

# The Clause

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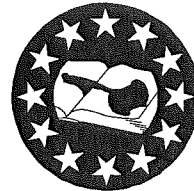
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"Congratulations to William Mahn, recently appointed as Judge with the Postal Service Board of Contract Appeals and Lynn Bush, appointed as Judge with the Department of Housing and Urban Development Board of Contract Appeals, both formally attorneys with the Navy."

## PRESIDENT'S COLUMN

Laura K. Kennedy  
Partner, Seyfarth, Shaw, Fairweather & Geraldson



Laura K. Kennedy

In the midst of continuing procurement reform, the BCA Bar Association looks forward to an active Fall. The Practice Committee, under the leadership of Roger Boyd, is compiling a "Practitioner's Guide" to Alternative Dispute Resolution (ADR) at the Boards of Contract Appeals. This Guide, expected to be issued in October, will consist of two parts. First, it will discuss the general principles of ADR, the various types of ADR available, the advantages and disadvantages of each type and examples of disputes that are suitable for ADR and examples of those that are not. Second, it will contain a collection of sample ADR agreements and Board rules, guidance and procedures for ADR. This guide will be useful in making ADR more accessible to practitioners interested in pursuing ADR at the Boards.

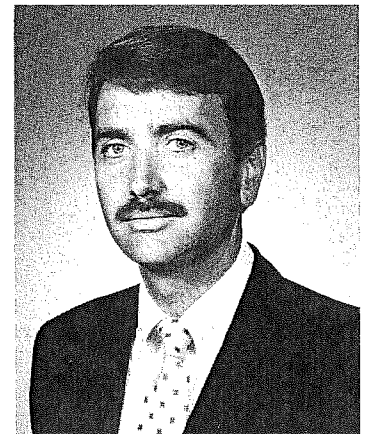
We are also looking forward to the BCABA Annual Program on October 23, 1996. This Program promises stimulating discussion on a broad range of issues, including innovative trial techniques at the Boards, and the impact of FASA, FARA and other procurement reforms on practice at the Boards of Contract Appeals.

At the Board of Governors Meeting on May 10, we discussed a variety of other possible projects for the Association. Roger Boyd of the Practice Committee is interested in assembling the "unwritten rules" for practitioners at the Boards, such as the procedures for payment of subpoenas and for contacting retired employees. We also discussed the possibility of annotating Board rules and/or establishing a body of uniform rules at the Boards. These and other similar issues will be explored further at upcoming committee meetings.

I have also been working with the President-Elect, Jim Nagle, to identify potential candidates to chair a new membership committee. Although the Association is currently healthy and in sound financial condition, we look forward to expanding the membership in the next year and stimulating greater participation from both the private and public sectors.

## EDITOR'S COLUMN

Professor Andre Long, CPCM  
Air Force Institute of Technology



Andre Long

As someone who is actively involved in Government contract law education, I am keenly aware of the numerous current and well researched publications available for practitioners in our field. A few of the articles used in the current and past *CLAUSE* editions have been republications from these better known and distributed sources, although most of our material has never been published before. However, my biggest challenge as editor is to find material that is unique to Board practice. For example, in this edition, *THE CLAUSE* features an article from Judge Bernie Parrette of the IBCA about his views on pleadings, discovery, motions for summary judgment, briefs, opening statements and objections. While I am always interested in any informative material dealing with Government contract law in general, I am most interested in material that is unique to Board practice. *THE CLAUSE* is the publication of the Boards of Contract Appeals Bar Association, and articles directly related to the improvement of our professional skills in Board practice are especially useful. For example, it would be most helpful to many members if we could make the "Judge's Corner" a permanent feature in future editions. In working to meet your needs, I would like to thank all past contributors and encourage past and future authors to keep the articles coming. I can be reached at (513) 255-7777 x3146, Fax (513) 656-7997, e-mail: along@afit.af.mil.

**AN INTERVIEW WITH JAMES F. NAGLE  
INCOMING PRESIDENT OF THE BOARD OF  
CONTRACT APPEALS**

by Andre Long



**Question:** Jim, what are your plans for your year as president?

**Answer:** I'd really like to focus as much as possible on practice before the Boards. The substantive law aspects of government contracting are very well covered in other forums. So I would like our association to focus on practices and procedures, not only the formalized practices of the Board rules, but also the "best practices" that the judges prefer and experienced Board practitioners have used. Along that line I wrote to all the Boards and invited the judges to submit articles on what they liked or disliked about techniques and practices they frequently see. Judge Parrette's article was the first one I received. The article was exactly what I had hoped for. It gave some insight into the views of one judge but views that are, I am sure, by no means unique.

**Question:** Do you plan on ignoring some of the substantive aspects of government contracting law?

**Answer:** Not exactly. There are some aspects of substantive government contract that are so frequently litigated before the Boards that we should continue to focus on them both in articles in "The Clause" and at our programs. As an example, I would cite Paul Whelan's article in the Summer 1995 issue on "idle equipment costs". That article and similar articles on such issues that appear so frequently before the Boards as unabsorbed overhead, excusable delay, and constructive changes would be a terrific vehicle to illustrate how to go about proving or disproving the requirements of that topic. For example, I would like in an article on excusable delay not only to have a brief section on the law and who has the burden of proof, but also sample interrogatories, requests for admissions, deposition questions and cross-examination questions. As an example I would point out, Toomey & Berry, *The Scheduling Expert: A Primer on Preparing Direct and Cross*, in the April 1995 issue of "The Construction Lawyer".

In that regard, I would love it if, in "The Clause", we could basically update some articles which I view as classics dealing with Board practice. For example, Peacock, *Discovery Before the Boards of Contract Appeals*, 13 Pub. Cont. L.J. 1 (July 1982), and Cotter, *A Dramatized Presentation: Evidence and Trial Problems in an Appeal Under the Contract Disputes Act of 1978*, 13 Pub. Cont. L.J. 307 (1983). If we could do that, we would have served our members well.

**Question:** Do you plan on any coordination with any other bar associations or other professional groups?

**Answer:** I have already contacted the heads of some groups which share a mutual interest such as the ABA Public Contract Law

Section, the BCA Judges Association, and the ABA Forum Committee on the Construction Industry so that we can plan joint activities not only for this coming year, but beyond that. Probably the best example of that is the week long practice seminar for the Boards of Contract Appeals in which the judges of the various Boards add tremendous value by giving extensively of their time to come in and listen to the arguments of the attendees, rule on motions, and give on-the-spot critiques. We have done that jointly with the ABA Public Contract Law Section and will continue to do so.

**Question:** Have all the changes in government contracting in the last few years made the job of the Association more difficult?

**Answer:** Not at all. In fact, in all those reform statutes, very few of the matters changed dealt with the disputes process. I think that was a recognition by the Administration and Congress that the disputes process is not broken and often is not even in need of minor tinkering, let alone major overhaul. In fact, many of the items in Board practice such as the Rule 4 file and the Board's willingness to go to where the witnesses are have facilitated the disputes process. Many small contractors are able to pursue their claims who would not be able to pursue them in a more formalized setting in which an attorney might be required either for compliance with that court's rules or for simple practicality in complying with the numerous procedural hurdles that must be overcome in other forums. So I am thrilled to be able to do my part especially in the next year to aid the Association in what I think is a very worthwhile cause.

