into a written post-trial agreement under which the accused, with assistance of counsel, makes a knowing, voluntary, and intelligent waiver of his right to contest the providence of the pleas in exchange for an alternative form of relief.

In *Smith, remedial action was required* because the

circumstances reflected the pleas were induced in significant part on a mutual misunderstanding by the parties of a material term of consideration. The CAAF remanded the case to the service court to determine whether some appropriate alternative relief was available to provide the appellant with the benefit of his bargain. If that relief was available, the court was directed to approve so much of the sentence reflecting that relief. If such relief was unavailable, the court was directed to set aside the findings and sentence and authorize a rehearing.

In 2003, the CAAF had the opportunity to revisit the issue in *United States v. Perron, 58 M.J. 78 (2003).* This decision drastically changed the ability of a convening authority and the service appellate courts in attempting to remedy a failure of a PTA term.

Perron had entered into a PTA requiring, in part, suspension of confinement in excess of sixty days and waiver of all automatic forfeitures. He was sentenced to a bad conduct discharge, confinement for 90 days, and reduction to pay grade E-3. After trial, defense counsel notified Perron that his enlistment had expired prior to trial and that he had entered a non-pay status upon his confinement. Defense counsel then asked the convening authority for relief in the clemency submission but relief from the failure to waive forfeitures was not granted. The service court determined the forfeiture provision was a material term of the PTA and remanded the case to the convening authority to either set aside the findings and sentence or determine whether some other form of alternative relief was appropriate. The convening authority modified the sentence by approving only the bad conduct discharge and reduction to E-3. Because the revised sentence did not include confinement, Perron was therefore entitled to payment for the time he spent in confinement. He was paid $3184.90, the amount his family would have received if the waiver provision had been effective.

Perron was still unsatisfied and appealed for relief. He argued the relief afforded by disapproving the confinment and allowing belated payment of funds that should have been paid under the waiver provision in the PTA didn't cure the failed material provision because payment at the later time didn't compensate his family for the value the payments would have had they been paid during his incarceration. He asked the court for either permission to withdraw his pleas or disapproval of his bad conduct discharge. The service court held it could provide alternative relief even if it was against Perron's wishes. The court held the belated payments were close enough to satisfy the agreement, particularly if the sentence was further reduced to allow additional money as a substitute for interest. Accordingly, the court further reduced the sentence by setting aside the reduction in grade. This gave Perron an additional financial entitlement.

Still unsatisfied, Perron petitioned CAAF for review. He argued his pleas were involuntary; that where an accused pleads guilty in reliance upon a promise in a PTA, the plea can only be voluntary if the Government fulfills those promises. He claimed when promises are not fulfilled, the proper remedy is either specific performance, withdrawal of the plea, or another remedy agreeable to the accused. Perron argued that imposing relief on him violated his Fifth Amendment due process rights.

The Court in *U.S. v. Smith, 56 M.J. 271* (2002), held that remedial action in the form of specific performance, withdrawal of the pleas, or alternative relief was required where mutual misunderstanding regarding a material term of a pretrial agreement prevents an accused from receiving the benefit of their bargain. However, the *Perron* Court had to determine whether the service court or a convening authority may, in effect, determine alternative relief it provides can render a plea voluntary when the appellant argues the relief does not satisfy the bargain. The Court held an appellate court may not impose such relief absent the appellant's consent.

The CAAF held imposing remedies on an unwilling appellant intrudes upon an accused's decision to plead guilty. A court's substitution of remedies in place of negotiated plea terms places itself into the accused's shoes and, in effect, renegotiates the accused's plea agreement and waives his or her rights concerning the plea. This, the Court stated, may not be done without the accused's consent. Further, compelling acceptance of unwanted remedies as relief may result in erroneous conclusions of voluntariness. The Court was skeptical that an appellate court could ever absolutely be sure that an accused would have voluntarily plead guilty had he or she been offered the relief the court sought to compel him or her to accept. Noting the relief chosen as an alternative might be of equal value for failed terms involving purely economic terms, the Court concluded such could not be said where the failed benefit related to non-economic concerns, such as the immediate care of a family.

Of additional significance to the Court is the prospect that withdrawal may effectively be eliminated as a form of relief if courts could impose alternative relief. Considerations of judicial economy might incline courts to impose "suitable" relief when withdrawal might be more appropriate. Ultimately, the Court held any remedy must go beyond making one whole; it must also support a conclusion that a plea was voluntary and imposing relief does not achieve this conclusion.

The CAAF held neither side may dictate the terms of the agreement. This is true on review, as well as the outset. Accordingly, if the parties can't agree on alternative relief, and specific performance is unavailable, the pretrial agreement must be nullified. The findings and sentence will be set aside and a rehearing will be authorized.

Implications for Future Cases

CAAF seemingly afforded an "out" from requiring the withdrawal of pleas when it stated that an appellate court could possibly find relief of equal value to a failed term in a PTA when that term involved purely economic terms. On further reflection, any waiver of forfeitures term in a pretrial agreement can have no relief of equal value unless an accused agrees to accept the alternative relief. An accused placing a waiver requirement in an agreement seeks to provide financial assistance to his or her family during the period of time right after their status changes from a gainfully employed person to an inmate no longer bringing home a paycheck. Payment at any significant time after expected under the agreement, regardless of whether the amount of the "relief" is greater than what could have been anticipated via a waiver under the agreement could fail to meet the promised non-economic concerns of the accused that helped induce him or her to enter into the agreement – i.e., the immediate financial care of the family. Of particular interest to practitioners will be the outcome to be decided by CAAF in *United States v. Mitchell, 57 M.J.476 (2002) (granting review).*

What Can be Done to Avoid This Problem?

One method to avoid the issue that occurred in these cases is to recommend that the convening authority deny all PTA offers that include provisions mandating deferment and/or waiver of forfeitures without addressing a non-pay status situation. This policy avoids ever having to be concerned over pay status or fashioning a remedial form of relief to make up for an unfulfilled PTA term.

