

The Clause

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Summer Issue, September 1999, Vol. VV, Issue II

FEATURED ARTICLES IN THIS ISSUE:

ASSERTION OF PRIVILEGES BY THE GOVERNMENT TO RESIST DISCOVERY

Thomas J. Madden & Jeremy K. Huffman, Venable, Baetjer,
Howard & Civiletti, LLP, a Gold Medal Status firm

APPEALS PROCEDURE UNDER MEDICARE CONTRACTS: A CASE OF LESS IS MORE

Peter A. McDonald
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BCABA FIRST ANNUAL EXECUTIVE POLICY FORUM

David P. Metzger; Terry L. Albertson; Honorable Stephen M. Daniels;
and Arthur H. Hildebrandt

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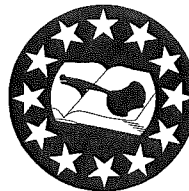
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PRESIDENT'S COLUMN

by David P. Metzger



Dave Metzger

Membership renewal, a seminar on motion practice before the BCAs, the first Annual Executive Policy Forum, the Annual Program and a list of thank yous are high on the list of reportable items.

Bar dues must be paid by October 1, 1999. Your BCABA membership is based on the government's fiscal year — October 1st - September 30th of each year. This year, BCABA dues have been de-coupled from the Annual Program. Confusion in the past over combined checks for dues payments with Annual Program fees mandated this change. Additionally, the Board of Governors raised non-government members dues to \$45.00 per member. Government member dues remain at \$30.00 per member. Each member will receive or has already received an Annual Dues Notice in the mail. We request each member to respond promptly by mailing their payment for the 1999-2000 dues year to Secretary **Jim McAleese**. The Secretary establishes the membership roll from the payments, and forwards the checks to the Treasurer.

On April 29, 1999, the Practice and Policy Committee held a seminar on motion practice before the BCAs, the second in a series of such seminars. It was extremely well attended, and in particular, by our BCABA judges. You will find a complete report on this excellent seminar under the Committee's report in this issue of *The Clause*, by our two Committee co-chairs, the **Honorable Barclay Van Doren** (Chairman of the Energy Board, a Gold Medal Board) and **Ross Dembling**, Holland & Knight LLP (a Gold Medal firm). Our thanks to each of these two hard-working co-chairs for their outstanding service.

In a very exciting development, the BCABA held its first Annual Executive Policy Forum in Washington, D.C. Nineteen BCABA members of the three communities we represent — judges, government attorneys and private sector practitioners — gathered in Washington, D.C. for a fascinating and productive discussion of the state of the BCAs today. The bottom line of the discussion was that the BCAs are working well and do not require congressional intervention or management at this time. That is not to say that improvements in the performance of all BCAs are not possible, but congressional tinkering at this time is unnecessary.

The half-day discussion covered a variety of subjects, including ADR, the degree of process appropriate to the BCAs, speed of decisions, "riding the circuit" and the current role of the BCAs. The participants noted a variety of areas where improvement is possible. However, these opportunities for improvement in practice by all three communities are so technical and subtle they cannot and should not be addressed by legislation. An article summarizing this first ever Annual Executive Policy Forum is included in this issue of *The Clause*. We wish to thank all nineteen participants and note that many more members who had been invited to attend were unable to do so because of a conflict with the ABA Annual Meeting in Atlanta, a conflict for which the BCABA President takes sole responsibility. We look forward to this event being established as an annual part of the active life of the BCABA.

The Annual Program will be held October 20, 1999 in Washington, D.C. at the St. Regis Hotel (formerly the Carlton). An extremely informative program is planned by our two hard-working co-chairs — **Honorable Reba Page**, Chairman of the Army Corps of Engineers Board of Contract Appeals and **Alan C. Brown**, a partner in McKenna & Cuneo, a Gold Medal firm. I am very excited about this year's program. The panel on non-cost based contracting will address one of the emerging issues facing the boards — cost issues arising under contracts resulting from non-cost offers. The health issues seminar will focus on the rapidly emerg-

ing area of health care costs. Luncheon speaker **Bob Murphy**, GAO General Counsel, is one of the leading experts on procurement and hopefully will comment on Comptroller General Walker's new regime at GAO. He will be followed by an afternoon Judge's Panel, the first ever composed entirely of BCA chairmen, who will address advocacy issues before the BCAs. The Annual Program will also include several new awards this year. A detailed description of the Annual Program is included in a report from our two Annual Program Committee co-chairs elsewhere in *The Clause*. I urge every member to consider attending this year's Annual Program.

A host of thank yous are due. I first would like to thank the Board of Governors for their dedication and extra efforts put into the BCABA this year. Because of a significant agenda of changes, reforms and activities planned for this year, the Board held more meetings than in the past, and they were always well attended. This also leads to a special thank you to **John Pachter**, a partner in Smith, Pachter, McWhorter & D'Ambrosio, a Gold Medal firm, who took over for **Jim Dobkin**, our board member who passed away mid-term. John made nearly every meeting and contributed significantly to issues faced by the Board.

Profuse thank yous go to our Gold Medal entities for their support of the BCABA this year. By tendering their entire government contract groups into BCABA membership, they gave us the critically needed support to expand our agenda this year. The list of Gold Medal entities is included on the Gold Medal page in this issue.

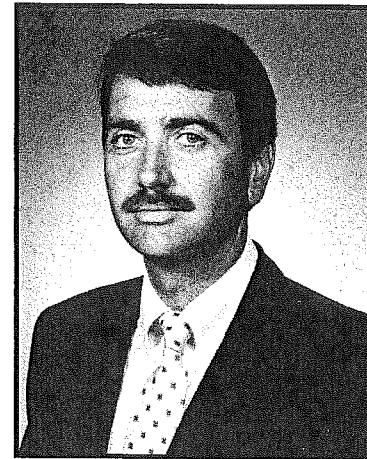
Thanks also to our officers, especially **Jim McAleese** and his Assistant, **Andrea Comes**, for maintaining the membership list and writing minutes of our Governors Meetings, and for Pete McDonald's handling of our funds.

Thanks are also due **André Long**, Editor of *The Clause*, for publishing *The Clause* on time and in a significantly expanded format (no less than three articles in each issue) despite a year of transition for him personally. I would also like to thank **Judge Barclay Van Doren** and **Ross Dembling** for their productivity on the Practice and Policy Committee. Thanks also go to **Judge Reba Page** and **Alan Brown** for their work on the Annual Program. I would also like to acknowledge the on-going advice and support received from **Judge Paul Williams** Chairman of the ASBCA, **Judge Stephen Daniels** of the GSBCA, **Judges Ronald Kienlen** and **Carol Park-Conroy** of the ASBCA, **Chip Retson**, Chief Trial Attorney of the Army, **Richard Duvall**, partner, Holland & Knight LLP and **Pete McDonald**, Senior Manager of KPMG. Finally, not at all least of which I would like to thank **Esther Townsend**, Holland & Knight LLP, for her faithful support of the BCABA, careful attention to detail and overall commitment to the bar association's work.

On October 20, 1999, at our Annual Meeting, my successor and President-Elect, **Barbara Bonfiglio**, of Williams & Jensen, will assume the presidency of the BCABA, subject to the vote of the membership. Because this is the last issue of *The Clause* planned during my tenure as President, I would like to thank each member (including and especially our Gold Medal entities) for your support this past year and urge you to continue your work and support of this fine, specialized bar association under my successor.

EDITOR'S COLUMN

by Andre Long



Andre Long

Watch out World Wide Web! The BCABA is joining the information super highway. Ty Hughes hopes to have our new site, _____, posted within the month. Ty has spent a great deal of time to get this up and running and he deserves kudos for a job well done. My goal is to have the *Clause* electronically available on the site shortly thereafter. This web site will be one more way for our Bar Association to be responsive and ready to deal with the serious issues facing Board practice.

However, a web site is only as good as what is on it. We need your input, articles and opinions! If it doesn't add any value, it shouldn't exist. What do you want to see on it? How can this web site help you grow and enhance your professional skills? Please e-mail your suggestions to _____

One frequent suggestion is to focus more on substantive articles and materials dealing with Board practice. While members have continued to support *The Clause* with substantive articles dealing with government contract law, we could use more material specifically directed to Board practice. Another suggestion has been to eliminate picture covers and replace it with an index of feature articles. Please share with me your thoughts on this and any other related subject. What we are should be what you want.

CORRECTIONS: In the last issue of *The Clause*, endnotes were inadvertently omitted from James Nagle's article entitled "The Board of Contract Appeals, a Brief History of their Development." Please feel free to contact Jim if you would like a copy.

Also omitted from our Gold Medal Status list was the law firm of Seyfarth, Shaw, Fairweather & Geraldson.

Please accept the editor's apologies.