**Question:** Jim, how and when did you first get into government contracting?

**Answer:** I first became involved in government contracting when I was still in the Army. I had taken the general courses on government contract law at the Army JAG school and then, about 1976, I was assigned to Fort Monmouth, New Jersey, the home of the Army's electronics command. I became heavily involved in government contracting there. When I was reassigned from Fort Monmouth to the Washington, D.C. area, I enrolled in George Washington University's Master of Laws program in government contracting and received that degree in 1981. I enjoyed the academic side of government contracting so much that I pursued my Doctor of Juridical Science (SJD) degree, which I received in 1986. After that the Army would not let me do anything else but government contracts. I was a trial attorney and trial team chief in Contract Appeals Division; then a procurement attorney at the United States Forces Command, and then served in the Contract Law Division at the Pentagon. Since my retirement I have done federal contracting exclusively and spent a great deal of my time teaching courses on government contracting for George Washington University and the Educational Services Institute.

**Question:** What areas of Board practice are you presently involved in?

**Answer:** Pretty much the standard Board issues. First, like

many attorneys in private practice, if we have to go to the Board that is, in one sense, a failure. We were unable to resolve the matter at the contracting officer level. Most of the areas that we wind up going to the Board on are terminations for default, or issues of constructive changes and amounts of entitlement. Many of these involve small contractors operating under fixed price contracts primarily because the larger contractors with cost reimbursement contracts are able to reach an amicable settlement at the negotiations table.

**Question:** What are the main differences you have perceived between representing the government and representing the contractor?

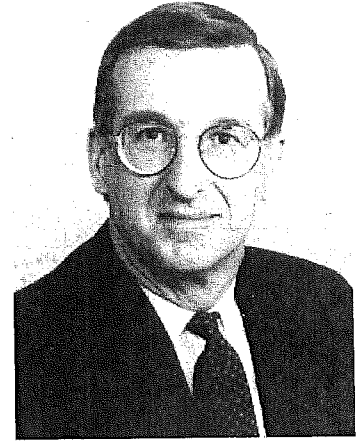
**Answer:** When you are representing the government, normally the contracting officer and other government personnel have gotten the legal department involved much earlier in the process because there is no cost for the contracting officer to meet with an attorney. Also, government contracting personnel are normally much better at keeping detailed records of what has occurred. Contractors, especially small contractors, normally try to go it alone before going to the expense of contacting an attorney. They also often do not keep very good records primarily because they are not very claims conscious. For that reason very often the first thing you are confronted with in private practice is a mess of uncoordinated and vaguely remembered facts. Also, unfortunately, many contractors simply do not have the money to put into a case because the problem that is the basis for the appeal has often drained their financial resources almost to the breaking point. When I was with the government obviously we never suffered from problems such as this, or at least not as severe as this. We did not send bills for our time to the contracting officer, nor was there any danger that the agency would go into bankruptcy at any moment.

**Question:** What difficulties, if any, do you anticipate as the new president?

**Answer:** The main difficulty will be to convince people why there is a need for yet another bar association or other professional association. Many attorneys will feel, with some bases, that their participation in the American Bar Association and the National Contract Management Association already gives them substantial information and ability to make their voice heard. Our association is much more focused, both in its subject matter and in the individuals with whom we must interface. The private practitioners can interface with the offices of the chief trial attorneys and the judges can interface with the practitioners on both sides of the bar. Furthermore, many of our members are the same dedicated, busy practitioners who are already heavily involved, not only in their practices but also in those other professional groups. For that reason, as you, Andre, know better than any one, it can be like pulling teeth to have people submit articles, or to meet deadlines for programs, so one of my main duties this year will be to act as cheerleader and encourager. In a voluntarily organization like ours, it is only by such encouragement appeals to professional responsibility that we can produce the type of high caliber articles and programs we would like.

# THE DIVAD DECISION

ANALYSIS



David P. Metzger

## The DIVAD Decision:

Another *Scanwell* Sea Change  
Or Merely a *Torncello* Ripple?

Steven D. Gordon, Peter A. McDonald, and  
David P. Metzger\*

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Peter McDonald

On March 25, 1996, a federal district court in California rendered a judgment of nearly \$26 million in favor of General Dynamics Corp. for accounting malpractice by the Defense Contract Audit Agency (DCAA).<sup>1</sup> The court found that DCAA had breached a duty of care owed General Dynamics by negligent performance of audits on a contract for the Divisional Air Defense (DIVAD) gun system. The case is

noteworthy not only because it marks the first time DCAA had been found liable for professional negligence, but also, and more fundamentally, because it clearly establishes a duty of professional care toward government contractors audited by DCAA. The significance of this case, and its potential enormous impact on government contract law, undoubtedly will make it the subject of lively debate. But whether it will profoundly alter the landscape of government contracting, as has the *Scanwell*<sup>2</sup> decision for bid protests, or instead will be confined to its facts, as was the *Torncello*<sup>3</sup> decision regarding terminations for convenience, remains to be seen.

## Background: GD's Malpractice Suit

The DIVAD case involved blatant negligence on the part of DCAA auditors that profoundly affected the company and several of its senior executives. The Army awarded General Dynamics (GD) a contract to develop a prototype for the DIVAD gun system. DCAA conducted three successive cost audits, the results of which eventually became the subject of GD's malpractice suit. The first audit, issued in draft form, and the second one executed, were never issued. However, the third audit report, issued in February 1984, allegedly fraudulently mischarged approximately \$8.4 million in DIVAD costs. Even before the third audit was completed, the auditor's supervisor drafted a memorandum alleging mischarging of costs, and referred the matter through channels to the Department of Justice (DOJ) for criminal investigation. This memorandum alleged that after the company overran the cost ceiling on the DIVAD contract, it improperly charged DIVAD prototype development costs to certain cost reimbursable accounts, specifically bid and proposal (B&P) and independent research and development (IR&D).

**Based largely on the information contained in the DCAA audit report, a federal grand jury indicted GD and four of its senior executives--including former NASA administrator James M. Beggs--for conspiracy and making false statements...**

Of crucial significance, the DCAA auditors erroneously assumed that the contract was "firm fixed-price," when in fact it was a "firm fixed-price (best efforts)" type contract. This contract type required GD only to make its best efforts, within the funding constraints of the program, to deliver a DIVAD prototype with the desired capabilities. As the parties commented at the time, GD theoretically could have satisfied the amorphous "best ef-

forts" requirement by delivery of a "bucket of bolts." The "best efforts" term meant that once contract funds were expended, GD was not obligated to expend its own funds toward completion of the program. Accordingly, additional costs could legitimately be charged to appropriate B&P/IR&D accounts related to the follow-on DIVAD production contract. Not one of the numerous DCAA auditors involved ever verified the assumption that the contract was a typical firm fixed-price contract, either with knowledgeable government officials or with GD, nor did DCAA ever communicate its findings to GD for comment.<sup>4</sup>

Based largely on the information contained in the DCAA audit report, a federal grand jury indicted GD and four of its senior executives--including former NASA administrator James M. Beggs--for conspiracy and making false statements. However, a year-and-a-half later, DOJ moved voluntarily to dismiss the indictment, admitting in its motion that the contract type was firm fixed-price (best efforts), and that no mischarging had occurred. A related civil fraud suit brought by DOJ also was dismissed shortly thereafter. The following year, the attorney general sent letters of apology to the defendants on behalf of DOJ for the wrongful indictments. In November 1989, GD filed a malpractice suit against DCAA in the U.S. District Court for the Central District of California under the Federal Tort Claims Act (FTCA) to recover the legal fees and costs of defending against the criminal investigation and indictment.