Of course, having such a promise of a waiver may be critical to an accused before he or she would consider waiving rights and pleading guilty. Having a *sub rosa* agreement to approve a waiver would be improper. Accordingly, law offices should expect that PTA offers will continue to contain deferment/waiver provisions. Avoiding conviction and sentence set asides by appellate courts is easy if military justice practitioners pay attention to details.

The outcomes of cases such as *Hardcastle, Mitchell, Smith, and Perron* could have been avoided if any of the trial participants or the convening authority's legal staff had paid attention to detail. Military justice practitioners must examine all provisions of pretrial agreement offers to determine whether compliance is feasible. This applies to defense counsel during discussions with their clients before submitting an offer to the convening authority. Base law offices, including the trial counsel and SJA, should also scrutinize the offer. The convening authority's legal staff must carefully analyze each proposed term. These offices have access to the accused's personnel records; they either prepare or review the personal data sheet and charge sheet, and they can readily determine when an accused enters a non-pay status.

When either the base law office or convening authority's legal staff identify a provision that will fail, they need to notify defense counsel and ascertain whether they are willing to resubmit the offer. If counsel wishes to proceed with a pending offer, the convening authority's SJA should explain the potential consequences of accepting it to the convening authority and recommend denial of the offer. Finally, trial counsel should ensure the military judge conducts a thorough inquiry into any agreement. Military judges can inquire in all PTA inquiries whether an accused understands that military pay and allowances stop on an ETS date. The judge should then also inquire whether the accused understands that after passing an ETS date and entry into a non-pay status, any efforts to defer or waive forfeitures of pay and allowances are impossible. Assuming the accused acknowledges understanding, the military judge may inquire whether any circumstance whereby deferment or waiver was expected and impossible would cause them to not enter into the pretrial agreement. If the accused suggests that he or she would still have entered into the agreement, the accused will be hard pressed to allege the pleas were involuntary. Moreover, the misunderstanding of the collateral consequences of a component of an agreement cannot be said to have been induced by the military judge, and may not be relied upon to contest the providence of the pleas. *See United States v. Bedania, 12 M.J. 373, 376 (CMA 1982)*

If defense counsel approaches the base SJA to initiate PTA negotiations or indicates a willingness to submit a modified offer (with a deferment or waiver requirement), the Government can strongly suggest that the defense include language to protect the voluntary nature of pleas under the agreement. We suggest adding a paragraph to the offer portion stating:

I understand that any sentence including a punitive discharge and any period of confinement, or confinement for more than six months or death will result in mandatory forfeitures under Article 58b, UCMJ. I understand that a convening authority may defer man-

datory and/or adjudged forfeitures until (he or she) takes action on the case and may waive any or all mandatory forfeitures for the benefit of my dependents for a maximum period of six months. I further understand that the convening authority may not waive forfeitures during any period if I am in a non-pay status. My desire is to enter into this agreement regardless of whether I am now or later become ineligible to have any mandatory or adjudged forfeitures deferred or waived for the benefit of my dependents.

Additionally, we recommend that any provision in the Appendix A relating to waiver or deferment contain an additional provision stating:

[The convening authority agrees to (defer adjudged and/or mandatory forfeitures (in the amount of) and) waive mandatory forfeitures (in the amount of ___) for the benefit of dependents to the extent [the accused] is otherwise entitled to pay and allowances under existing laws and pay regulations.] In the event that [the accused] is not entitled or becomes ineligible to receive pay and allowances under any provision of law or regulation, other than Article 58b, UCMJ, the convening authority has no obligation to defer/waive forfeitures beyond whatever entitlements [the accused] has under all applicable laws and regulations.

CAVEAT

LET'S NOT GET PHYSICAL

The accused was apprehended for a variety of drug offenses. He was not placed in confinement, but given a written order of restriction. He was restricted to his military installation, prohibited from engaging in certain activities (e.g., consuming alcohol), barred from certain facilities (e.g., MWR facilities), and restricted with respect to some of his movements on the installation (e.g., could not leave his room after 2200).

At trial, the military judge held that the period the accused was under the written order constituted "restriction tantamount to confinement." The judge credited the accused with the number of days in the period, but declined to give the accused any additional credit, as requested by trial defense counsel, for violation of RCM 305. The defense had argued there was illegal pretrial restriction tantamount to confinement and that the commander had failed to periodically review the conditions of restriction, as he would have been required to do had the accused actually been in confinement.

The Service court found that the military judge erred by not granting the requested credit, citing *United States v. Gregory*, 21 M.J. 952 (A.C.M.R.), *aff'd* 23 M.J. 246 (C.M.A. 1986), which held that RCM 305 applies to restriction tantamount to confinement. In *United States v. Rendon*, 58 M.J. 221 (2003), the Court of Appeals for the Armed Forces clarified RCM 305. The rule requiring periodic review of prisoners in confinement and additional credit for illegal pretrial confinement applies to "restriction tantamount to confinement" *only when* the conditions and constraints of that restriction constitute physical restraint, the essential characteristic of confinement.

The accused in *Rendon* did not get his *extra* credit. He had not been physically restrained. While he was geographically restricted and faced moral constraints attendant to limitations imposed upon him, he was not *physically restrained.* Restriction that is tantamount to confinement will get you *Mason* credit, but if those who draft conditions are restrained, extra credit can be avoided.

BREAKING THE SPEEDY TRIAL LIMIT?

In the case of *United States v. Rowe*, ACM 34578 (A.F.Ct.Crim.App. 28 Feb. 2003) a major issue before the court was whether the accused had been denied her constitutional and UCMJ right to a speedy trial. Factually, she was arraigned 179 days after she was placed in pretrial confinement. The Manual's R.C.M. 707(a)(2) requires that an accused be brought to trial within 120 days of the imposition of restraint. Obviously the government was way over that limit in this case. However, R.C.M. 707(c) permits the exclusion of periods of time from the 120-day rule if such delays are approved by a military judge or the convening authority (CA). The military judge found that a delay granted by the CA for a 72 consecutive day chunk of the pretrial confinement was reasonable and excluded that entire time from the total.