BOARD PRACTICE & POLICY COMMITTEE REPORT

by
Honorable E. Barclay Van Doren & Ross W. Dembling
Co-Chairs

On April 29, 1999, the Committee sponsored the second in our series of luncheon seminars: "*An Informal Discussion of Motion Practice At the Boards of Contract Appeals.*" We had a distinguished panel that included Honorable David W. James and Honorable Ronald A. Kienlen, both of the Armed Services Board of Contract Appeals, and M. Roy Goldberg, Esq. of Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C., in Washington, D.C. The discussion and presentations covered dispositive motions, such as motions to dismiss and summary judgment motions. Motions to dismiss for lack of jurisdiction, for failure to state a claim and failure to prosecute were discussed. Papers presented by the panelists cited cases where these were both granted and denied. The discussion of summary judgment motions demonstrated that many were denied because facts are determined to be in dispute, but some have been granted. A variety of non-dispositive motions were dis-

cussed, including motions to strike allegations, amend pleadings or make them more definite, extend time for filing, compel discovery, obtain *in camera* inspection, impose sanctions or dismiss without prejudice. As with our first seminar in February "*Discovery Before the Boards of Contract Appeals,*" the active participation in the discussions by attending board judges and experienced practitioners enhanced a lively and informative session. The distributed written materials included a comprehensive outline of board decisions on motion practice.

We are planning another program in our series for the early fall to address the "Policy" component of our Committee's charter. To that end, we hope to have dialogue session with a key congressional staff member to discuss legislative initiatives and oversight of matters that may impact board practice and procedures.



HEAR YE! HEAR YE! HEAR YE!

For commitment to the Boards of Contract Appeals Bar Association and outstanding leadership in the field of government contracts, demonstrated by bringing the entire government contracts group membership into membership of the BCABA, we honor and salute the following organizations by bestowing on them the BCABA's:

GOLD MEDAL STATUS

Arnold & Porter

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Kirkland & Ellis

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Piper & Marbury LLP

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Smith, Pachter, McWhorter & D'Ambrosio, P.L.C.

Venable, Baetjer, Howard & Civiletti, LLP

Williams & Jensen, P.C.

THE 1999 ANNUAL PROGRAM AND MEETING

by
Honorable Reba Page and Alan C. Brown
Annual Program Committee Co-chairmen

The Annual Program of the BCA Bar will provide government contract practitioners with timely and provocative insight into issues demanding our immediate attention, presented by key participants in the field. "Contract Dispute Issues for the New Millennium" will be held on October 20, 1999, at the St. Regis Hotel (formerly the Carlton Hotel), 923 16th Street, N.W., Washington, D.C.

The morning will begin with a session on "Disputes in a Non-Cost Based World," moderated by Carl Vacketta of Piper and Marbury LLP, and will focus on the effect of price-based (non-cost based) contracting on the appeals process. This panel will focus on the status and issues presented by the Department of Defense's initiatives regarding price-based acquisition, and including the issues raised by the pricing and proof of claims under non-cost based contracts. The speakers will include William Stussie, the Deputy Assistant Secretary of the Navy for Air Programs, John Kuelbs, Senior Vice President, Acquisition Policy for Raytheon Corp., and Steve Knight, a partner with Kirkland & Ellis.

The second session, "Disputes in Health Care Contracts," will be moderated by Alex Brittin of McKenna and Cuneo, LLP. Health care is absorbing an increasing share of the Federal budget, and this session will spotlight the health care industry and Government health care contracts. These issues have captured the interest of every consumer as well as the government contracts community. Rod Benson of the Health Care Financing Administration, Peter McDonald of KPMG, and Mike Anderson of Holland

& Knight LLP will discuss a variety of healthcare issues including competitive Medicare contracting, cost issues under health care contracts, and litigation of disputes arising under Medicare, TriCare, and FEHBA contracts.

The keynote speaker, featured after the luncheon, will be Robert Murphy of the General Accounting Office. Mr. Murphy is a highly respected government official in the area of procurement who will provide, among other things, his views on procurement and insight into GAO agenda under Comptroller Walker.

The final session will be moderated by the Honorable Reba Page, Chairman of the Army Corps of Engineers Board of Contract Appeals. The "Chairmen's Panel," will discuss important concerns such as the role of the boards and trial advocacy and practice. The panel will consist of Honorable David T. Anderson, Chairman, HUD Board of Contract Appeals; Honorable Stephen M. Daniels, Chairman, General Services Board of Contract Appeals; Honorable Edward Houry, Chairman, Agriculture Board of Contract Appeals; Honorable Paul Williams, Chairman, Armed Services Board of Contract Appeals; Honorable E. Barclay Van Doren, Chairman, Energy Board of Contract Appeals; and Honorable Reba Page, Chairman, Army Corps of Engineers Board of Contract Appeals.

Watch for the Annual Program and Meeting brochure in the mail. We look forward to an exciting and informative program.

ASSERTION OF PRIVILEGES BY THE GOVERNMENT TO RESIST DISCOVERY

by

Thomas J. Madden* & Jeremy K. Huffman**,
Venable, Baetjer, Howard & Civiletti, LLP, a Gold
Medal Status firm



Thomas J. Madden

The Government possesses a large arsenal of privileges that it uses to resist discovery. Although the government is bound by the same procedural rules as other parties in litigation, it can draw on several unique privileges and has often done so in the Court of Appeals for the Federal Circuit ("CAFC"), the Court of Federal Claims ("COFC"), the boards of contract appeals, and the other federal courts. The privileges that the government has successfully asserted include the following:

- 1) military or state secrets;
- 2) matters protected by executive privilege and the deliberative process;
- 3) matters protected by an investigative file privilege;
- 4) certain reports made to the government and labeled confidential by statute;
- 5) the identity of government informants;
- 6) matters protected by attorney-client privilege or the work product doctrine;
- 7) matters prohibited from disclosure by the Privacy Act, 5 U.S.C. § 552 to 559; and
- 8) matters protected by the housekeeping statute, 5 U.S.C. § 301.

In exercising its jurisdiction over patent cases, the CAFC applies the law of the pertinent regional circuit when the precise issue to be addressed involves an interpretation of the Federal Rules of Civil Procedure not unique to patent law. See Wexell v. Komar Indus., 18 F.3d 916, 919 (Fed. Cir. 1994); Nike Inc. v. Wolverine World Wide, Inc., 43 F.3d 644, 647-48 (Fed. Cir. 1994).

While the COFC has promulgated its own unique procedural rules, the COFC rules generally follow the Federal Rules of Civil Procedure ("FRCP"). Rule 1 of the COFC rules provides the following specific guidance:

The Federal Rules applicable to civil actions tried by the court sitting without a jury and in effect on December 1, 1991, have been incorporated in these rules to the extent that they appropriately can be applied to proceedings in this court.

Under 28 U.S.C. § 2503, the COFC follows the Federal Rules of Evidence in its proceedings, including Rule 501 which recognizes statutory and common law as the general basis for the assertion of privileges.

Although the boards of contract appeals have their own procedural rules as well, codified in federal regulations, see e.g. Rules of the Armed Services Board of Contract Appeals, 1 July 1997; 48 C.F.R. § 6302 (1998) (Rules of Procedure of Department of Transportation Board of Contract Appeals); 43 C.F.R. § 4 (1998) (De-

partment Hearings and Appeals Procedures of the Department of Interior), the FRCP are instructive and generally followed by the boards in the areas of discovery and privilege. See Holk Development, Inc., ASBCA No. 4307, 94-1 BCA ¶ 26,591 at 132,313 (1994). As will be seen, the boards adopt federal court precedent interpreting the FRCP and the Federal Rules of Evidence in deciding discovery disputes involving issues of privilege.

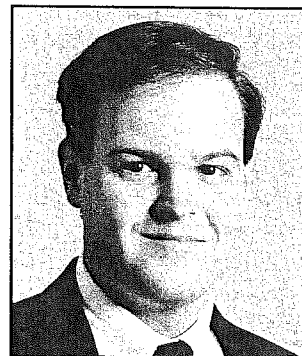
The CAFC, the COFC, and the boards of contract appeals have issued decisions on the majority of the government's discovery privileges. These tribunals' decisions are consistent with the reasoning used by other federal courts. A discussion and survey of the recognized government privileges follows.¹

1. Military or State Secrets

The Federal Courts:

The CAFC and the COFC have repeatedly addressed the government's privilege for military or state secrets. In Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989), the plaintiff alleged that he had been recruited to conduct covert military operations for the United States during the Vietnam War. His action against the United States sought to enforce an employment contract for these services. Plaintiff asserted that the court should review his secretive agreement with the United States in camera in order to determine whether a breach of contract had occurred. In dismissing plaintiff's claim, the CAFC noted that the Supreme Court, in United States v. Reynolds, 345 U.S. 1 (1953) had confirmed the existence of the common law privilege for military and state secrets "where 'there is a reasonable danger that compulsion of evidence will expose military matters which, in the interest of national security should not be divulged.'" Guong, 860 F.2d at 1066 (quoting Reynolds, 345 U.S. at 10). Reynolds explained further that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Guong, 860 F.2d at 1066 (quoting Reynolds, 345 U.S. at 11).ⁱⁱ Thus, once a court believes information falls within the military or state secrets privilege, this privilege provides absolute protection to the government.

The CAFC again discussed this privilege in In re United States, 1 F.3d 1251 (Fed. Cir. 1993), which arose from a discovery dispute



Jeremy K. Huffman

in a lawsuit by contractors McDonnell Douglas and General Dynamics against the United States after the Navy terminated a contract for the production of stealth aircraft. The contractors' attorneys sought access to classified information. Discussing the military and state secrets privilege, the CAFC explained that a court must consider whether there is a "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at *7 (citing Reynolds, 345 U.S. at 10).