### A. The Federal Tort Claims Act

The FTCA<sup>5</sup> partially waives the sovereign immunity of the United States and renders it liable for most (but not all) torts committed by government employees acting within the scope of their employment. The FTCA covers claims that are: (1) against the United States, (2) for money damages, (3) for injury or loss of property, (4) caused by the negligent or wrongful act or omission of any government employee, (5) while acting within the scope of his or her office or employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>6</sup>

There are some significant differences between FTCA suits and government contract litigation. FTCA suits are litigated in federal district courts, rather than before the boards of contract appeals or the U.S. Court

of Federal Claims, and the plaintiff has a right to a jury trial. Further, liability under the FTCA is governed by state tort law, rather than by a body of federal law, as are government contract cases.<sup>7</sup>

However, the FTCA limits the government's tort liability through certain exceptions. The government asserted that the following four exceptions barred GD's malpractice claim against DCAA:<sup>9</sup>

- (1) claims based upon the performance or failure to perform a *discretionary function* or duty on the part of a federal agency or employee, whether or not there was any abuse of discretion;
- (2) certain claims arising out of malicious prosecution;
- (3) certain claims arising out of misrepresentations; and
- (4) claims arising out of interference with contractual rights.<sup>9</sup>

### B. Overview of the Decision

There are two significant facets to the *General Dynamics* decision. First, the court ruled that DCAA was liable to the contractor for professional malpractice under the law of California, the state in which the audit activities in issue had occurred. Second, the court held that none of the above-listed statutory exceptions to liability applied. To appreciate the implications of the *General Dynamics* decision, it is necessary to review these two aspects of the court's ruling.

#### 1. Auditing Malpractice

In addressing the basic issue of malpractice, the *General Dynamics* court engaged in a classic tort analysis, considering in turn each of the following elements of a cause of action for negligence:

- (1) duty--whether, in performing its audit work and issuing the audit report, DCAA owed the contractor a duty of professional care;
- (2) breach--whether DCAA breached the applicable duty of care;

(3) proximate cause--whether there was a sufficient nexus between DCAA's breach of duty and the injury to the contractor; and

(4) damages--whether the contractor was damaged by DCAA's breach of duty, and whether the amount of such damages was proven with requisite specificity.

The court concluded that all four elements had been established.

Although the court applied California law, its analysis would be transferable to the law of most other states. Generally, the laws of other states are similar to California law with respect to most of these elements. However, there are some significant variations in state law with respect to the first element--the party to whom an auditor owes a duty of professional care.

#### **a. The Government Auditor's Duty of Professional Care**

All states permit a suit for professional malpractice where there is privity of contract between the injured party and the professional. Thus, where a contractor hires a certified public accountant to perform an audit, and the accountant's negligence in performing the audit causes damage to the contractor, the contractor would have a cause of action against the accountant for malpractice. However, there is divergence among the states with respect to whether a third party, which does not have a contractual relationship with the professional, can sue for malpractice.

Traditionally, government contractors have been viewed as third parties to DCAA audits, since they are the subjects of such audits. DCAA's "client" is typically the contracting officer for whom it performs the audit. Accordingly, the government contended that DCAA's professional duty of care extends only to the contracting officer, and not to the contractor. Under that interpretation, a contractor would have had no cause of action against DCAA for a negligently prepared audit.

The *General Dynamics* court articulated alternative rationales for holding that DCAA owed a duty of professional care to GD as the auditee. The first was a "third party" analysis, based upon the assumption that there was no privity between GD and the DCAA. How-

ever, the court went on to conclude in its second rationale that there was privity between the contractor and DCAA, so that a duty of care attached on that basis as well.

#### **(1) 'Third Party' Analysis**

The court initially assumed that GD, as the auditee, was a third party with no contractual relationship with DCAA. The court reasoned that under applicable California law, whether a defendant owes a duty to a third party depends on the balancing of several factors, including: (a) the extent to which the transaction was intended to affect the plaintiff; (b) the foreseeability of harm to the plaintiff; (c) the degree of certainty that the plaintiff suffered injury; (d) the proximity between the defendant's conduct and the plaintiff's injury; (e) the moral blame attached to the defendant's conduct; and (f) the policy of preventing future harm.<sup>10</sup> Applying this test, the court readily concluded that DCAA owed a duty of care to GD in connection with its audit of the DIVAD contract.<sup>11</sup>

Most other states use a more restrictive formulation for defining the circumstances under which accountants owe a duty to third parties.<sup>12</sup> Although there are variations in the precise formulations employed by different states, almost all recognize a duty to third parties in situations where the accountant was or should have been aware that an audit report was to be used for a particular purpose, and that a third party was going to rely on the audit report. The test of third party liability may present more problems for government contractors than the test utilized in *General Dynamics* because it focuses on whether the third party *relied* on the accountant's work product, as opposed to whether it was *intended to be affected* by the work product. In most instances, where a contractor is harmed by a defective DCAA audit, the contractor will not have relied on the audit report, but instead will have challenged it unsuccessfully. (It is possible, of course, to imagine certain situations in which a contractor may rely to its detriment upon a defective DCAA audit report--for example, where a contractor forgoes a valid claim in reliance upon a defective audit report and later discovers the error.)

Moreover, some states simply do not recognize any duty by an accountant to third parties. Virginia and Pennsylvania, for example, insist upon privity of contract in order for any duty of care to attach.<sup>13</sup>



Indeed, California itself recently adopted a far more restrictive definition of the duty which accountants owe to third parties, akin to the Pennsylvania approach. The audits at issue took place between 1979 and 1984, and the court evaluated them pursuant to the test of third party liability articulated in the California Supreme Court's 1958 decision in *Biakanja v. Irving*.<sup>14</sup> However, in 1992 the California Supreme Court circumscribed that approach, and held that an auditor's liability for negligence in the conduct of an audit of its client's financial statements was confined to the client, i.e., the person who contracted for or engaged the audit services. Third parties who were specifically intended beneficiaries of the audit report--known to the auditor or for whose benefit the audit report was rendered--also could recover, but only on the theory of negligent misrepresentation, which is accepted by the FTCA.<sup>15</sup> The court left open the possibility that a third party beneficiary who was expressly identified in an audit engagement contract may possess the rights of parties to the contract and so be able to recover on a pure negligence theory.<sup>16</sup>

## (2) 'Privity of Contract' Analysis

However, the court proceeded to obviate any third party issue by ruling that General Dynamics was in privity with DCAA through the DIVAD contract and, accordingly, was owed a duty of care on that basis. This is one of the most significant--and potentially controversial--aspects of the court's decision. As noted above, all states permit a suit for professional malpractice where there is privity of contract between the injured party and the professional.

### **b. Elements of the Standard of Care Government Auditors Owe Contractors**

Once a duty of care is established between government auditors and federal contractors, the next issue becomes articulating the elements of that duty, i.e., the applicable standard of care. Generally, state law does not define the standard of care with respect to malpractice cases. Rather, the states look to the profession involved to ascertain the standard of care.