Upon considering the issue, the Air Force court found that the military judge's decision was erroneous. The court reasoned that the delay amounted to an impermissible blanket exclusion of time from point A until a date specific rather than an "interval of time between events," which is an excludable delay for R.C.M. 707 purposes.

Fortunately for the government, the court further found that the accused's unconditional guilty plea to two of the three charged offenses waived the speedy trial violation as to such offenses. However, upon consideration of the third offense, as to which the accused had pleaded not guilty, the court concluded that the government had failed to comply with the accused's right to a speedy trial and ordered the affected charge dismissed.

Before leaving the issue, the Air Force court felt

constrained to say that the government had other options to ensure the accused's right to a speedy trial was not violated. The court reminded practitioners that one of them was to release the accused from pretrial confinement for a "significant period" of time before preferral, citing R.C.M. 707(b)(3)(B). The best possible option, of course, is to avoid the speedy trial problem entirely by trying a confined accused within the time limit. Recognizing there are situations wherein that option may not be feasible, however, releasing the accused from confinement prior to referral merits serious consideration when a speedy trial issue may be lurking on the trial horizon.

GENERAL LAW

DEPLOYED PERSONNEL DELAYED BAGGAGE CLAIMS

We were recently asked to review a JACC determination that the payment of claims resulting from delayed baggage is not authorized under the Military and Civilian Employees' Claims Act (PCA) (31 U.S.C. 3721). The JACC determination was rendered in response to a request from USCENTAF/JA that the Air Force claims policy be modified to provide for payment of claims from deployed personnel as a result of their baggage being delayed and not arriving in the AOR with the member.

According to USCENTAF/JA, deploying members travel on flights that are routinely "overbooked" and the authorized baggage of passengers on such flights often exceeds the capacity of the aircraft. Consequently, personal baggage is sometimes delayed until subsequent flights and can arrive in the AOR anywhere from a day to 5 days after the member does. A member, whose carry-on bags do not include "emergency" quantities of hygiene items such as toothpaste and underwear, may be forced to buy these items to meet their needs until the delayed baggage arrives. USCENTAF argues that even if the location of a member's delayed baggage is known, if it is not with the member in the AOR it is "lost" to him or her for all practical purposes and the member should be paid for a claim based on the cost of replacing items in the delayed baggage. USCENTAF stresses that providing for the immediate needs of deployed personnel, particularly at a time they are first arriving, is important for morale purposes.

We agree with the JACC determination that even though the PCA is generally intended to help maintain the morale of employees and military members, the term "lost" as used in the statute can not reasonably be read to include delayed baggage that has been located. Even though that baggage is not with the member, its location is known and it will be reunited with its owner in a reasonable period of time. This is to be distinguished from cases where the baggage did not arrive with the member and after a reasonable period of time has not been located. In that case, the baggage can be declared lost and the resultant claim paid as specified in AFI 51-502, Personnel and Government Recovery Claims, para. 2.32. While we agree that the PCA is not a means to reimburse members for the inconvenience of having to replace personal items that are temporarily unavailable, we also agree that the problem is potentially significant (especially to the member) as stated by USCENTAF/JA and deserves some solution other than through the claims process.

AIR FORCE MEMBERSHIP IN MILITARY CHILD EDUCATION COALITION

The question periodically arises as to the appropriateness of using O&M funds to acquire centrally funded installation memberships in non-profit associations that advocate to improve education for military dependents and mitigate transition challenges encountered as they move between schools.

The Comptroller General has held that appropriated funds may be used to purchase organizational memberships in private organizations if such memberships are of primary benefit to the service and the appropriate official determines they are necessary to carry out its statutory functions. B-221569, June 2, 1986. The same decision held that a membership can be paid for at the beginning of the membership period without violating the advance payment prohibition of 31 U.S.C. 3324. Thus memberships can be paid for at the beginning of the membership period instead of in arrears at the end of the period as would be required in most similar service-type contracts.

While memberships can be paid for in advance, we are not aware of any authority that excludes their acquisition from the rule that appropriated funds are available only for needs arising in the fiscal year for which the funds are available. 38 Comp. Gen. 316, 1958. An exception to this rule is recognized for services that are "entire" or "non-severable" at the time of purchase. Such services can be purchased in their entirety with current year funds even though payment will be made for benefits received in future years. 23 Comp. Gen. 370 (1943). However, this exception cannot be applied to purchases of services that are "severable" or can be divided into discrete periods of performance on an annual basis. Often, although memberships in non-profit organizations may be available on an annual basis, they are at a yearly rate higher then that rate available for a multiyear membership. In

our opinion, such memberships are severable into annual increments and current year funds are available only to purchase a one-year membership. However, if only a multiyear memberships was available, then it could be considered "non-severable" for the period in question.

While the result may seem incongruous in that the yearly cost would be higher assuming the Air Force maintains the membership for the duration of the multiyear period, the benefit is that we are not locked into the relationship for that period. If at the end of the first year it is determined there is no longer a benefit to continued membership, it can be terminated by non-renewal. Thus a yearly review of the need and benefit of these memberships is required.

TORT CLAIMS AND HEALTH LAW

The Judge Advocate General and Deputy Judge Advocate General met with the Surgeon General to discuss ways to improve both quality and timeliness of medical malpractice processing. Unfortunately, a significant number of malpractice cases are not processed within the time limits set under AFI 51-501, para 1.15. As a result, many claims are going into litigation with judgments and settlements at that level when they may have been settled (where appropriate) more expeditiously by the agency. Both JA and SG are concerned about this and are taking steps to improve processing times.