The COFC's decisions regarding the military and state secrets privilege have paralleled the CAFC. "The state secrets privilege is one of common law origin. It exempts an executive agency from an obligation of disclosure it would otherwise have in litigation when the disclosure would be injurious to the national interest." See e.g. Monarch Assurance P.L.C. v. United States, 42 Fed. Cl. 258 at 259 n.4 (Fed. Cl. 1998).

In McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 270 (Fed. Cl. 1996), the court found that appropriate officials could refuse to disclose certain military and state secrets concerning materials and component information critical to "stealth" aircraft technology for the A-12 aircraft.ⁱⁱⁱ The court cited to the Supreme Court's opinion in Reynolds for the analysis of a military or state privilege claim.

In order to uphold the state secrets privilege, a court must conclude that: 1) the head of the agency controlling the secret invoked the privilege; 2) he or she did so after careful consideration of the information at issue; and 3) he or she used the proper words to invoke the privilege. McDonnell Douglas, 37 Fed. Cl. at 278; Monarch, 42 Fed. Cl. at 259 n.4. The court then must satisfy itself, by in camera review of the contested information, that disclosure would pose a significant threat to the nation's security. McDonnell Douglas, 37 Fed. Cl. At 278. Once the court makes this finding, the state and military secrets privilege is absolute. See Guong, 860 F.2d at 1066; see generally Monarch, 42 Fed. Cl. at 264.

The Reynolds analysis applied by the COFC in McDonnell Douglas has been utilized by other federal courts. The Ninth Circuit upheld an assertion of the state secrets privilege by the Air Force in Kasza v. Browner, 133 F.3d 1159, 1165 (9th Cir. 1997). The Eighth Circuit also relied on Reynolds in permitting the Central Intelligence Agency to withhold information concerning the identities of government agents and the nature of their contacts with a plaintiff. Black v. United States, 62 F.3d 1115, 1118-19 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996).

Boards of Contract Appeals:

Similar reasoning animates the few decisions of the boards of contract appeals that address the issue of military and state secrets. In Ingalls Shipbuilding Division, ASBCA No. 17717, 73-2 BCA ¶ 10,205 (1973), perhaps the most comprehensive discussion of privilege issued by a board, the Armed Services Board of Contract Appeals was presented with a contract dispute involving the construction of nuclear submarines. Speaking generally of the boards' privilege analysis, the board noted that its own Rule 15 governs discovery disputes but that "[i]n applying this rule, the board has generally followed the Federal Rules of Civil Procedure or the substantially similar Rules of the United States Court of Claims." *Id.* at 48,094.

Although the case itself presented no issue of state or military secret, the board, in dicta, recognized this privilege as a variety of executive or deliberative process privilege. *Id.* at 48,097. Citing

the Supreme Court's decision in Reynolds, 345 U.S. 1, the board acknowledged the existence of a privilege for military and state secrets "which protects the Government from production of evidence that would impair the national security or diplomatic relations." Ingalls Shipbuilding, 73-2 BCA ¶ 10,205 at 48,097. The board also noted that in Reynolds, the head of the agency had asserted the privilege. *Id.* This analysis aligns with that of the COFC.

The Veterans Administration Board of Contract Appeals similarly recognized the military and state secrets privilege and the requirement that such claims "be lodged by the head of the agency after personal consideration of the material and evaluation of the risks of disclosure." Galler Associates, Inc., VABCA No. 1535, 83-1 BCA ¶ 16,142 at 80,179 (1983) (citing Kinoy v. Mitchell, 67 F.R.D. 1, 11 (S.D. N.Y. 1975) (comparing the deliberative process privilege to military and state secrets privilege)). Although no decision appears to have actually applied these standards to an invocation of the state or military secrets privilege, the boards' analysis appears to be well-settled and adopted from the federal courts.

2. Executive Privilege and the Deliberative Process Privilege The Federal Courts:

Although courts apply different labels, executive privilege often includes the deliberative process privilege.^{iv} For the purposes of this paper, the deliberative process privilege will be treated separately from the recently newsworthy privileges, including both the executive and attorney-client privileges, arising in the context of the Office of Independent Counsel's investigation of the President. These unique situations will be addressed in the discussion of the attorney-client privilege.

As stated by the CAFC, the form of executive privilege recognized generally as the deliberative process privilege, "protects agency officials' deliberations, advisory opinions and recommendations in order to promote frank discussion of legal or policy matters in the decision-making process." Zenith Radio Corp. v. United States 764 F.2d 1577, 1580 (Fed. Cir. 1985) (citing Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958)). The Zenith court recognized that the deliberative process privilege is qualified and may be overcome by a "strong showing of need" which will overcome the policy interest in protecting the deliberations of government. Zenith, 764 F.2d at 1580. In Zenith, the plaintiff failed to demonstrate sufficient need to overcome the government's privilege. *Id.*

Until recently, the COFC's jurisprudence has been inconsistent in its approach to claims of deliberative process privilege by the government. At least one decision has held that the COFC only recognizes the executive privilege and not the deliberative process privilege. Deuterium Corp. v. United States, 4 Ct. Cl. 361, 362 (Ct. Cl. 1984). The COFC, in Abramson v. United States, 39 Fed. Cl. 290, 293 (Fed. Cl. 1997), noted this inconsistency concerning the validity of the deliberative process privilege and attempted to correct this misperception by explaining that the executive privilege includes the deliberative process privilege. Abramson, 39 Fed. Cl. at 293; see also Walsky Constr. Co. v. United States, 20 Ct. Cl. 317 (Ct. Cl. 1990); CACI Field Servs. v. United States, 12 Ct. Cl. 680 (Ct. Cl. 1987) *aff'd* 854 F.2d 464 (Fed. Cir. 1988).

The deliberative process privilege protects the government's decision-making process but will not protect purely factual information. Abramson, 39 Fed. Cl. at 295. The Abramson court recognized that the government must comply with three procedural requirements akin to those necessary to invoke the military or state

secrets privilege, in order to assert this privilege. First, the head of the agency that has control over the requested document must assert the privilege after personal consideration. Second, the agency head must state with particularity what information is subject to the privilege, and third, the agency must provide the court with precise and certain reasons for maintaining the confidentiality of the documents. *Id.* at 294. Third, after the government has met the first two procedural requirements, it must establish that the information sought is pre-decisional or addresses “activities ‘antecedent to the adoption of an agency policy.’” *Id.* at 294 (citing *Walsky*, 20 Cl. Ct. at 320). The information also must be deliberative in nature, containing opinions, recommendations, or advice pertaining to agency decisions. *Abramson*, 39 Fed. Cl. at 295.

The *Abramson* court noted that this privilege is not absolute, and can be overcome based on a court’s weighing of the litigant’s need for information against the harm that may result from disclosure. *Id.* In contrast to the military and state secrets privilege, even a validly invoked claim of privilege will be overcome by a showing of compelling need for the information. *Id.* at 296. In *Abramson*, the government met its proof and the plaintiff was unable to demonstrate a compelling need for deliberative information concerning the General Printing Office’s decision to change its overtime policy. *Id.* at 297.

The District of Columbia Circuit employed this analysis in refusing to permit the Internal Revenue Service to shield field service advice memoranda (“FSAs”) from discovery. *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 618 (D.C. Cir. 1997). The court recognized that the deliberative process privilege is a variant of the executive privilege shielding “materials which are both predecisional and deliberative.” *Id.* at 616. Nevertheless, the court denied the IRS’ assertion of the privilege because, in the court’s estimation, maintaining secrecy surrounding FSAs would permit the IRS to develop a body of secret law. The court concluded that FSAs were not predecisional but rather, were considered statements of the agency’s legal position. *Id.* at 617.

Neither the court in *Tax Analysts* nor the Fourth Circuit in *Hennessey v. United States Agency for Int’l Dev.*, 121 F.3d 698 (4th Cir. 1997) belabored the procedural aspects of this privilege discussed by *Abramson*. Nevertheless, the core issue was identical; whether the requested discovery materials reflected policy formulation and threatened, with disclosure, to inhibit an agency’s decision-making process. *Tax Analysts*, 117 F.3d at 618-619; see also *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (upholding deliberative process privilege for referral memorandum from Federal Trade Commission to Department of Justice). Although the District of Columbia Circuit and Fourth Circuit failed to employ the balancing test described by *Abramson*, the District of Columbia Circuit did acknowledge that the deliberative process privilege is qualified and can be overcome by a sufficient showing of need. *Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998).

The COFC’s criteria are consistent with other circuits, however, courts vary in their concern for the formality with which the agency asserts the privilege. Compare *CACI Field Servs.*, 12 Cl. Ct. at 686-87 with *Tax Analysts*, 117 F.3d at 616-18. In its *Zenith* decision, the CAFC did not discuss the formal invocation of the deliberative process privilege by the head of Department of Commerce or the Customs Service involved in that case. Uncertainty amongst the courts, thus, counsels caution by government agencies asserting the deliberative process privilege and suggests that any

such claim should be supported by an affidavit of the agency head.