Consistent with this approach, the *General Dynamics* court concluded that DCAA auditors must adhere to the standards of the auditing profession when performing their audit work. Specifically they must adhere to three sets of standards: (1) generally accepted au-

ditng standards (GAAS), authored by the American Institute of Certified Public Accountants; (2) generally accepted government auditing standards (GAGAS); and (3) the auditing standards set forth in Chapter 2 of the DCAA Contract Audit Manual (CAM),<sup>18</sup> which essentially recapitulates GAAS. Of these standards, the court found that the CAM is the primary source for the DCAA auditor to consult in performing audit work.<sup>19</sup>

There appears to have been little controversy between the parties in the *General Dynamics* case that these three sets of standards applied. Under DCAA policy, the agency's auditors must adhere to all three sets of standards when performing their audit work.<sup>20</sup> Further, by executive order, GAGAS apply to all federal auditors, including DCAA auditors.<sup>21</sup>

Because these three sets of standards are uniform and apply to DCAA's work at any location, they should be equally applicable to accounting malpractice cases brought in states other than California. In addition, GAAS and GAGAS should apply to accounting malpractice actions involving government auditors other than DCAA auditors. However, the CAM may not apply to other government auditors because it is a DCAA manual.

The *General Dynamics* court noted that there are three categories of generally accepted auditing standards: general standards, field work standards, and reporting standards. General standards comprise due professional care, qualifications, and independence. Due professional care is the ultimate, umbrella standard by which the auditor's work must be judged. The qualifications standard requires that auditors have the professional training and skills necessary to carry out their audit assignments. Further, when an auditor encounters an issue whose resolution is beyond his professional competence, he must seek technical assistance from the appropriate discipline. The independence standard requires auditors to be fair and impartial in performing their audits, and not to assume the attitude of prosecutors or criminal investigators.<sup>22</sup>

The field work standards require that the work be properly planned, and that the auditor develop sufficient competent and relevant evidence to provide a factual basis for his conclusions and recommendations. The reporting standards require that the audit report present the auditor's findings and conclusions objectively, accurately, and fairly.<sup>23</sup>

In addition to the foregoing standards which are broad in nature, the CAM also provides directions on specific auditing procedures. In the *General Dynamics* case, the government characterized the CAM's auditing procedures as "guidance," which DCAA auditors were free to follow or not as they deemed fit.<sup>24</sup> The court rejected this argument, noting that many of the CAM procedures were stated in the imperative. In any event, the CAM procedures--whether required or suggested--constituted persuasive evidence of a reasonably prudent auditor's duties and how to perform them. Thus, the court concluded that reasonably prudent auditors would not depart from established CAM procedures absent compelling reasons clearly documented in their workpapers.<sup>25</sup>

In order to satisfy the field work standards, the court found that a reasonably prudent auditor performing the DIVAD audit should have taken the following critical steps drawn from the CAM:

- (1) Understand the purpose of the audit.
- (2) Review and brief the contract.
- (3) Prepare an audit program.
- (4) Conduct an entrance conference.
- (5) Prepare workpapers.
- (6) Obtain technical assistance.
- (7) Talk with the contractor during the audit.
- (8) Resolve conflicts in the evidence.<sup>26</sup>

Thereafter, in order to satisfy the reporting standards, the auditor should have taken the following steps:

- (1) Draft a report based on the workpapers:
- (2) Discuss his or her conclusions at the exit conference.
- (3) Include the contractor's reaction in the report.
- (4) Issue the report promptly.<sup>27</sup>

The *General Dynamics* court found that DCAA had violated virtually all of the foregoing standards and requirements. It is not necessary to detail here every single shortcoming in each category. The principal defects were that the various DCAA auditors never properly analyzed the provisions of the DIVAD contract, based their audit findings on the wrong type of contract, compromised their objectivity and impartiality by assuming the role of investigators instead of auditors early in the audit, never obtained technical assistance on the contractual requirements from knowledgeable government officials whom they should have consulted, and never communicated their concerns and their conclusions to GD so that the contractor could respond.

Most important, of course, was the fact that DCAA's conclusions were flawed--its allegation of mischarging was completely erroneous. Absent such a flawed result, an auditor's failure to comply with various professional standards in performing an audit would not establish a compelling cause of action for malpractice.<sup>28</sup>

For example, one shortcoming that the court found in the *General Dynamics* case was that the initial DCAA auditor was given the specific objective to audit for mischarging. According to the court, this was an improper audit objective because it violated the independence standard requiring auditors to be fair and impartial in performing their audits, and not to assume the attitude of prosecutors or criminal investigators. The court said that under the independence standard, audits cannot be planned in terms of presumed conclusions.<sup>29</sup>

It is not clear that the use of such an improper audit objective would be considered persuasive evidence of malpractice in another case absent flawed findings of mischarging. Even if a contractor was forced to undergo an unusually prolonged and expensive audit process because the auditor had a partisan attitude and a preconceived determination that fraud existed, the contractor would face sizable proof and damages problems in seeking to recover for malpractice if the ultimate audit report did not make any unfounded allegations.

Because the facts in *General Dynamics* were so egregious, the court did not analyze how many departures from the applicable professional standards, or how gross a departure from these standards, are necessary to establish a case of auditing malpractice. Nor did the court engage in any rank ordering of the relative seriousness of the various violations it found.

It clearly should be possible to establish a claim of auditing malpractice on facts less extreme than those presented in *General Dynamics*, involving negligence that is less pervasive or audit results that are not so completely flawed. In concept, a malpractice claim could be established with respect to an audit report that is flawed only in part but is otherwise accurate, providing that the flaw is attributable to professional negligence. However, the boundaries of future malpractice claims are not readily apparent from the *General Dynamics* decision.

### c. Proximate Cause

Tort laws of all states incorporate 'proximate cause,' which requires that there be a sufficient causal relation between the defendant's negligence and the plaintiff's injury in order to hold the defendant liable for that injury. In *General Dynamics*, the court concluded that DCAA's negligence was the proximate cause of GD's injury because DCAA's audit work set in motion the chain of events that culminated in the indictment of the company and its executives.<sup>30</sup>

However, the government argued that the grand jury's indictment and DOJ's prosecution constituted an intervening, superseding cause of the company's injury that broke the chain of causation and relieved DCAA of liability. The essence of this argument was that DCAA did not (and could not) institute the criminal prosecution of the company and its executives. Rather, DCAA referred the matter to DOJ, and the indictment came about only after DOJ and the grand jury conducted their own investigation. The court rejected this argument because the criminal prosecution was a foreseeable consequence of DCAA's negligent audit.<sup>31</sup> This ruling follows well-established legal principles.<sup>32</sup>

Moreover, GD was able to establish the nexus between DCAA's negligence and GD's injury through the testimony of former Assistant Attorney General William Weld, who admitted to Congress that DOJ had relied upon the audit report for its indictment of GD.<sup>33</sup> This unique proof of proximate cause probably will not be available in future cases. Whether proof of the causal chain is easier or harder where an agency takes adverse action against a contractor in explicit reliance on a flawed DCAA audit report (such as denying a contractor's claim for reimbursement,

etc.) is an issue for future litigation.