RES GESTAE

The 2003 Medical Law Mini-Course was held from 20-24 October 2003 at Travis AFB, California. Attendees included claims officers, members of the SG community, and representatives from sister services. The course is a one week intensive session to enhance understanding of the medical malpractice adjudication process, quality assurance and patient safety, and legal and ethical concepts in healthcare practice

The Accident Investigation Board Legal Advisor Course will be conducted on 11-13 February 2004, immediately following completion of the Claims and Tort Litigation Course beginning on 2 February 2004. AFI 51-503, paragraph 4.3.4, requires all Judge Advocates appointed as AIB Legal Advisors to have completed this course.

VERBA SAPIENTI

For general tort claims processed under the Federal Tort Claims Act (e.g., GOV-POV accidents, on-base slip and falls), the installation SJA's settlement authority is $25,000. However, if multiple claims arise out of the same incident and the aggregate amount of the demands exceeds $25,000, the installation must consult AFLSA/JACT before paying any of the claims. In addition, the installation must obtain JACT approval to pay subrogation claims from insurance providers before settlement of the parent, injured person's claim. Installation SJA's may not deny any general tort claim that demands more than the SJA's settlement authority. For additional information, see AFI 51-501, JACT's web page at: https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jact/, and call JACT at DSN 312-426-9055.

ARBITRIA ET IUDICIA

NBC News reported at the end of July a small claims court case in Las Vegas, Nevada, where a patient who had suffered a back injury waited almost four hours to see a physician before leaving the office in frustration. He was awarded $250 in compensation for this delay by the court.

According to the news story, the patient had been fit in to a busy schedule the doctor already had. The physician had apparently been shuttling back and forth between offices, and another patient visit ran much longer than expected. The patient, according to the physician, had even been given the option of rescheduling or waiting. He chose to wait. It was the patient's contention that his time was as valuable as the doctor's.

The Nevada State Medical Association commented in the report that the case points out the results of frustration over long waits for health care.

Our own Medical Treatment Facilities are not immune from similar patient frustrations, and when scheduling is made by a facility, that issue should be taken into account. That goal, however, must be balanced with the need to give each patient proper time and attention as warranted. If and when overbooking is necessary, patients should be warned at time of scheduling. The doctor plans to appeal this decision, but the case is a timely example of the need for good patient rapport and communication, and how far a frustrated patient population can carry its anger.

TRIAL BRIEF

MAJOR CHRISTOPHER C. VANNATTA

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

The examination began well. The defense counsel started strong and the witness was answering all the questions the right way. Then came the most important part of the examination. The defense counsel was confident he was going to get the witness to admit he could not be sure it was the captain's client he saw in the hallway and later going in the victim's room. The defense counsel just knew he had this witness eating out of the palm of his hand and that he was about to get the testimony that would result in an acquittal. He was already thinking of which director to hire to do his videotape presentation called 'The New and Improved Ten Commandments of Cross-Examination.' Heck, what did Irving Younger have on him any way?

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

"Well, . . . " the witness began.

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

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

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

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

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

What happened? How did the counsel lose control? The answer is simple. He asked the wrong question. Or, more accurately, he asked the question the wrong way. They key to controlling witnesses on cross-examination is asking the questions the right way. (Author's Note: If you cannot control your witness on direct, perhaps you should consider an exciting career in the field of bricklaying.) Really, it is that simple. If you can control the witness with your questions, you will get the information you are looking for, you minimize your risk of getting a harmful answer, and you project the image of an attorney in control of her case and the courtroom. To be sure, there are other ways to try and control a witness, but they are not nearly as effective and they each come with their own set of special problems.

One way, for example, is telling the witness to answer 'yes' or 'no.' This is probably the least effective way to attempt to control a witness. First of all, it does not work. The witness will almost certainly ignore you – after all, it is not as if you can take the witness out back and teach him a lesson for giving a multi-word answer to a question calling for a multi-word answer. Or, the witness might start arguing with you about answering the question. Of course, neither one makes you look particularly good. Second, you will draw an objection from opposing counsel who, with as much indignation as he can muster, will accuse you of trying to hide facts from the panel by preventing the witness from answering a question you asked. Even if your opponent is overruled, the point will have been made. Third, the judge could stop you in the same manner as the doomed counsel above. Finally, it makes you look like you are not in control and makes the witness look like he is. Once this happens, the panel begins to view you and your case with skepticism or worse yet distrust.

Another tactic counsel often resort to is a direct appeal to the judge. It goes something like this; "Your Honor, please instruct the witness to answer 'yes' or

'no' to the question." Sound familiar? Sadly, to too many attorneys, it does. This approach also does not work well. First, the judge is likely to say, "No." Or worse yet, "Counsel, I am not going to instruct the witness to answer your questions the way you think she should. If you want a better answer, ask a better question." Of course, the effect on your case of this kind of judicial participation is obvious. Second, right after the witness ignores you, the witness will then ignore the judge. Sure, the judge could ask the question, but there is very little (okay, nothing) a judge can do if the witness won't cooperate. Finally and worst of all, whining to the judge for help with a witness only reminds a panel you are not in control of the courtroom or your case. Again, this is not a perception you want to foster. In extremely egregious cases, where the witness is non-responsive and ill-mannered, it may be a good idea to appeal to the judge. But even then, you want to do it in such a way that the judge appears to be validating you and your actions. Judges do come to court with a certain moral authority, after all.