Boards of Contract Appeals:

The boards have adopted identical requirements in their consideration of the government’s assertion of the deliberative process privilege. In *Charlesgate Constr. Co.*, LBCA No. 96-BCA-2, 1997 WL 159,854 (March 7, 1997), the Labor Board of Contract Appeals explained that “[t]he [deliberative process] privilege extends to intra-government documents reflecting advisory opinions, recommendations, and deliberations that comprise a part of the process by which governmental decisions and policy are formulated.” *Id.* at *153,264 (citing *Federal Data Corp.*, DOTCAB No. 2389, 91-3 BCA ¶ 24,063 (1991)).

Federal Data Corp. explains that the deliberative process privilege is not an absolute privilege but may be overridden based on:

- the relevance of the evidence sought to be protected;
- the availability of other evidence;
- the seriousness of the litigation and the issues involved;
- the role of the government in the litigation; and
- the possibility of chilling government employees in carrying out their duties.

Federal Data Corp., 91-3 BCA ¶ 24,063 at 120,473.

Federal Data Corp. also holds that the privilege must be formally claimed by the head of the agency having control over the matter. *Id.* at 120,471. The board applied these principles to thirteen documents claimed to be privileged by the head of the Drug Enforcement Administration and found that the documents were indeed predecisional and deliberative and that the appellant was unable to demonstrate an essential need for the board to override the privilege. *Id.* at 120,474.

Texas Instruments, Inc., 84-2 BCA ¶ 17,396, adopted these same standards, but concluded that the deliberative process privilege need only be formally asserted via affidavit where an agency wishes to avoid in camera inspection by the tribunal of the documents at issue. The Armed Services Board of Contract Appeals suggested, in this case, that this formal requirement is used by courts to insure that the privilege is being raised by individuals with specific and detailed knowledge of the disputed documents. *Id.* at 86,650.

Unisys Corp. v. Department of Commerce, GSBICA No. 12823-COM, 95-2 BCA ¶ 27,903 (1995) relied upon *Federal Data Corp.* in concluding that the privilege protects advisory opinions on legal and policy matters that are both deliberative and pre-decisional. The deliberative process privilege does not shield “factual material, summaries, or commentaries on past administrative determinations or investigations of past agency acts.” *Unisys*, 95-2 BCA ¶ 27,903 at 139,206; see also *Charlesgate*, LBCA No. 96-BCA-2, 1997 WL 159,854 at *153,264; *Automar IV Corp.*, 88-2 BCA ¶ 20,821 at 105,263; *Ingalls Shipbuilding*, 73-2 BCA ¶ 10,205 at 48,099. While adopting the standards enunciated by the federal courts concerning the deliberative process privilege, the boards have generally permitted a department head as well as a subordinate official of a high delegated authority to assert the privilege. *Wilson v. General Services Admin.*, GSBICA No. 13152, 1996 WL 627,424 at *115,570 (Oct. 22, 1996); *Federal Data Corp.*, 91-3 BCA ¶ 24,063 at 120,471; *Texas Instruments*, 84-2 BCA ¶ 17,396 at 86,650.

3. Investigative File Privilege

The Federal Courts:

Although the CAFC does not appear to have had occasion to address the investigative file privilege, the COFC issued a recent

opinion upholding an assertion of this privilege by the government. In R.C.O. Reforesting v. United States, 42 Fed. Cl. 405 (Fed. Cl. 1998), the COFC had before it a motion to compel production by R.C.O. against the U.S. Forest Service seeking to discover information concerning the termination of the government's forestry contract with R.C.O. The Forest Service invoked the investigative file privilege to protect statements by employees of R.C.O. who were interviewed during an agency investigation of R.C.O.'s practices. The COFC noted that the investigative file privilege provides a qualified privilege for files compiled for law enforcement purposes. "Where, as here, the privilege is invoked to withhold portions of files which would reveal the identity of sources, the government must show that the sources 'provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.'" Id. at 408. Citing the potential criminal consequences of the investigation and the possibility of reprisal, the COFC decided that circumstances were sufficient to infer confidentiality and uphold the investigative file privilege. Id. at 409-10.

The Fifth Circuit has indicated that federal common law recognizes a qualified privilege that protects the confidentiality of investigative files in an ongoing criminal investigation. Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991). The court noted that the privilege may be available after a weighing of the government's interest in confidentiality against the litigant's need for the documents. Id. at 1160.

Some courts have suggested that this privilege is closely related if not subsumed within the deliberative process privilege. The Ninth Circuit recognized this qualified privilege to preserve the confidentiality of investigative files in National Labor Relations Bd. v. Silver Spur Casino, 623 F.2d 571, 580 (9th Cir. 1980), cert. denied, 451 U.S. 906 (1981). The court noted that this privilege protects "informal deliberations of all prosecutorial agencies and branches of the government" and found that the privilege precluded discovery of the investigative files of a NLRB field examiner who had investigated unfair labor practice claims against the corporate defendants in Silver Spur. Id. at 580. The court also weighed the importance and materiality of the undisclosed information in upholding the privilege. Id.; see also Tuite v. Henry, 181 F.R.D. 175 at 181 (D. D.C. 1998) (upholding nondisclosure of Department of Justice Documents regarding a criminal investigation on the basis of the investigative privilege); United States v. Rockwell Int'l Corp., 144 F.R.D. 396, 402 (D. Colo. 1992) (recognizing existence of government investigative file privilege).

Boards of Contract Appeals:

The boards have been presented with few claims of investigative file privilege. Where they have considered the investigative file privilege, the boards mirror the federal courts. In Unisys Corp., 95-1 BCA ¶ 27,441, the Department of Commerce unsuccessfully asserted the investigative file privilege to shield an investigation of potential fraud by Unisys. Examining this privilege, the board indicated that the investigative file privilege had the following three procedural requirements, again closely tracking the requirements for the deliberative process privilege: there must be a formal claim of privilege by the head of the department having control over the requested information; the assertion of the privilege must be based on actual personal consideration by that official; and the information must be specified with an explanation as to why it falls within the scope of the privilege. Id. at 136,726.

The explanation of the privileged information must then permit the tribunal to consider: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceedings . . . ; (6) whether the . . . investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the [litigant's] suit is frivolous; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information to the [litigant's] case. Id. (citing In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988)).

The General Services Board of Contract Appeals, recognized an investigative file privilege without expounding upon its requirements in San Diego Wiping Materials, GSBICA No. 7659, 87-1 BCA ¶ 19,641 at 99,422 (1987).

4. Reports Made Confidential by Statute

The Federal Courts:

A survey of the case law fails to reveal decisions by either the CAFC or the COFC assessing a claim of privilege arising from a statute or regulation concerning reports made to the government. Courts considering these claims first seek a statutory basis for the government's assertion of confidentiality and then balance the interests of the litigant in having the information against the government's interest in maintaining confidentiality. See Assoc. for Women in Science v. Califano, 566 F.2d 339, 344 (D.C. Cir. 1977) (conflict of interest forms filed with the Department of Health, Education and Welfare); Canal Authority v. Froehlike, 81 F.R.D. 609, 612 (D. Fla. 1979) (environmental reports filed with the Army Corps of Engineers).

Boards of Contract Appeals:

Statutory claims of privilege have also not been subject to review by the boards of contract appeals but the boards would presumably follow the above-mentioned balancing test in assessing any such claims.

5. Identity of Government Informants

The Federal Courts:

The CAFC does not appear to have discussed the confidentiality of government informants. A balancing test, however, lies at the heart of the COFC's recognition of the government privilege to withhold the identities of informants. ATL, Inc. v. United States, 4 Cl. Ct. 374, 391-92 (Cl. Ct. 1984). The ATL court relied chiefly on Roviaro v. United States, 353 U.S. 53 (1957) to conclude that the government may refuse disclosure of informants' identities in civil or criminal cases. ATL, 4 Cl. Ct. at 392; see R.C.O., 42 Fed. Cl. at 409. Information must have been provided under circumstances that would suggest that the identity of the informer is intended to be kept secret. R.C.O., 42 Fed. Cl. at 409. This privilege is not absolute, however, and a court assessing such a claim must balance the government's interest in protecting informants against the competing interests of the litigant seeking the information. A court is to consider whether disclosure is "essential to a fair determination of

a cause.” Roviaro, 353 U.S. at 61. The COFC refused to uphold this privilege in ATL where the government sought to impose civil sanctions on a company on the basis of evidence gained from informants yet refused to reveal the evidence or the informants to the subject company. Id. at 392.

The Sixth Circuit recognized the balancing test governing the informant privilege in United States v. Young, 915 F.2d 1574 (6th Cir. 1990). In Carter, the court determined that the testimony of the informants would not have been relevant to the plaintiff’s cause and thus, the plaintiff failed to overcome the government’s privilege. The Third Circuit addressed similar facts in United States v. Brown, 3 F.3d 673 (3d Cir. 1993), cert. denied, 510 U.S. 1017 (1993), where the court employed the Roviaro balancing test and upheld the government’s privilege because the defendant was unable to demonstrate that the identity of the informant would be relevant or helpful to his defense. Id. at 679. Although these courts considered this privilege in the context of criminal cases, the balancing test and the ultimate purpose of the privilege aligned with the reasoning in ATL. See United States v. Lumpkin, 163 F.3d 608 (9th Cir. 1998), cert. denied, 119 S.Ct. 848 (1999).