### d. Damages

The final element of a malpractice cause of action is damages. The plaintiff must prove that it was damaged by the defendant's breach of duty, and must establish the amount of its damages with reasonable specificity. The *General Dynamics* court ruled that the company had suffered compensable damages in the form of the money it had expended in attorney fees and other defense expenses with respect to the criminal case.<sup>34</sup>

This ruling follows established tort law that permits the victim of another's negligence to recover reasonable compensation for loss of time, attorney fees and other expenditures incurred in bringing or defending an action to protect its interests.<sup>35</sup> It should be noted, however, that neither the FTCA nor common law provides for a plaintiff to recover attorney fees expended on the malpractice action itself. Recovery is limited to fees expended in bringing or defending a separate, earlier legal action that was occasioned by the defendant's negligence.

## 2. The FTCA Exceptions

After concluding that the plaintiffs had made a case for malpractice under applicable state law, the court considered whether the various FTCA exceptions to liability barred GD's suit. The court concluded that they did not.

### a. The 'Discretionary Function' Exception

The purpose of the "discretionary function" exception to liability is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic or political policy through the medium of an action in tort."<sup>36</sup> The *General Dynamics* court acknowledged that DCAA auditors exercised judgment in performing their duties. However, the court ruled that this was a purely professional type of judgment, grounded in auditing standards, rather than the type of policy-based discretion that the FTCA exception was intended to protect.<sup>37</sup> Moreover, the professional judgment that an auditor exercised did not grant the discretion to ignore or depart from generally accepted auditing standards.<sup>38</sup> (Likewise, government doctors exercise professional judgment in the course of treating patients, and malpractice on their part has long been recognized as giving rise to a cause of action under the FTCA.)<sup>39</sup>

The court also rejected the contention that DCAA's work came within the ambit of the discretionary function immunity accorded to prosecutors. The court concluded that the DCAA auditors acted at all times as professional auditors, not as prosecutors or investigators. This distinction between the audit function and the investigative/prosecution function is sound in concept and was well defined by the facts presented in *General Dynamics*. However, in other circumstances the difference might be considerably less distinct. For example, the offices of the various inspectors general are divided between "audit" and "investigation" components. Is an "investigation" employee considered an auditor or an investigator when performing audit-like reviews of a government contract? Will the *General Dynamics* decision be extended to cover DCAA or inspector general auditors who are assigned to assist in a criminal investigation? Such a development could be even more problematic for inspector general offices than for DCAA because of the dual audit/investigative functions of those offices.

#### **b. The 'Malicious Prosecution' Exception**

The court held that the action was not a suit for malicious prosecution--which is barred by the FTCA--because GD did not claim that DCAA had conducted its audits with malice, or had made a deliberate effort to procure initiation of unwarranted criminal proceedings (or even that DOJ had acted maliciously in instituting such proceedings). GD's claim was solely for professional malpractice, which had triggered an unwarranted, albeit good faith, prosecution.<sup>40</sup>

But in *Enterprise Electronics Inc. v. U.S.*, 825 F.Supp. 983 (DC MA 1992), a federal district court reached the opposite conclusion, ruling that this exception barred a "negligent audit" claim against DCAA for damages suffered by a contractor in defending a criminal prosecution, along with related civil and administrative proceedings.<sup>41</sup> The court reasoned that because the contractor's cause of action was predicated in part upon DCAA's referral of its audit to the Justice Department and the subsequent prosecution, the "malicious prosecution" exception applied.<sup>42</sup>

The analysis of this issue by the *General Dynamics* court is far more persuasive than the analysis in *Enterprise Electronics*. The "malicious prosecution" exception does not bar all tort actions which are based (in

whole or in part) on ill-founded prosecutions. The tort of malicious prosecution is distinguishable from an unwarranted, but good faith, prosecution caused by a negligent audit. Had Congress intended to bar all tort claims based on allegedly ill-founded prosecutions, then presumably it would have created a far broader exclusion than the "malicious prosecution" exception.

#### **c. The 'Misrepresentation' Exception**

The "misrepresentation" exception did not bar the suit, the *General Dynamics* court ruled, because the essence of GD's claim was that DCAA negligently audited the DIVAD contract in the first instance, not that DCAA subsequently communicated its erroneous findings to DOJ. Although this distinction may be a fine one, it is supported by a line of precedent.<sup>43</sup>

Nonetheless, the "misrepresentation" exception may bar at least some types of claims for audit malpractice. In *Enterprise Electronics*, DCAA audited a contract proposal and found discrepancies and errors indicating possible fraud. However, the auditor did not report these findings to the Department of Defense (DOD) or to the contractor, as required by the DCAA audit manual and as a reasonably prudent accountant would have done. Had the auditor done so, the alleged defects would have been resolved by DOD and the contractor at that point, before the contract was finalized. Instead, the parties proceeded to negotiate a definitive contract which incorporated the questionable costs. DCAA subsequently reported the suspected fraud to the DOD inspector general, who initiated various criminal, civil and administrative proceedings against the contractor.<sup>44</sup>

The contractor filed suit under the FTCA, alleging that it had been damaged by DCAA's negligence in performing the audit. The *Enterprise Electronics* court ruled that the action was barred by the "misrepresentation" exception because the contractor's alleged injury was only due to DCAA's failure to communicate its findings to either the contractor or to DOD. (The courts have held that the government's failure to communicate information it has a duty to provide falls within the "misrepresentation" exception.)<sup>45</sup> In contrast to the situation presented in *General Dynamics*, there was no allegation that DCAA's audit findings per se were flawed.

Accordingly, absent a substantive flaw in the audit findings, the "misrepresentation" exception bars

a malpractice claim based solely on the auditor's breach of a professional duty to communicate the audit findings.

#### d. The 'Interference With Contract Rights' Exception

Finally, the *General Dynamics* court held that the interference with contract rights exception was inapplicable because GD had not made any such claim. GD had not even alleged that DCAA intended to induce a breach of the DIVAD contract, or that there had been such a breach.

### C. Commentary

One remarkable aspect of the *General Dynamics* decision is that it reads like a garden variety professional malpractice judgment: the defendant performed professional services (an audit report); the defendant (DCAA) owed the plaintiff (GD) a duty of due professional care; the defendant negligently breached that duty of care; the plaintiff was injured as a result of the defendant's negligence; and the plaintiff suffered monetary damages of nearly \$26 million. What is not ordinary is the holding that DCAA owes a duty of care to its auditees. If this holding withstands appellate scrutiny, DCAA might find itself the object of numerous malpractice actions.

The government has filed a notice of appeal with the Ninth Circuit but has not yet submitted an appellate brief. It may argue that, apart from the liability exposure, there are other compelling reasons why a DCAA auditor should not owe a duty of care to a contractor. Unlike their private sector counterparts, DCAA auditors interact with contractors in an inherently adversarial context that has a direct bearing on the anticipated degree of cooperation and openness. This relationship is entirely different than that between private auditors and their private sector clients, where access is willingly provided to support the audit work. The rebuttal is that DCAA auditors have the necessary authority to obtain access to contractor records and to refer matters for criminal investigation, which accords them considerable leverage in dealings with the contractor. Further, DCAA cannot be held liable for malpractice where a contractor withholds relevant documents or information.

Second, the government can be expected to argue that the auditee is assuredly not the DCAA

auditor's client. The government would contend that the DCAA auditor's client is the contracting officer, for whose benefit the audit is being conducted. However, even if the contractor is not the DCAA's "client," it nonetheless may be owed a duty of professional care when it is the subject of an audit pursuant to a government contract.