The best way to control a witness is with your questions. First, you have to lead the witness. If you will pardon the momentary foray into trial advocacy basics, it is worth talking about leading questions. Unless you are cross-examining an accused or an expert (this, of course, is a separate column), you should use leading questions exclusively. It seems like this ought to go without saying, but too many new counsel and even some veterans inexplicably insist on asking open-ended questions during cross. Theoretically, you are the one who is testifying on cross-examination. If you do it correctly, it will actually work out that way. By using leading questions and getting the witness to answer only yes or no, you are the one the panel is listening to. Using non-leading questions allows the witness to do all the talking and to control the examination. That is because you are never going to get a yes or no answer to a non-leading question. So, first and foremost, to control a witness—any witness—you MUST use leading questions. Second, the questions have to be short . . . really short . . . really. In other words, you should only use one fact per question. Aside from the benefit of being easy to understand, it makes it hard for the witness to do anything but answer 'yes' or 'no.' For example, rather than asking a witness whether he can be sure it was your client he saw in the dark hallway with the burned out lights, ask the questions one fact at a time.

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

By using one fact per question in this fashion—asking for bricks rather than for walls or entire buildings—there is virtually no way for the witness to do anything other than provide a 'yes' or 'no' answer. It constrains the witness and provides no effective wiggle room at all. Also, by using one fact per question, it creates a "flow" in the questioning. As these short questions are asked and answered with a single word (or two), the witness gets into a rhythm that makes it much easier for counsel to exert control. In its simplest terms, the witness comes to expect this kind of exchange. The panel also finds it easier to settle into the "testimony" they are hearing from counsel. Finally and perhaps most importantly, the counsel gets into the same rhythm, allowing the questions to come more easily and more naturally.

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

An example would be helpful. Suppose that during the questioning outlined above, the witness will not admit the hallway was dark. The counsel must get the witness to answer the question. (Author's note: It might be helpful to actually have some pictures of the

dark hall under the same conditions, with the same lights turned off at the same time of night, etc.; this could be very useful with such a witness.)

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

Now, if you are feeling lucky like Vinny in *My Cousin Vinny*, you could say, "You guess so? Come on. It was dark, wasn't it? It's okay. You can say it. Everyone knows the answer." In reality, you would not have to do that because the point was won the minute the witness said he guessed it was kind of dark.

The key here is to recognize the real issue (whether the witness was or was not able to see clearly), remember what position you have taken on that issue (he was not; it was too dark), and realize that he doesn't want to accept your position. Therefore, rather than ram the position down his throat, feed him bite-sized questions based on facts you *know* are true (as in, the witness will admit to them or some other evidence will firmly establish them – remember those pictures of the hallway?) that support your position. This moves the witness, question-by-question, fact-by-fact, in the direction of the truth. Then, when there is nowhere for the witness to hide, ask the ultimate (position) question again. The witness will have to give you the answer you want, or deny the obvious and look ridiculous doing it. Actually, come to think of it, the cross-examination of the eyewitness with the dirty screens and the trees and bushes in the movie *My Cousin Vinny* is another excellent illustration of this type of questioning.

There are several benefits to this approach. First, it strengthens the relevance of a fact in the case, whatever the fact may be. By forcing the witness to admit to what he initially would not, it gives that fact that much more importance. Now, all of a sudden, not only was it dark, but the witness does not want the panel to know it was dark. Why? Is it because the witness could not see the other person very well? Seems . . . reasonable. Second, you are controlling the testimony and, therefore, your case. Third, imagine the witness answers, "Nope—I do not think it was dark." He will have lost all credibility and you will have lost nothing (provided you move on, saving your continued incredulity for closing!). Finally and most important, the witness will think twice before trying to

disagree with you again. The rest of the examination will be like leading a horse to water . . . and making it drink. This is witness control.

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

GOING FOR BROKE: AN INTRODUCTION TO BANKRUPTCY

Captain Tobin C. Griffeth

Depending on the society in which you lived in the days of old, debtors could be thrown in jail, sold into slavery, flogged or beaten, their family could become responsible for their debts and/or many other horrible things. Our capitalist society today realizes that risks must be taken for prosperity and progress. We realize that, at times, hardships fall upon innocent people that cause devastating financial consequences. We also realize that some are financially irresponsible but deserve a fresh start with some basics of life. Thus, Congress created the Bankruptcy Code.

Filing a petition for bankruptcy should be perceived as an extreme measure taken by debtors when no other satisfactory route is available to satisfy their debts, by state law. Unlike most citizens, Air Force members are required to meet financial obligations in a timely manner. While the Air Force maintains a policy of strict neutrality with respect to bankruptcy, it is a constitutional right that is not lost simply because you join the military. Filing for bankruptcy by military members is a statutory and constitutional right of all citizens and does not provide a basis for adverse action against those who need to use it. In fact bankruptcy is viewed as one way of dealing with financial problems responsibly. However, misconduct or late payments usually associated with the circumstances leading to bankruptcy may be a proper basis for disciplinary action.

Several different forms of bankruptcy exist. The non-farm/non-business, or personal related bankruptcies in which I write today are commonly called, under the chapters of the U.S. Bankruptcy Code in which they are found, Chapter Seven and Chapter Thirteen. Some bankruptcy attorneys also refer to a Chapter Twenty, which is basically when a Chapter Thirteen is filed and then later followed by a Chapter Seven. This will be further explained later. Every person who is thinking of filing for bankruptcy is under a lot of pressure and has a lot of questions. The most commonly asked questions are explained below.

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WHAT PROTECTIONS CAN A PERSON GET FROM THE DIFFERENT TYPES OF BANKRUPTCY?

A Chapter 7 is a liquidation of your assets to pay off your debts to the extent possible and discharge the rest, leaving the debtor with the items, money, and assets that the state in which the debtor files for bankruptcy says are protected or exempt. The obvious advantage to a Chapter 7 bankruptcy is that it allows the debtor to get rid of all of his or her debts except alimony, child support, most taxes, federally insured student loans, and debts incurred 90 days before filing for bankruptcy. Once this is done, it offers the debtor the chance to get a fresh start in life. Attorneys also usually charge much less for filing a Chapter 7 than they do when filing a Chapter 13 because it is less involved and complex. A Chapter 13 is like a debtor repayment plan that can be spread out over three to five years. However, most courts do not want the repayment plan which the attorney and the client make to exceed three years. After a repayment plan is made, the payments are made to the bankruptcy trustee and he in turn pays the creditors according to the plan. Because of the time involvement and the difficulty of a Chapter 13 bankruptcy it is much more difficult to find an attorney that will do one for you.