Boards of Contract Appeals:

In considering whether a whistleblower should be protected from having his identity released, Inslaw, Inc., DOTCAB Nos. 1609, 1673, 89-3 BCA ¶ 22,121 (1989) discussed the informer’s privilege. “[T]he informer privilege exists, not for protection of witness or party, but because of public policy, to encourage communication of improprieties to the appropriate authorities.” Id. at 111,253. The board explained that the informer privilege, although originally arising in the criminal arena, has been extended to civil actions involving a public interest. Id. The board also noted that a court considering the informant’s privilege must conduct a balancing of conveniences. San Diego Wiping, 87-1 BCA ¶ 19,641 at 99,422, also recognized the existence of an informant’s privilege and noted that this privilege is a qualified, rather than an absolute privilege. See also Ingalls Shipbuilding, 73-2 BCA ¶ 10,205 at 48,095.

6. Attorney-Client Privilege and Work Product

The Federal Courts:

a) Attorney-Client Privilege

The attorney-client privilege “protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice.” Genentech v. United States Int’l Trade Comm’n, 122 F.3d 1409, 1414 (Fed. Cir. 1997). The CAFC considered a claim of attorney-client privilege and waiver by the government in Carter v. Gibbs, 909 F.2d 1450 (Fed. Cir. 1990) (en banc). There, the government sought to strike the plaintiff’s brief in response to the government’s motion for rehearing en banc after the government realized it had inadvertently attached a memorandum containing allegedly privileged material to its motion. The court noted that the attorney-client privilege belongs to the client and evaporates upon any voluntary disclosure of confidential information to a third-party. Id. at 1451 (citing American Standard Inc. v. Pfizer, Inc., 828 F.2d 734, 745 (Fed. Cir. 1987)). The government’s error, thus, resulted in a waiver of the attorney-client privilege.

The COFC has been presented with numerous opportunities to consider attorney-client and work product privileges asserted by the government. In Eagle-Picher Indus. v. United States, 11 Cl.

Ct. 452 (Cl. Ct. 1987), for example, the United States asserted both the attorney-client and work product privileges in refusing disclosure of certain information. The court adopted the formulation of the attorney-client privilege which provides protection if:

- 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made a) is a member of the bar of a court, or his subordinate and b) in connection with this communication is acting as a lawyer;
- 3) the communication relates to a fact of which the attorney was informed a) by his client b) without the presence of strangers c) for the purpose of securing primarily either i) an opinion on law or ii) legal services or iii) assistance in some legal proceeding, and not d) for the purpose of committing a crime or tort; and 4) the privilege has been a) claimed and b) not waived by the client.

Id. at 456 (citing United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950)). For additional cases applying this formula, see Deuterium Corp. v. United States, 19 Cl. Ct. 697, 700 (Cl. Ct. 1990) (communications from government employees to government lawyers receive full protection of attorney-client privilege); Triax Co. v. United States, 11 Cl. Ct. 130, 132 (Cl. Ct. 1986) (same).

In Eagle-Picher, the plaintiff sought to discover documents and facts relied upon by a Deputy Assistant Attorney General in preparing statements to a Congressional subcommittee. The court found that the Deputy Assistant Attorney General had sought counsel from an informed attorney prior to the testimony. An affidavit from the attorney convinced the court that the discussions between the parties were privileged as attorney-client communications. Eagle-Picher, 11 Cl. Ct. at 456.

The Sixth Circuit applied a slightly different formulation of the elements of the attorney-client privilege in Reed v. Baxter, 134 F.3d 351, 355 (6th Cir. 1998), cert. denied, 119 S.Ct. 61 (1998):

- 1) Where legal advice of any kind is sought 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence 5) by the client, 6) are at his instance permanently protected 7) from disclosure by himself or by the legal adviser 8) unless the protection is waived.
- Id. at 355-56. The court noted that loyalty is crucial to the attorney-client relationship and that the privilege encourages clients to make full disclosure to their lawyers. The court commented, however, that government assertions of the attorney-client privilege are fraught with added complexity because the privilege, when applied to government communications, conflicts with the principle of open government. Id. at 356. The court had assumed in the past that the privilege applied to government entities but did not settle the question in Reed. Id.

Although not concerning a claim of privilege by the government, the Federal Circuit discussed the attorney-client privilege and waiver in Genentech, 122 F.3d at 1415. Genentech involved a patent infringement suit by the plaintiff and the potential waiver of plaintiff’s privilege by disclosure to a third-party. “Generally, dis-

closure of confidential communications or attorney work product to a third-party, such as an adversary in litigation, constitutes a waiver of privilege as to those items.” *Id.* at 1415. The CAFC recognized that some courts will not find a waiver where a disclosure is inadvertent. *Id.* In *Genentech*, the CAFC upheld the decision of the lower court finding that an ostensibly inadvertent waiver of privilege by the plaintiff operated as a general waiver because the district court had determined that the plaintiff had taken inadequate precautions to prevent such disclosure. *Id.* at 1418.

In *B.E. Meyers & Co. v. United States*, 41 Fed. Cl. 729 at 733 (Fed. Cl. 1998), the COFC considered the waiver of the attorney-client privilege. The court determined, in the context of a patent infringement suit, that a disclosure of information by a nonparty to counsel did not waive the attorney-client privilege. The nonparty supplied the products to the defendant that allegedly infringed plaintiff’s patent. The court applied the joint defense theory to find that the nonparty and the government shared sufficient interest in the outcome of the case to utilize the joint defense privilege. The court noted that the COFC strictly construes claims of attorney-client privilege. *Id.* at 733.

In another recent case, the First Circuit considered waiver of the privilege. *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997). In the course of conducting an examination into MIT’s tax-exempt status, the IRS requested that MIT disclose its billing statements to law firms and minutes of the MIT Corporation. MIT produced redacted versions of these documents asserting attorney-client and work product privileges. Earlier, these documents had been provided in unredacted form to the Department of Defense Contract Audit Agency during review of MIT’s performance on defense contracts. The IRS sought to obtain the documents from the auditing agency. *Id.* at 683.

A district court held that the disclosure of the legal bills to the audit agency forfeited the attorney-client privilege. The privilege remained intact with regard to the minutes because the government had not proven that they had been disclosed to the audit agency. *Id.* The court determined that none of the documents were prepared in anticipation of litigation and, as a result, the work product privilege did not apply. *Id.*

On appeal, the First Circuit turned to the common law. The court noted that courts have upheld the attorney-client privilege where information is disclosed within a small circle of people including secretaries, interpreters, and counsel for cooperating co-defendants. *Id.* at 684. Disclosure outside of this circle, however, has been held to waive the attorney-client privilege. The court concluded that “MIT’s disclosure to the audit agency resulted from its own voluntary choice, even if that choice was made at the time it became a defense contractor and subjected itself to the alleged obligation of disclosure.” *Id.* at 686. Because MIT had disclosed the information to a third party, it had waived the attorney-client privilege.

Similarly, the court held that the work product privilege allegedly protecting the minutes had been forfeited when MIT disclosed the information to the audit agency. The court deemed this a disclosure to a potential adversary and applied the majority rule that a disclosure inconsistent with keeping information from an adversary waives work product protection. *Id.* at 687.

These cases and other recent court decisions suggest that courts are becoming more willing to find waiver of the attorney-client privilege. See *Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1250 (D. Md. 1995) (disclosure of information to government dur-

ing settlement negotiations worked waiver of attorney-client privilege as to entire subject matter); see also *United States v. Ackert*, 169 F.3d 136, 139 (2d. Cir. 1999) (attorney-client privilege does not shield conversations between an attorney and an investment banker aimed at helping the attorney better advise his client about a proposed deal with the banker).

Two recent cases have shed substantial light on the attorney-client privilege as it applies to government attorneys counseling government clients. In *re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.), cert. denied, ___ U.S. ___, 117 S.Ct. 2482 (1997) and *In re Bruce Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) cert. denied, ___ U.S. ___, 119 S.Ct. 466 (1998), each arose from the Office of Independent Counsel’s investigation of the Clintons.

Grand Jury Subpoena, involved assertions by Hillary Clinton that her communications with White House counsel were shielded by the attorney-client privilege and work product doctrine. The Eighth Circuit clearly distinguished the issue before it from a situation involving the personal attorney of a government employee. *Grand Jury Subpoena*, 112 F.3d at 915. The court concluded that a government organization could, in theory, assert the attorney-client privilege, but refused to permit the invocation of the privilege to shield information from a criminal grand jury.

In its opinion, the Eighth Circuit considered two possible paradigms for the government attorney-client privilege as represented by two Supreme Court decisions. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court considered President Nixon’s assertions of executive privilege to shield information from a criminal investigation. The Supreme Court recognized the existence and Constitutional basis for the executive privilege but held that this privilege is qualified, and must yield to a criminal investigation. Alternatively, *Upjohn Co. v. United States*, 449 U.S. 383 (1981) created precedent concerning the corporate attorney-client privilege. In *Upjohn*, relied upon by the White House, the Supreme Court spoke of the general importance of the attorney-client privilege to the legal system and held that conversations between corporate counsel and corporate employees were privileged to the extent they concerned an employee’s actions within the course of employment.