Whether the Ninth Circuit agrees that there is privity between DCAA and the contractor may well depend on whether it views the "government" as monolithic. If the party to the contract is deemed to be the United States, rather than a particular contracting agency, then the conclusion that there is privity between the contractor and DCAA follows rather easily. If the "United States" government owes the contractor a duty of care, then it matters little if the contracting officer hired another portion of the government to assist in working with the contractor. On the other hand, if the two entities--DCAA and the contracting agency--are seen as separate instrumentalities, then the government can argue more forcefully that the contractor's privity with the contracting agency does not translate into privity with DCAA.

It is noteworthy that the Tucker Act requires all contract claims to be brought against the United States rather than the contracting agency.<sup>46</sup> Likewise, the FTCA requires that all tort claims be brought against the United States rather than the particular agency involved.<sup>47</sup> Thus, under the FTCA the government may have a hard time separating the contracting agency and DCAA in order to disclaim any duty of care by DCAA to the contractor it audits.

On the topic of professional negligence, the *General Dynamics* court specifically found that "DCAA owed a duty to General Dynamics to conduct its audits of the DIVAD prototype contract *with such skill, prudence and diligence as other professional auditors*" (emphasis supplied).<sup>48</sup> Further, the first standard of GAAS states: "The examination is to be performed by a person or persons having adequate technical training and proficiency as an auditor." In all 50 states, a non-government audit may be conducted only by a certified public accountant licensed in that state. However, most DCAA auditors are not CPAs, and there is a substantial gulf between the academic and licensure requirements for a CPA and those established by DCAA for its auditors.

In an unrelated development, the DOD inspector general recently recommended that incurred cost

audits, which make up approximately 40% of DCAA's workload, should be privatized.<sup>49</sup> Privatizing part of its audit mission could result in a downsized DCAA performing a revolutionary new role of supervisory intermediary between an outside accounting firm and the requesting agency.

Assuming that the *General Dynamics* decision and the imposition on DCAA of a duty of professional care to contractors is upheld on appeal, its actual reach remains to be determined by future litigation. Major questions would remain. Specifically, would the holding apply to the DCAA audit of a contractor's claim? Would it apply to audits of forward pricing rates or incurred cost submissions? If so, would the standard of care be the same in such audits? Assuming the violation bears a causal connection to the contractor's harm, would a violation of a single auditing standard (instead of so many as in this case) be adequate to establish liability? Would the decision apply to DCAA audits of subcontractors? Should DCAA auditors owe a similar duty of care to nonprofit associations, colleges and universities, and grant recipients?

It is submitted that the answer to all of these questions should be "yes," but only time will tell whether the courts agree. Clearly, the *General Dynamics* decision raises a variety of issues that will be addressed either in the appeal or in future litigation.

## II. Conclusion

The 1970 decision in *Scanwell Laboratories Inc. v. Shaffer* vastly altered the government contracts landscape by finding that government procurement officials owed an implied duty of fairness to potential bidders. This holding laid the groundwork for contractors to contest government procurement decisions through bid protest suits in the federal courts. The subsequent stream of such protest actions confirms the seminal nature of *Scanwell*.

In contrast, the 1982 decision in *Torncello v. U.S.* seemed at first blush to significantly limit the government's right to terminate contracts for convenience. However, to the disappointment of contractors, it did not herald a sea change in government contract law. Instead, that ruling has largely been confined to its facts by subsequent decisions. Whether the DIVAD decision will have the broad impact of *Scanwell* or the narrower impact of

*Torncello* remains to be seen.

## Endnotes

<sup>1</sup> *General Dynamics Corp. v. U.S.*, No. CV 89-6762 (DC CCal, March 25, 1996).

<sup>2</sup> *Scanwell Laboratories Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

<sup>3</sup> *Torncello v. U.S.*, 681 F.2d 756 (CtClS 1982).

<sup>4</sup> 44 Federal Contracts Report 1005, 12/9/85.

<sup>5</sup> 28 USC 1346(b) and 2671-80.

<sup>6</sup> 28 USC Sec.1346(b). See *FDIC v. Meyer*, 114 S.Ct. 996, 1001 (1994).

<sup>7</sup> *FDIC v. Meyer*, 114 S.Ct. 1001.

<sup>8</sup> The case did not involve limitations against punitive damages or interest accruing during pendency of the suit. 28 USC 2674.

<sup>9</sup> 28 USC 2680.

<sup>10</sup> Findings of fact and conclusions of law at paragraph 224, citing *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16, 19 (1958).

<sup>11</sup> Findings of fact and conclusions of law at paragraphs 225-26.

<sup>12</sup> See *First National Bank of Commerce v. Monco Agency*, 911 F.2d 1053 (5th Cir. 1990) (discussing the three different formulations of accountant liability to third parties that are prevalent among the states).

<sup>13</sup> See *Ward v. Ernst & Young*, 435 S.E. 2d 628 (DC Va. 1993); *In re Phar-Mor Inc. Securities Litigation*, 892 F. Supp. 676 (DC WPa 1995) (auditor case); *PNC Bank, Kentucky Inc. v. Housing Mortgage Corp.*, 899 F.Supp. 1399, 1406 (DC WPa 1994) (accounting case).

<sup>14</sup> 49 Cal. 2d 647, 320 P.2d 16.

<sup>15</sup> *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 406-07, 834 P.2d 745, 767 (Calif SupCt 1992) (en banc).

<sup>16</sup> *Id.* at n.16.

<sup>17</sup> Findings of fact and conclusions of law at paragraph 227.

<sup>18</sup> The *General Dynamics* decision refers to the CAM as the DCAM.

<sup>19</sup> Findings of fact and conclusions of law at paragraphs 128-30.

<sup>20</sup> *Id.* at paragraph 131.

<sup>21</sup> *Id.* at paragraph 130.

<sup>22</sup> *Id.* at paragraph 133-137.

<sup>23</sup> *Id.* at paragraph 138-39.

<sup>24</sup> *Id.* at paragraph 141-42.

<sup>25</sup> *Id.* at paragraph 133-47.

<sup>26</sup> *Id.* at paragraph 150-52.

<sup>27</sup> *Id.* at paragraph 153-54.

<sup>28</sup> Consider, for example, the decision in *Enterprise Electronics Inc. v. U.S.*, 825 F. Supp. 983 (DC MAIa 1992), discussed at n. 40-41 and 43-44.

<sup>29</sup> Findings of fact and conclusions of law at paragraph 159.

<sup>30</sup> *Id.* at paragraph 229.

<sup>31</sup> *Id.* at paragraphs 230, 231.

<sup>32</sup> See Restatement of Torts, Secs. 442A, 442B and 443.

<sup>33</sup> Findings of fact and conclusions of law at paragraph 232.

<sup>34</sup> *Id.* at paragraphs 233-34.

<sup>35</sup> See Restatement (Second) of Torts, Sec. 914; *Nepera Chemical v. Sea-Land Service*, 794 F.2d 688, 696-97 (D.C. Cir. 1986).

<sup>36</sup> *U.S. v. S.A. Empresa de Viaco Aerea Rio Grandense*, 467 U.S. 797, 813 (1984); see also *Berkovitz v. U.S.*, 486 U.S. 531 (1988).

<sup>37</sup> Findings of fact and conclusions of law at paragraph 238.