The requirements before a debtor can file a Chapter 13 are:

1) That the plan provides that all of the creditors get as much or more money as they would get if the debtor filed a Chapter 7.

2) The debtor has a regular income or income sufficiently stable and regular to enable such an individual to make the payments as proposed in the plan. Military personnel qualify almost without exception.

The advantages to filing a Chapter 13 bankruptcy are:

1) The satisfaction of paying off some of the debts you owe others.

2) Creditors who have a secured loan or interest in items you have can be forced to lower the amount owed to what the item is presently worth (usually cars, furniture and houses).

3) High interest loans can be lowered to as low as zero percent if the debt is unsecured, and to an amount

that the court considers reasonable on any secured debt.

4) Payments on secured debts can be stretched out over the term of the plan.

5) It would help the military member avoid disciplinary action if it is filed before payments are missed or late.

6) If you file a Chapter 7 you can't file any other personal bankruptcy until 6 years have passed, but filing a Chapter 13 does not stop the debtor from later filing a Chapter 7 bankruptcy (thus a Chapter 20, 13 + 7 = 20) if it becomes clear he or she can't live up to the plan made. However, this will cost additional fees and payments of a regular Chapter 7 bankruptcy filing. In a Chapter 13 your debts are not discharged until the plan is fulfilled.

WHAT DOES IT COST TO FILE FOR BANKRUPTCY?

In general it costs about $200 in filing fees and about $200 to $2000 or more to pay the attorney for an individual to file a Chapter 7 bankruptcy. A Chapter 13 will cost about $200 for filing fees and $500 to $3000 in attorney fees. If you file a Chapter 13 and then a Chapter 7 (Chapter 20) don't be surprised if you end up paying the full amount for both. Make sure to ask your attorney approximately how much he or she will charge before the bankruptcy begins. Attorney fees will vary on the expertise, the volume of bankruptcies done and of course what the attorney thinks he or she is worth. Don't think the more expensive the attorney the better the attorney must be because that is not always true. Many times attorneys will not charge much more for couples filing jointly than they charge an individual who files separately because the amount of court time and paperwork is about the same. Yes, you can file for bankruptcy without an attorney but usually only a fool would take such a risk. As ironic as it may sound some attorneys will take payment via credit cards.

CAN AN INDIVIDUAL REPAY DEBTS IF THEY WANT TO?

Yes! The debtor is not just legally obligated after the bankruptcy to pay any debts that are legally discharged. The debtor may also "reaffirm" any debt owed by signing a Reaffirmation Agreement. This agreement makes the debtor now liable for the debt and provides no protection from the bankruptcy discharge. The normal reaffirmation is done on automobile and furniture loans in a Chapter 7 bankruptcy. Most of the time a reaffirmation of a debt is not wise for the debtor (more is usually owed on the car than it is worth) and should be seriously considered.

WHAT ARE SOME OF THE BAD THINGS THAT CAN HAPPEN IF AN INDIVIDUAL FILES A BANKRUPTCY?

A bankruptcy may stop a military top-secret clearance. A debtor may be asked in the future if he or she has had a bankruptcy on employment or loan applications. In addition, any form of bankruptcy will stay on your credit report for the next ten years and the debtor may not file for bankruptcy again for another 6 years if more financial problems should arise.

WHAT ASSETS AND PERSONAL PROPERTY CAN AN INDIVIDUAL KEEP IN A CHAPTER 7 BANKRUPTCY?

What the debtor can keep or what is exempt from creditors in a Chapter 7 bankruptcy varies from state to state. As a general rule, the closer you get to the north and east of the United States the less the debtor can keep and the further south you get the more a debtor can keep with Texas, and its don't touch my ranch history, and Florida being two of the most generous states. Although not law, in practice, the bankruptcy trustee usually does not care about the clothes or unsecured furnishings of the debtor. Unless the clothes or furnishings are of a high dollar amount they are not worth the trustees time. Have you ever tried to sell used furniture or clothes at a garage sale? If you have you know how worthless they are to everyone but you.

For example, in Oklahoma, the main exemptions are:

- The equity in the debtor's primary residence.
- All household and kitchen furniture used for personal use.
- Books and pictures used for personal use.
- Personal wearing apparel, up to $4,000.
- All personally prescribed health aids.
- Tools and books used in a profession.
- Equity in an auto of up to $3,000.
- Any alimony, support, child support and maintenance payments needed for personal support or support of dependants.
- Seventy-five percent of all earnings from the previous ninety-day period except those garnished due to child support or alimony.
- Almost all retirement accounts or payment including pension plans if they are created with pre-tax dollars.
- Any federal earned income tax credit.
- $50,000 in money given for a personal injury or workers compensation claim. After $50,000, claims on exemplary or punitive damages are not exempt.
- One hundred chickens, twenty head of sheep, ten hogs, two horses, five milk cows and their calves under six months, if held for

personal or family use.

One gun, two bridals and two saddles, if held for personal or family use.

Crops grown for personal consumption.

Exemptions not properly or timely filed can be lost.

WHO WILL COLLECT IF AN INDIVIDUAL FILES A CHAPTER 7 BANKRUPTCY?

Creditors who have a valid lien, mortgage, or other security interest in an asset or piece of property of the debtor will be able to get the item back from the debtor and sell it via the trustee. If any of the debt owed is in excess of the money obtained by the sale of the item, the remaining debt will be considered unsecured. If more than one secured creditor has a secured interest in a specific item, they will collect in the order in which they have perfected the security interest. For example if a debtor had a first and second loan on a home the first mortgage would collect in full before the second mortgage holder would be entitled to collect one cent. Any unsecured debts are paid off in equal proportions to all unsecured creditors. As a general rule, unsecured creditors will collect little or nothing in a bankruptcy. Therefore, if unsecured creditors are told a bankruptcy is about to be filed, most are willing to work some sort of a deal out with the debtor in an effort to avoid the bankruptcy. Many times all the debtor needs is a little help and a bankruptcy can be avoided all together.