In weighing these two options, the Eighth Circuit was persuaded that the public interest inherent in the duties of government counsel removed this case from the *Upjohn* model. The court adopted *Nixon*’s proposition that “the government’s need for confidentiality may be subordinated to the needs of the government’s own criminal justice processes.” *Grand Jury Subpoena*, 112 F.3d at 919. Assessing the impact of its ruling, the Eighth Circuit stated that “a government attorney is free to discuss anything with a government official – except for potential criminal wrongdoing by the official – without fearing later revelation of the conversation.” *Id.* at 921. The court was not persuaded by the White House’s argument that government employees would be chilled in their interaction with government attorneys. The court was similarly unconvinced by arguments that either the presence of Ms. Clinton’s private attorney, or Ms. Clinton’s belief that the privilege applied at the time of the conversations, supported the application of the attorney-client privilege. *Id.* at 922 – 923.

Similar issues arose before the D.C. Circuit, in *Lindsey*, 148 F.3d 1100. The *Lindsey* court considered whether the government attorney-client privilege extends to information concerning federal crimes sought by a federal grand jury. The court’s opinion, like *Grand Jury Subpoena*, drew a clear distinction between the per-

sonal attorney-client privilege and the government attorney-client privilege. “[Government attorneys’] duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. [] Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.” *Id.* at 1108.

This policy consideration was further emphasized by the D.C. Circuit with a quotation from *Grand Jury Subpoena*. “[T]o allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a criminal investigation would represent a gross misuse of public assets.” *Lindsey*, 148 F.3d at 1110. On this basis, the court concluded that the attorney-client privilege cannot prevent a government attorney from providing information concerning potential criminal acts to a federal grand jury.

During a recent roundtable discussion of these precedents, Philip Lacovara summarized the policy underlying these decisions as follows: “[t]he public has the ultimate interest in finding out what the truth is, and government lawyers should not be obstacles to that pursuit.” *Lawyer’s Roundtable, Attorney Client Privilege - Does it Pertain to the Government*, *The Washington Lawyer*, January/February 1999 at 34. These precedents necessarily place government attorneys’ clients on notice that only personal counsel should be involved in any discussions having potential criminal ramifications.

In their decisions, both circuits noted the existence of the executive privilege, recognized by the Supreme Court in *Nixon*, to protect advice and communications between the President and his advisors. In *Nixon*, the Supreme Court found this privilege to be qualified rather than absolute, and held that it could be overcome by a criminal investigation. Each circuit determined that the existence of the qualified protection of the executive privilege placed limits on the scope of the government attorney-client privilege. The *Lindsey* court noted that:

[o]nly a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President’s conversation with the most junior lawyer in the White House Counsel’s Office is deserving of more protection from disclosure in a grand jury than a President’s discussions with his Vice President or a Cabinet Secretary.

Lindsey, 148 F.3d at 1114. Both courts rejected the balancing test inherent in *Nixon*’s executive privilege rule, opting instead to strike altogether the government attorney-client privilege in the context of grand jury inquiries. In *Lindsey*, the court acknowledged that Bruce Lindsey was still protected by the executive privilege as any other advisor, but that his position as a government attorney could not shield information from a criminal grand jury. *Lindsey*, 148 F.3d at 1114.

By relying on *Nixon*, both courts rejected the corporate attorney-client privilege model delineated by *Upjohn* and traditionally analogized to the government attorney-client privilege. The circuits, in *Grand Jury Subpoena* and *Lindsey*, refused to characterize the government as a “corporation” and permit its employees to confidentially discuss criminal matters with its attorneys. As noted above, the government attorney’s role as a public official undercut this analogy.

Critics of these decisions fear that government employees will

now be chilled in their communications with government lawyers. Roundtable at 37 – 38. Critics argue further, that by placing this obstacle between government attorneys and government employees, employees will be forced to discuss certain matters, impacting national security and welfare, with personal attorneys for fear of future criminal investigation. *Id.* at 37. Emphasizing the practical rarity of this situation, however, attorney-client privilege expert, Paul Rice, suggested that government officials do not often consult with government attorneys concerning the commission of criminal acts. *Id.* at 38. Whatever the frequency of such conversations, neither court found these concerns compelling and concluded, instead, that any chilling effect was merely a necessary consequence of open government. See *Lindsey*, 148 F.3d 1100.

In light of the distinctions now drawn in the attorney-client privilege on the basis of the status of the attorney and client, government attorneys cannot counsel government clients regarding criminal matters with any confidence that their communications will be protected. If nothing else, the roundtable panel members agreed that, for better or worse, a clear rule has been fashioned in the grand jury context. *Id.* at 50. This fact is underscored by the Supreme Court’s denial of certiorari in both cases. Less clear, however, is the status of the government attorney-client privilege outside of the grand jury room.

Boards of Contract Appeals:

The formulations of the attorney-client privilege applied by the federal courts are also followed by the boards of contract appeals. The board deciding *B.D. Click Co.*, ASBCA No. 25609, 83-1 BCA ¶ 16,328 at 81,172 (1983), cited the widely accepted definition of the privilege enunciated in *United Shoe Mach.*, 89 F. Supp. at 358. See also *Federal Data Corp.*, 91-3 BCA ¶ 24,063 at 120,475. Other boards cite the Supreme Court’s decision in *Upjohn*, 449 U.S. at 389, for the proposition that the privilege protects not only the giving of professional advice but also the communication of information to the lawyer to enable him/her to give sound advice. See *Sierra Rock v. Regents of University of California*, EBCA No. C-9705223, 98-2 BCA ¶ 30,083 (1998); *Superior Timber Co.*, IBCA No. 3459, 97-2 BCA ¶ 29,112 at 144,864 (1997); *Wilson*, GSBCA No. 13152, 1996 WL 627,424 at *115,569.

Wilson held that the privilege protects not only communications made by a client to a lawyer but also communications of the lawyer to the client which reveal the substance of a confidential communication by the client. Both *Sierra Rock* and *Wilson* also demonstrate that the application of the work product doctrine by the boards parallels the federal courts. See also *Ingalls Shipbuilding*, 73-2 BCA ¶ 10,205 at 48,104.

A number of boards have noted, like the COFC, that the attorney-client privilege is to be narrowly construed. *Sierra Rock*, 98-2 BCA ¶ 30,083; *B.D. Click Co.*, 83-1 BCA ¶ 16,328 at 81,173.

The Federal Courts:

b) Work Product Privilege

The CAFC’s decision in *Carter v. Gibbs* also addressed the work product doctrine. The purpose of the work product doctrine “is to prevent the disclosure of an attorney’s mental impressions and thought processes either to an opponent in the litigation for which the attorney generated and recorded those impressions, or to a third party with interests not ‘common’ to those of the party asserting the privilege.” *Carter*, 909 F.2d at 1450; see *Zenith Radio Corp.*, 764 F.2d at 1580. Unlike the attorney-client privilege, how-

ever, the CAFC has ruled that this privilege is not in all cases frustrated and consequently waived by a voluntary disclosure of confidential information. Where the government had attached a legal memorandum to a brief delivered to the opposing party, however, the purpose beneath the work product privilege had been defeated. "Voluntary disclosure of attorney work product to an adversary in the litigation for which the attorney produced that information defeats the policy underlying the privilege . . ." *Id.* at 1451.

The COFC in *Eagle-Picher* also recognized that the work product privilege "complements the attorney-client privilege insofar as protecting the production of an attorney, or those working for him, from the time litigation is anticipated." *Eagle-Picher*, 11 Cl. Ct. at 457. Factual work product is distinguished from opinion work product in that it is discoverable upon a showing of substantial need and inability without undue hardship to obtain the undisclosed information. *Id.* at 457. Discovery of opinion work product, however, is more rarely compelled. *Id.*

The *Eagle-Picher* court concluded that the work product privilege protected documents discussed in a Deputy Assistant Attorney General's briefing with an outside attorney. *Id.* at 457. The court considered a split in the case law concerning work product protection for documents prepared in anticipation of one case and then withheld from production in another. *Id.* (citing *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977)). The court adopted what it interpreted to be the majority approach and protected documents included in the briefing with outside counsel as well as documents prepared in anticipation of previously terminated litigation by the Department of Justice. *Id.* at 458.

Tax Analysts applied the work product doctrine in the same manner as *Eagle-Picher* to protect field service advice memoranda prepared by the IRS to the extent they were deliberative products containing attorneys' mental processes and were prepared in anticipation of litigation. *Tax Analysts*, 117 F.3d at 620. The District of Columbia Circuit in *Tax Analysts* cited FRCP 26 (b) (3) in defining work product to shield materials "prepared in anticipation of litigation or for trial by or for [a] party or by or for that . . . party's representative (including the . . . party's attorney, consultant, . . . or agent)." *Tax Analysts*, 117 F.3d at 620. The court also noted that factual work product, not containing mental impressions, could be disclosed upon a showing of "substantial need." *Id.* As such, the D.C. Circuit's analysis pursuant to the FRCP paralleled the common law logic employed by the COFC in *Eagle-Picher*.