<sup>38</sup> *Id.* at paragraph 237.

<sup>39</sup> See, e.g., *U.S. v. Kubrick*, 444 U.S. 111 (1979).

<sup>40</sup> *Id.* at paragraph 240.

<sup>41</sup> *Enterprise Electronics Inc. v. U.S.*, 825 F.Supp. 983 (DC MAIa 1992). The facts of this case are discussed in the following subsection, which analyzes the "misrepresentation" exception to the FTCA.

<sup>42</sup> *Id.* at 985.

<sup>43</sup> *Block v. Neal*, 460 U.S. 289 (1983); see also *Saraw Partnership v. U.S.*, 67 F.2d 567, 569-71 (5th Cir. 1995).

<sup>44</sup> 825 F.Supp. at 984.

<sup>45</sup> *Id.* at 986.

<sup>46</sup> 28 USC 1491.

<sup>47</sup> 28 USC 2679.

<sup>48</sup> Findings of fact and conclusions of law at paragraph 221.

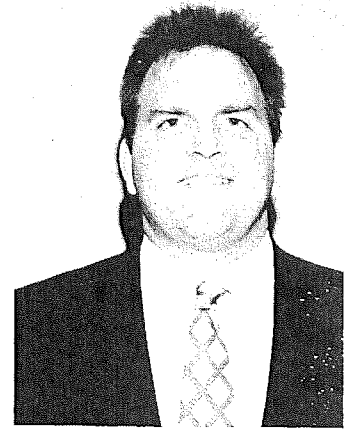
<sup>49</sup> 65 Federal Contracts Report 461, 5/6/96; 65 Federal Contracts Report 527, 5/20/96.

WAS-188197

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# NEWLY PROPOSED RULES FOR FAR PART 15

James McAleese, Jr.  
*McAleese & Associates, P.C.*



James McAleese, Jr.

Contractors have comfortably relied upon “full and open competition,” “meaningful discussions,” and “Best and Final Offers” (“BAFO”) in award of negotiated procurements since passage of the Competition in Contracting Act in 1984 (“CICA”). Recently, dramatic proposed rules for all future negotiated procurements have been made public in proposed Federal Acquisition Regulation Part 15. The sweeping breadth of these rules will institutionalize (1) a newly constricted competitive range; (2) “technical leveling” to incorporate best product concepts into awardee’s solution; (3) offeror notification if price is “too high” relative to other offerors; (4) unilateral discussions with preferred offeror(s); (5) evaluation criteria that evolve during negotiations; and (6) elimination of BAFOs.

The proposed rules will be open to public comment for at least sixty days. If they become final, these rules will impact competitive procurements in ongoing acquisition programs, such as the JAST/JSF, MEADS, National Missile Defense, Arsenal Ship, C4ISR, and numerous Service Life Extension Programs (“SLEP”). It is undisputed that the proposed rules will reduce award time and cut “red tape.” However, “technical discriminators” gleaned from private funding on existing development contracts are subject to “leveling” under the new rules, so long as: (1) individual technical solutions are not revealed; or (2) the awardee was not coached or prompted that it “must change its proposal to bring it up to the level of other proposals.” This presents new opportunities and new hazards in the award of all negotiated procurements. Therefore, teams from Business Development, Programs, Contracts, Finance, and Legal must move swiftly to craft “win-win” strategies to ensure customer “best value,” while curbing technical leveling and price auctions.

Only those initial proposals with “greatest likelihood of award” would be admitted into the constricted competitive range, to achieve “efficient” competition under the recently enacted Federal Acquisition Reform Act (“FARA”). Historically, contractors tendered their genuine offers as BAFOs following meaningful discussions, since all offers with “reasonable chance of award” were admitted into the competitive range under “full and open competition” mandate of CICA. If the proposed rules become final, offerors must effectively prepare their initial proposals as “First and Final Offers” (“FAFO”) to ensure admission into the newly constricted competitive range. The contracting officer will then conduct discussions with each surviving offeror only once, after which he or she can pursue unilateral discussions with other more preferred offeror(s). The prospects for negotiating high value technical contracts are particularly chilling in view of the new authority to continue oral discussions with other preferred offeror(s) up to actual award. The proposed rules also encourage amending or evolving the evaluation criteria prior to award, creating strong potential that the winning solution will be a conglomeration of technical solutions from each offeror’s proposal. A contractor who offers the superior technical solution in its initial proposal may be eliminated from the competitive range under the original evaluation criteria, with the proposed solution later appearing in the winning offer after the evaluation criteria have “evolved.” Obviously, adequate protective arrangements must be instituted to protect against this technical leveling process. “Work around” strategies were set forth in our mid-April briefing paper entitled “Exploiting Acquisition Reform for Profitable New Business Capture.”

While the proposed rules of FAR Part 15 do not alter the statutory mandate for evaluation of past performance since July 1995, such evaluation on initial proposals is a prime determinant of which offerors shall be admitted into the constricted competitive range. This essentially pits initial proposals against each other, as only those with “greatest likelihood of award” will now survive for discussions. Unfortunately, those prior contracts with strongest past performance shall be closed out in a timely manner and not be considered for future competitions more than three years later. The irony is that stale fixed price development contracts, in which contractors “bought in” with customer consent, may linger on unless properly closed out. Therefore, contractors must “scrub” relationships with teaming partners, discreetly restructure disrupted programs prior to submission of initial proposals, and examine newly acquired contractors to ensure such do not become “impaired assets.” Similarly, those contractors who acquire, or merge, with other contractors without careful program review, now risk erosion of shareholder value and becoming tainted by such “impaired assets” as a matter of law.



## TREASURER'S REPORT

David P. Metzger  
*Holland & Knight*

September 9, 1996

### BCA Bar Association Statement of Financial Condition For the Period Ending September 9, 1996



David P. Metzger

Beginning Balance		\$ 2,817.36
Fund Income:		
Dues	\$ 125.00	
Total Fund Income		+ 125.00
Subtotal	\$ 2,942.36	
Fund Disbursements:		
Total Fund Disbursements		- 0
Ending Cash Balance		<u>\$ 2,942.36</u>

## THE JUDGE'S CORNER

Bernie Parrette,  
Interior Board of Contract Appeals

I like the title, Judge's *Corner*, because it seems to suggest that the authoring judge is standing alone, perhaps even ostracized from his fellow judges, and that his views may be solely his, shared by no other intelligent creature on the face of the planet. Since that may well be the case here, I'll let the title serve as my disclaimer!

Pleadings: In my view, they are in practice close to absolutely worthless. In my 10 years as a judge, I can probably count on the fingers of one hand the number of times the parties' pleadings proved useful for any purpose. The irony is, the more primitive the appellant's format (e.g., in pro se cases), the more likely the pleadings are to make sense, because a simple narrative presentation of the case is a lot more helpful than a carefully crafted, carefully non-incriminating, carefully self-serving document prepared by a high-paid lawyer; which then leads, of course, to what is in effect a general denial by Government counsel. Why go through the motions if no one learns anything from the documents?

Perhaps BCABA could come up with some rules that the profession could live by without compromising its clients.

Discovery: If there were ever an area where informality should rule in administrative cases, discovery is it. But even informal discovery can be time consuming and costly. So my policy is that as soon as the pleadings are in, I send out an order urging the parties to the negotiation table, with a firm date for reporting on their progress. If either side lacks sufficient information to make a decision, and the other side is reluctant to provide it, I tell the parties to let me know immediately and to resolve the matter by conference call.