WHEN SHOULDN'T AN INDIVIDUAL FILE FOR BANKRUPTCY?

Many times if the debtor is in financial trouble and he or she runs in to see an attorney to file for bankruptcy, the attorney is more than happy to collect the fee and file for the bankruptcy. However, a Chapter 7 bankruptcy should not be filed, and the client is being done a disservice if it is filed, if after the bankruptcy he or she still can't meet their debt obligations. This happens many times when huge medical bills are being incurred or when someone has lost a job. Until a job is found or the medical problem is taken care of they are like a boat with holes taking on water. The bankruptcy temporarily bails out the water but in the end the client still goes down with the ship. Many debtors who are jobless or who are incurring huge medical bills are already judgment proof and do not need to worry about creditors taking more than they already are. But, each case should be looked at on an individual basis. Just remember, the debtor can't claim bankruptcy for another six years.

To be able to file for bankruptcy in a state, it must be your primary domicile 180 days before filing or your primary assets must be located in the state in which you file. The debtor should list all debts owed to creditors on the bankruptcy petition. Once the petition for bankruptcy is filed, a "stay" stops all creditors listed from all collection actions or sales even if the sale was only seconds from taking place. That means that all calls by the creditors to the debtor must stop. Now the debtor waits for any motions (few are usually made) and the 341 meeting. The 341 meeting is usually a short meeting where the trustee and the creditors get to ask questions to ascertain the assets of the debtor and determine whether or not he or she is trying to hide or destroy any assets. Hiding assets can make the debtor lose his or her bankruptcy rights and be subject to criminal penalties, so in other words this is dumb to try. Finally, the big day comes and the debts are discharged and the debtor now has a fresh start in life.

CONCLUSION

This has been a simple and quick lesson on the basics of bankruptcy including things to look for or advise legal assistant clients of. Keep in mind that bankruptcy is very complex and volumes have been written on the subject. Any person seeking a bankruptcy should seek professional assistance from a qualified bankruptcy attorney. Bankruptcy is an awesome tool that can be used to help the debtor start over. If it were not for bankruptcy protection many of the wealthiest industrialists in our nation who have taken investment risks and made our country an industrial giant may not have dared to do so. The legal assistance client or Air Force member who comes to the Staff Judge Advocate seeking advice on filing for bankruptcy also deserves this same opportunity to get a fresh start on life.

Saving the Bacon: How Hazard Prevention Programs Can Be The Icing On Your Claims Cake

Major Sally Stenton

Recently, the United States won a summary judgment motion in a case that arose out of a slip and fall at a commissary at one of our bases in Florida, but we only won because of a statute change. A new statute in Florida negates a presumption in Florida slip and fall tort cases that the premises owner did not maintain the premises in a reasonably safe condition. The new statute shifts the burden of proof to the plaintiff to show that the premises owner acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises.

Unfortunately for the government, Florida is in the minority. In most states the presumption is in favor of the plaintiff and the burden of proof on the defendant. Consequently, our ability to win cases in most other jurisdictions rests upon being able to show that some inspection of the facility is being conducted on a consistent, recurring basis. For example, someone is performing a periodic “walk through” of the commissary (or other retail facilities on base). Unfortunately, this documentation is often incomplete or nonexistent.

Had we lost this case, which was likely prior to the statute change, it most probably would have cost the United States hundreds of thousands of dollars, because the plaintiff was seriously and permanently injured. Since each state has its own statutes and case law, it's imperative you all know the law of your particular jurisdiction. Is yours a jurisdiction where the law is not favorable to the defendant, in our cases that means the United States? We were fortunate in the above noted case that there was evidence, primarily from the plaintiff's statement, that the slippery substance had not been on the floor long and it had not been noticed, by anyone, until the plaintiff slipped and fell. This evidence along with the statute change got us passed the summary judgment hurtle, but without the new statute the plaintiff’s statement alone likely would not have been enough for the US to win on summary judgment and likely not even at trial. Fortunately it did not come to that, because had it we would have had a very tough case. This is because this particular BX did not have a program for keeping their premises safe from slipping, tripping, and other hazards. They did not have employees who did periodic “walk through" inspections of the premises, specifically looking for things that could be hazardous to their patrons and employees. They did not make and keep logs of inspections that were done. In addition, there was no record keeping system for any incidents that were reported and/or investigated. Disturbingly, this BX is not a rarity in the Air Force.

Many BXs and commissaries do not have hazard prevention and/or record keeping programs in place. Consequently, the United States pays out hundreds of thousands of dollars annually in settled claims and lost tort litigation cases. And do not forget when you calculate in the government attorney and paralegal costs the final expenditure is that much greater. Accidents where we are liable are inevitable and there is no problem compensating the injured party. But there is a big problem with paying claimants/plaintiffs solely because we have failed to implement the easy fix. Just as there are accidents we are liable for there are accidents where we are not liable, but end up paying anyway, because liability cannot be refuted. It cannot be refuted, because no evidence or documentation that we met the owed standard of care exists.

In too many cases, the United States is forced to pay a claim or loses litigation because the facts will not allow us to rebut the assertion (in some jurisdictions it’s a presumption) that we should have known about the hazard. Consequently, it’s presumed we did have notice and failed in our duty of reasonable care to maintain the premises in a reasonably safe condition for the safety of business invitees on the premises.