It appears that the definition of documents "prepared in anticipation of litigation" may still be subject to some minor variation between the circuits. *Eagle-Picher* adopted the majority rule that even work product from terminated litigation may later be protected in subsequent related litigation. *Eagle-Picher*, 11 Cl. Ct. at 457; see *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 659-60 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483-84 (4th Cir. 1973). The D.C. Circuit may require a closer relationship between work product and specific litigation before granting work product protection. In certain contexts, the District of Columbia Circuit has considered whether a specific claim exists at the time alleged work product is created. A recent decision demonstrates that this factor is not determinative in the court's work product analysis. See *In re Sealed Case*, 146 F.3d 881, 885-87 (D.C. Cir. 1998).

Unlike the COFC, the CAFC does not appear to have directly addressed the relationship between work product and subsequent litigation. In practice, the difference between the circuits is minor,

and the approach of the COFC is consistent with the majority practice. Moreover, the Supreme Court has given indirect support to the majority rule in a Freedom of Information Act case, *Federal Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 28 (1983) (finding that FTC documents from civil penalty action were protected in subsequent FOIA action).

Boards of Contract Appeals:

"The work product privilege is designed to safeguard the fruits of counsel's trial preparation from discovery by the opposing parties." *Sierra Rock*, 98-2 BCA ¶ 30,083. The boards have again followed the federal courts with respect to the work product privilege. Specifically, they cite the codification of the common law work product doctrine in FRCP 26 (b) (3) "which provides that documents prepared in anticipation of litigation or for trial . . . are discoverable only if the party seeking the documents has a substantial need for them and is unable without undue hardship to obtain the substantial equivalent of the documents by other means." *Wilson*, GSBCA No. 13,152, 1996 WL 627,424 at *115,569; *Ingalls Shipbuilding*, 73-2 BCA ¶ 10,205 at 48,096. In *Wilson*, the General Services Administration Board of Contract Appeals determined that the government could not demonstrate that a number of documents were prepared in anticipation of "pending or impending" litigation. *Wilson*, GSBCA No. 13,152, 1996 WL 627,424 at *115,569. Lacking evidence that "counsel was at this time planning on litigating with appellant" no work product privilege arose. *Id.*

The boards have been consistent in holding that documents prepared in the course of ordinary business, rather than for purposes of litigation are not protected by this privilege. *Taylor v. General Services Admin.*, GSBCA No. 12915, 96-1 BCA ¶ 27,958 at 139,657 (1996). Documents must have been prepared by or at the direction of an attorney. *Charlesgate*, LBCA No. 96-BCA-2, 1997 WL 159,854 at *153265. This determination is made on a case-by-case, document-by-document basis. *Taylor*, 96-1 BCA ¶ 27,958 at 139,657; *Sierra Rock*, 98-2 BCA ¶ 30,083.

As in the federal courts, the boards draw a distinction between opinion and fact work product. Opinion work product, once established, receives absolute protection barring extraordinary circumstances, while fact work product may be discovered with a showing of substantial need. *Taylor*, 96-1 BCA ¶ 27,958 at 139,657.

7. Privacy Act

The Federal Courts:

The Privacy Act has had little effect on discovery because it includes an exception requiring the government to release materials upon court order even if those materials are protected by the Act. 6 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 26.52 [6] [c] (Matthew Bender 3d. ed.); 5 U.S.C.A. § 552a (b) (11) (West 1996 & Supp. 1998). Although research discloses no CAFC decisions discussing the Privacy Act in the discovery context, the COFC addressed the above exception in *Martin v. United States*, 1 Cl. Ct. 775, 781-82 (Cl. Ct. 1983).

In *Martin*, the plaintiff leased a parcel of land to the government and the government agreed to hire twenty-four hour security guards to patrol the property. After three suspicious fires occurred, the plaintiff filed suit for breach of lease and sought to discover the security guards' employment files. After reviewing a number of cases considering the Privacy Act's exception for the disclosure of court orders, the court applied a balancing test to determine whether to compel disclosure of the employment files. *Id.* The court conducted an in camera review of the files and concluded that the rel-

evance of certain documents outweighed the government's interest in confidentiality because the files contained evidence of the government's effort to conduct background checks on the security guards. *Id.* at 778. See e.g. *Croskey v. United States*, 24 Cl. Ct. 420, 428 (Cl. Ct. 1991) (refusing to levy discovery sanctions on the government where undisclosed documents may be subject to the Privacy Act).

The analysis employed by the court in *Martin* is consistent with other federal courts' consideration of the Privacy Act's effect on discovery. The District of Columbia Circuit, in *Laxalt v. McClatchy*, 809 F.2d 885 (D.C. Cir. 1987), reversed a district court's ruling that the court order exception to the Privacy Act would apply only upon a showing of need for the undisclosed information by the litigant. The *Laxalt* district court, had, in effect, created a qualified discovery privilege on the basis of the Privacy Act. The circuit court disagreed with this interpretation of the Privacy Act and concluded instead that material protected by the Privacy Act was discoverable according to the discovery standards of the FRCP. *Id.* at 889. This standard only requires a showing of relevance to discover materials protected by the Act. *Id.* at 888. Nevertheless, the court recognized that judges may exercise their discretion under the FRCP to issue protective orders or undertake in camera review wherever justified. *Id.* at 889. The court further noted that the FRCP contemplate a balancing of interests when courts consider discovery requests. Necessity, however, is not "a prerequisite to initiating discovery of records subject to the Privacy Act." *Id.* at 890. See *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980) (Privacy Act does not create a qualified discovery privilege); *Forrest v. United States*, No. 97-3367, 1998 WL 230200 (E.D. La. May 6, 1998) (citing *Laxalt*).

Commentators suggest that other courts have attributed the balancing test gleaned from the FRCP in *Laxalt*, to the Privacy Act itself. 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.52 [6] [c] (Matthew Bender 3d. ed.) (citing *Perry v. State Farm Fire & Cas. Co.*, 734 F.2d 1441, 1447 (11th Cir. 1984)). Whatever the source of the test, the *Laxalt* and *Perry* courts each balanced the relevance of the undisclosed information against the government's interest in confidentiality. The approach adopted by the court in *Martin* addresses the same interests without identifying the FRCP as the source of the test.

Boards of Contract Appeals:

Research has not uncovered discovery disputes in the boards of contract appeals implicating the Privacy Act.

8. Housekeeping Statute

The Federal Courts:

Housekeeping statutes have not been addressed specifically by the CAFC or the COFC although other federal courts have had occasion to address privileges ostensibly premised on such statutes.

The Ninth Circuit addressed the assertions of privilege arising from housekeeping statutes and discovery against the government as a non-party in *Exxon Shipping Co. v. United States Dep't. of Interior*, 34 F.3d 774, 780 (9th Cir. 1994). The housekeeping "privilege" ostensibly arises from 5 U.S.C. § 301, which provides that the head of a federal agency may promulgate regulations for "the conduct of [the agency's] employees" and "the custody, use, and preservation of [the agency's] records, papers, and property." 5 U.S.C. § 301 (1996). Federal agencies have utilized this statute to implement agency regulations requiring agency officials to give their approval before any agency employees may testify or provide

agency records in disputes to which the government is not a party. Recent Case, 108 HARV L. REV. 965 (1995). For example, the Department of Energy's housekeeping regulations are codified at 10 C.F.R. § 202.21 - 202.26 (1998):

No employee or former employee of the DOE shall, in response to a demand of a court or other authority, produce any material contained in the file of the DOE or disclose any information relating to material contained in the files of the DOE, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the General Counsel of DOE.

10 C.F.R. § 202.22. Pursuant to this regulation, the DOE may apparently forbid its employees from responding to discovery requests either for deposition testimony or the production of documents.

In *Exxon*, the Ninth Circuit cast doubt on the reach of such housekeeping regulations when it refused to permit the Department of Interior to avoid discovery requests on the basis of a housekeeping statute. *Exxon*, 34 F.3d at 780. In 1989, commercial fishermen, landowners, local governments, and businesses allegedly damaged by the Exxon Valdez oil spill, instituted litigation against Exxon. *Id.* at 775. In the course of discovery, Exxon issued a notice of deposition and subpoena to ten federal employees working for five federal agencies. *Id.* at 776. The government refused to comply with the discovery requests and instructed agency employees not to submit to depositions. *Id.* The agencies relied on their housekeeping regulations promulgated under 5 U.S.C. § 301 as well as a Supreme Court case, *Touhy v. Ragen*, 340 U.S. 462 (1951). Exxon thereafter filed a complaint against the government seeking to compel testimony by these agency employees. *Exxon*, 34 F.3d at 776. The district court found in favor of the United States and Exxon appealed to the Ninth Circuit. *Id.*

The Ninth Circuit reversed the district court and required the agency employees to testify. In reaching its decision, the Ninth Circuit concluded that § 301 did not create a privilege and that a federal agency could be compelled to submit to discovery by a federal court. *Id.* at 778. The court determined that sovereign immunity did not apply when a federal court exercised its subpoena power against federal officials. *Id.* The court held that:

[s]ection 301 does not create an independent privilege to withhold government information or shield federal employees from valid subpoenas. Rather, district courts should apply the federal rules of discovery when deciding on discovery requests made against government agencies, whether or not the United States is a party to the underlying action.