But despite all efforts to the contrary, there are always attorneys who want to treat an administrative proceeding as if it were a court proceeding; and they begin burying the Board and the other party in lengthy (and often redundant!) interrogatories, hoping that by some magic they will turn up something novel that (a) is not in the Rule 4 file and (b) neither their client nor the contracting officer knows about.

Personally, I have never seen anything obtained by formal discovery, with the possible exception of depositions (once the case has proved impossible to settle), that could not have been obtained informally, both more quickly and more cheaply.

Motions for Summary Judgment are an indispensable device for resolving cases with difficult legal issues more quickly and more satisfactorily than leaving everything unresolved until the case is submitted to the Board for decision. If anything, SJ motions are not used enough, rather than being used too much. I recently had a case where the law was entirely on the Government's side; but Department counsel did not seem to realize it. So I had to follow my usual procedures and urge settlement negotiations. The case in fact settled for about half of the appellant's claim, despite no real Government liability. A summary judgment motion would quickly have resolved the matter otherwise.

Similarly, I recently had a case where the Government was confident that the lack of a particular clause in the contract meant that appellant lacked the rights it would normally have had; so Department counsel moved for summary judgment. In my order denying it, I was able to point out some contrary case law that neither side apparently knew about. The case was promptly settled!

Prehearing Briefs: I never ask for prehearing briefs, but I do not object to them if either counsel wants to submit one. I do not require either side to submit a prehearing brief just because the other side does. However, I do think that a prehearing brief ought to be well organized and therefore, yes, brief! Such a brief is most useful in seeing where the author is going, once its case begins, especially in long hearings. But for me, a short oral statement of each side's case during the prehearing conference just before the hearing begins (preferably if, in longer cases, counsel provides me with a short outline of proposed testimony by various witnesses) is all I ever need. Other judges may differ.

A Posthearing Brief, on the other hand, is virtually a necessity in these days of short-handed staff, particularly if the judge can't get to the resolution of the case right away. In addition, it permits both sides to cite the authorities that lend the most support to the case as it was tried, and to cite the portions of the record upon which they mainly rely.

Reply Briefs: Unless the parties become unruly, or their arguments redundant or irrelevant, I am loathe to deny requests for further briefing at any stage of the proceedings. In my view, it is the parties' case; and if they want to incur the time and expense of further briefings, then the least I can do is read what they have to say. But, generally, one posthearing brief from each side is all I need for a decision.

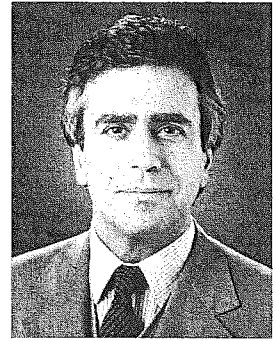
Opening Statements (on the record, as opposed to summary statements at the prehearing conference) are, in my view, primarily devices for getting the party's view of the case on the record for the benefit of a concurring judge, or for possible use on appeal. I do not regard them as essential for the hearing judge, although, if short, they may have some utility in setting up witnesses for the questions that are to follow. But lengthy opening statements all too often become argumentative, and the judge is turned off rather than aided by their use. On the other hand, I would never deny either side the opportunity to make one if it so desired.

Objections: I try to stress that while objections should be limited to irrelevance, repetition, and lawyer misconduct, such as the badgering of witnesses, there are times when objections are clearly called for; and, because the hearing is an administrative one, the judge may be reluctant to stop objectionable questioning if the other side sees fit to tolerate it. On the other hand, repetitious objections where the substance has already been considered (such as hearsay objections in a relevant contest) serve no useful purpose; and there is no way to get a judge irritated faster than to continue to object on grounds that the judge has already ruled on. In this area, a word to the wise is sufficient!

Further, this judge sayeth not.

# THE 1996 ANNUAL PROGRAM AND MEETING

by James A. Dobkin, Partner  
*Arnold & Porter*



James A. Dobkin

It is an honor to serve as the Chair of this year's Annual Program Committee, and I would like to share with you briefly some information about what I am sure will be a timely and provocative event. The BCABA will hold its Annual Program and Meeting on Wednesday, October 23, 1996 at the offices of Arnold & Porter in Washington, D.C.

This year's program will include the second annual "State of the Boards" address focusing on developments and trends during the past year. I am pleased to inform you that the address this year will be presented by Judge Steven M. Daniels, Chairman of the GSBCA.

We are fortunate to have Rand Allen of Wiley, Rein & Fielding, Bruce Moldow, General Counsel of the Clark Construction Group, Inc., and Dick Duvall of Holland & Knight as moderators of this year's three program panels.

Mr. Allen's panel, entitled "The Dark Side: Unintended Consequences of Procurement Reform," will examine the effects of the limitations on competition (in the name of "efficiency") that characterize so many of the reform initiatives.

Mr. Moldow's panel, entitled "Litigation Avoidance: Will the Boards--And the Disputes Lawyers--Suffer the Fate of the Dinosaurs?", will address how parties to government construction contracts have been seeking to avoid litigation at different points along the contract time line.

The final panel, which will be moderated by Mr. Duvall, is a reprise of last year's very successful seminar on advanced litigation tactics and strategies. This year the panel will revisit some of the approaches discussed last year, as well as introduce some new techniques.

I am especially pleased to announce that our program will also include Circuit Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit as the featured luncheon speaker. Judge Michel will discuss opportunities available to contract litigators to make more effective use of the appeals process in the Federal Circuit. In addition to the luncheon speaker, the annual "Best Clause" article award will be presented.

All BCABA members are encouraged to attend the business meeting portion of the Annual Program and Meeting which is scheduled for the afternoon of October 23. BCABA President-Elect James F. Nagel will be presiding over the meeting and elections.

You will be receiving shortly an invitation with the Program's agenda and registration materials. In the meantime, please feel free to contact Laura Wessells at Arnold & Porter (202/942-5972) if you have any questions about the Program. Please mark your calendars and plan to join us at the Annual Program and Meeting on October 23. I look forward to seeing you there.

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**BOARDS OF CONTRACT APPEALS BAR ASSOCIATION**

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# Application for Membership

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Annual Membership Dues: \$25.00 [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

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**SECTION I**

Name: \_\_\_\_\_

Firm/Organization: \_\_\_\_\_

Dept./Suite/Apt. Street Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Work phone: \_\_\_\_\_ Fax: \_\_\_\_\_

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**SECTION II (THIS SECTION FOR COMPLETION BY NEW MEMBERS ONLY.)**

I am applying for associate membership (for non-attorneys only)

I am admitted to the practice of law and am in good standing before the highest court of the:

District of Columbia: \_\_\_\_\_ State (s) of: \_\_\_\_\_

Employment:                      Firm \_\_\_\_\_ Corp \_\_\_\_\_ Govt \_\_\_\_\_ Judge \_\_\_\_\_ Other \_\_\_\_\_

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**SECTION III**

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

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**FORWARD THIS APPLICATION WITH A CHECK FOR \$25.00 PAYABLE TO THE BCA BAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:**

Dave Metzger  
Holland & Knight  
2100 Pennsylvania Ave, NW  
Washington, DC 20037-3202

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