Your claims office involvement in an effective hazard prevention program, which includes a thorough investigation of any incidents (regardless of how minor an incident might initially appear), can significantly affect the number of claims with a favorable result for the United States. How? Because we could prove this lack of notice and that we had met our duty of reasonable care owed the patron. Literally over the

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years millions, in actual dollars and uncounted costs, could be saved by the implementation of simple, yet effective, hazard prevention and record keeping programs. These programs are essential as claimants often wait till just before the two-year statute of limitations to file their claim and, as we all know, if the incident wasn't reported, recorded, and investigated by that time, it's nearly impossible to reconstruct it and find witnesses.

This is where the claims officer becomes key. The claims officer needs to work closely with BX and commissary management to set up a hazard prevention program where there isn't one, and embed themselves in the ones already establish. Further the claims officer needs to ensure the BX and commissary have a good records keeping program for when accidents do happen.

The hazard prevention program needs to be tailored to your base, but all these programs should have a similar foundation and the same fundamental elements. Like "cops and robbers" or family maltreatment meetings, the claims officer should have a regularly scheduled meeting with BX and commissary management. The size of your commissary and BX will determine how often you should meet. If your facilities do not already have a hazard prevention program in place or the one they have is haphazard, you should work with management to implement a proactive program. At a minimum, "walk through" inspections must be done at specified intervals and any hazards identified. Of course, all this will be for naught if there is not an inspection log, because without this log it will be very difficult to prove a lack of notice of the hazard when you receive a tort claim after the incident--in many situations, some two years later when the statute of limitations is about to expire. The inspection log does not have to be complicated; it simply needs to indicate the who, what, when, and where of the inspection (e.g., who did it; when did they do it; what, if anything, was found during the inspection, where it was found and what was done about it). For instance, most Base Exchange restrooms have a log posted on the back of the door, showing when it was last checked. As claims personnel, you should check to be sure that log is kept at least two years.

When an accident, such as a slip and fall, does occur, an investigation of the occurrence is a MUST. But again, without a record of this investigation, the best investigation in the world is of little value. How simple or detailed this investigation is will depend on your facilities program and the specific incident. Needless to say, both the inspection logs discussed above and investigation reports need to be kept for a minimum of two years after the incident for statute of limitation purposes. Naturally the claims office should ensure as part of the BX and commissary programs that the claims office is notified when an accident/incident occurs. Because many times, the claims office is never notified of the incident so an investigation is not accomplished. Lastly, if you are not sure how to get these programs started call us at JACT (DSN 312 426-9055 and COM 703 696-9055) and we can help. Also, if you already know of a base with an successful program contact that claims office. In addition, you can get in touch with a local supermarket, convenience store, or retail store and learn about their hazard prevention programs. Our experience has shown that bases with the fewest slip and fall claims have an active hazard prevention program, which includes an engaged claims office.

Whether this investigation is easy or difficult probably the most vital part of the investigation is the witness interview and locator information. Witnesses should be interviewed early. As we all know memories fade and witnesses become difficult to find. For example, many times after someone slips and falls, the first person to assist them is not a BX or commissary employee, and equally often the person who fell does not appear to be injured or to need further assistance. (But rest assured you will find out that they were injured about two years later.) Consequently, no one gets that primary witness' name and contact information, so when someone adjudicating the claim needs to interview them, they can't be found. Even when the primary witness is an employee and the contact information is available, more often then not, this witness (for that matter any witness), is not interviewed until the claim is filed. And as you already know, very few claims are filed early on. On the contrary, the opposite is true, most claims are filed at the eleventh hour. Therefore, you can have the best contact information in the world on whoever helped that embarrassed patron up off the floor and then went back about their business, but what do you think the odds are two years later that that person is going to have a clear (if any) recollection whatsoever of that incident? Moreover, too many times the locator information provided in Tab D of the tort claim file is scant and outdated. Remember military identification card holders change jobs, move, retire, separate, divorce, marry, etc. Consequently, simply getting a witness' name, current job, and telephone numbers (DSN and commercial, the later of which is often missing from Tab D) is not adequate. Likewise, the witness could very easily be a non-identification cardholder, which makes it all the more critical enough contact information be collected. Sufficient contact information must be obtained and periodically updated so that the witnesses who need to

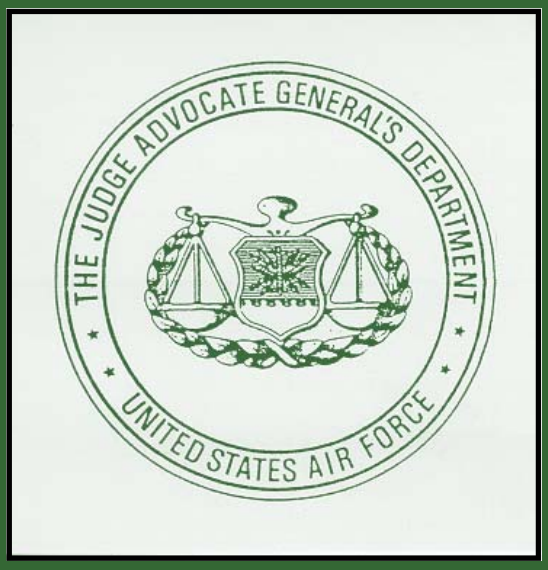
be contacted several months to years after the incident can be located.

Bottom line: hazard prevention and record keeping programs along with early identification, interviewing, and complete witness locator information is absolutely crucial! Finally, be sure when documenting witness interviews that you use the language in AFI 51-501, paragraph 1.8.1 and include all the information required in paragraph 1.8.2. Having a proactive hazard prevention and records keeping programs in place along with comprehensive, timely, witness interviews and current locator information will help spare our store patrons the pain and potentially serious physical injury that can accompany a slip, trip, fell, or other accident. In addition, when a claim for personal injury or property damage is made, having that vital witness information can literally help save the United States millions of dollars, while ensuring claimants, whose injuries the government is liable for, are appropriately compensated.

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 Chris Schumann at chris.schumann@maxwell.af.mil.


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
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