Id. at 780. The court concluded that FRCP 26 (c) and 45 (c) (3) gave district courts sufficient discretion to weigh a litigant's interest in discovering information against the government's interest in maintaining confidentiality. The court determined that the FRCP empowered courts adequately to grant motions to quash or modify subpoenas creating an undue burden on the government without the housekeeping privilege. The Ninth Circuit also noted that common law privileges such as the state secret privilege could still be asserted by the government. *Exxon*, 34 F.3d at 779.

The housekeeping statute was also relevant to a recent Eighth Circuit decision. *United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288 (E.D. Mo. 1997), *aff'd*, 132 F.3d

1252 (8th Cir. 1998). In the course of litigating a False Claims Act charge, the Department of Defense, at the direction of Government attorneys, sent a questionnaire to the defendant's current and former employees. The questionnaire requested information concerning any mischarging of labor by defendant, who asserted Missouri Supreme Court Rule 4-4.2, which prohibits counsel from communicating about the subject of representation, with a party known to be represented by another lawyer, unless the party's lawyer gives consent. In the context of organizations, the comment to Rule 4-4.2 explains that communications are prohibited with persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

The district court determined that the defendant could be held liable under the False Claims Act for the acts or omissions of its current employees involved in the alleged mischarging. On the basis of this finding, the court applied Rule 4-4.2 and precluded the government from making ex parte contact with defendant's current employees. The court refused to enforce Department of Justice regulations promulgated pursuant to the housekeeping statute, 5 U.S.C. § 301, allegedly preempting state ethical rules on this issue. With regard to former employees, the court concluded that only former employees who were represented by counsel were off-limits to the government. The court did, however, require the government to maintain a list of all former employees contacted. The Eighth Circuit affirmed the district court's decision. These decisions suggest that assertions of privilege premised on the housekeeping statute and its implementing regulations will not provide the government protection during discovery.

Boards of Contract Appeals:

The logic underlying the Exxon ruling has also been adopted by the boards. The Armed Services Board of Contract Appeals, in Towne Realty, Inc., held that 5 U.S.C. § 301 "does not bestow any special privilege on the executive agencies to refuse to release information for use in litigation. It bestows the right to provide control over the paperwork within the agency." Towne Realty, Inc., ASBCA No. 30538, 86-3 BCA ¶ 19,104 at 96,566 (1986). This holding arose in the context of the Department of Defense's assertion of its own regulations, promulgated under § 301, in response to a discovery request. It appears, therefore, that the boards will similarly fail to recognize any privilege based upon the housekeeping statute.

Conclusion and Practical Considerations

Where the CAFC, the COFC, and the boards of contract appeals have considered the unique privileges available to the government, their analysis has largely paralleled the reasoning of the other federal courts. As such, government privilege decisions are generally consistent between these tribunals, recognizing, in a number of contexts, the advantages that the government brings to litigation in which it is a party. For this reason, the practitioner must be aware of the panoply of privileges available to the government, and must assess the impact of the government's privileges in devising a prudent litigation strategy. Practical considerations include the following:

- Most government privileges are qualified and may be overcome by a showing of sufficient need for the information by the contractor (the major exception is the military or state secrets privilege);

- Attorneys should approach information exchanges with the government cautiously so as to avoid broad subject matter waivers of privilege and ensure that all communications intended to be protected hew closely to the traditional requirements of the privilege contained in United Shoe;
- When confronted with a government assertion of an executive-type privilege or the deliberative process privilege, the contractor may be able to obtain information by demonstrating a failure by the government to meet the specific procedural requirements applicable to that privilege;
- Assertions of executive privileges may also be defeated where the government seeks to extend the privilege beyond the limited categories of information protected by the privilege or fails to demonstrate that certain information falls within these categories;
- Government contractors regularly involved in classified contracts involving military secrets and national security, when entering into these agreements, should have a full understanding of the negative effect that the military or state secrets this privilege may impose on their ability to recover for constructive changes in their contracts and on the availability or discovery of information in any future litigation against the government;
- Above all, attorneys must be prepared to deal with the adverse impact on their claims that arise out of the unique privileges that the government may utilize to shield information that would be regularly disclosed in litigation between private parties.

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¹ Courts often consider privilege claims in the context of Freedom of Information Act requests and are, thus, called to interpret exemptions such as Exemption 5, 5 U.S.C. § 552(b)(5), "protecting inter-agency or intra-agency memoranda . . . which would not be available by law to a party other than an agency in litigation with the agency." Decisions regarding these exemptions are premised on similar principles applied to common law privilege claims and, as a result, are useful in either context. See Automar IV Corp., DOTCAB No. 1867, 88-2 BCA ¶ 20,821 at 105,263 n.3 (1988); Texas Instruments, Inc., ASBCA No. 23,678, 84-2 BCA ¶ 17,396 at 86,649 (1984).

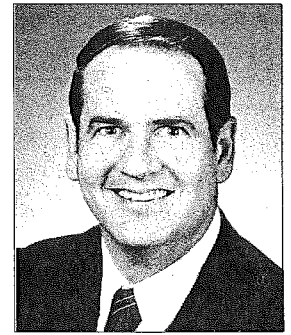
² The CAFC and the COFC have also recognized the Totten doctrine which holds that contracts to perform "secret services" for the United States are unenforceable in court. See Air-Sea Forwarders, Inc. v. United States, 39 Fed. Cl. 434,440 (Fed. Cl. 1997) (citing Totten v. United States, 92 U.S. 105 (1875)), aff'd in part, 1999 WL 25407 (Fed. Cir. Jan. 21, 1999). Totten involved an action by a spy's estate to recover compensation for services performed for President Lincoln in a spy operation. Totten, 92 U.S. at 107. In Reynolds, the Supreme Court reaffirmed Totten by stating that a special species of military or state secret exists where "the very subject matter of the action, a contract to perform espionage, was a matter of state secret." Reynolds, 345 U.S. at 11 n.26. See Guong, 860 F.2d at 1065.

³ A recent decision by the Court of Appeals for the Federal Circuit, McDonnell Douglas Corp. v. United States, 1999 WL 450934 (Fed. Cir. July 1, 1999), determined that the trial court erred in converting the government's termination of the A-12 contract to a termination for convenience. The court expressed no view as to whether the military and state secrets privilege could prevent a contractor's pursuit of a superior knowledge claim against the government and remanded the issue to the trial court for reconsideration.

⁴ The term "executive privilege" is used to describe numerous privileges including the deliberative process privilege, the military and state secrets privilege, and the Constitutional executive privilege recognized by the Supreme Court in United States v. Nixon, 418 U.S. 683 (1974). See Ingalls Shipbuilding, 73-2 BCA ¶ 10,205 at 98,097.

APPEALS PROCEDURES UNDER MEDICARE CONTRACTS: A CASE OF LESS IS MORE

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While government contracts practitioners are increasingly becoming involved in health care contracting, few have any knowledge of or experience with the appeals procedures under Medicare contracts, and specifically how an appeal is made. As shown below, appeals under Medicare contracts — even those involving tens of millions of dollars — entail far less litigation than cases under the Contract Disputes Act. As such, they are illustrative of a minimalist approach — used successfully for decades — to resolving government contract disagreements.

Introduction

For those unfamiliar with the Medicare system, it is important to first understand who the players are. To begin with, there are several different kinds of health care service providers. They are generally classified as either a skilled nursing facility (SNF, but referred to as a “SNIF”), a home health agency (HHA), a comprehensive outpatient rehabilitation facility (CORF), or a hospital. Technically speaking, there are other kinds of providers (referred to in the regulations as “other entities”), but they are encountered so infrequently that they are ignored for the purpose of this article.¹

Providers submit a Medicare cost report to a designated fiscal intermediary in their state. After reviewing the submission, the fiscal intermediary determines the total amount of payment due the provider under Title XVIII (Medicare). This determination is detailed in the Notice of Amount of Program Reimbursement (NPR), wherein both the computation of the amount due and the authoritative basis of the fiscal intermediary’s position is set forth. In addition, the fiscal intermediary determines whether any interest charges apply. Finally, just as in a contracting officer’s Final Decision, the provider is informed that it may request a hearing over any determination made in the NPR.

Any request for a hearing must meet the following requirements:

- The request must be in writing;
- The request must be made within 180 days after receipt of the NPR;
- If the amount disputed is between \$1,000 and less than \$10,000, the request must be filed with the fiscal intermediary;

- If the amount in dispute is \$10,000 or more, the request must be filed with the Provider Reimbursement Review Board (PRRB); and finally,
- Any appeal filed by providers under common control must be brought before the PRRB as a group appeal for matters involving a common issue and for which the amount in dispute is \$50,000 or more.

In short, there are two types of appeals under the Medicare payment system. One appeal is to the fiscal intermediary, where the amount in dispute is over \$1,000 but under \$10,000, and the other appeal is to the PRRB, for all appeals of \$10,000 and more. In government contract litigation, agency board jurisdiction is based on time (i.e., whether the contractor filed its appeal within 90 days), but in Medicare appeals jurisdiction is based on both time (180 days) and money (amount in dispute).

Intermediary Hearings

The fiscal intermediary’s determination in the NPR is final and binding on the provider unless an appeal is made.

The appeals procedures themselves are found in the Medicare regulations² as supplemented by the guidance in Chapter 29 of the Provider Reimbursement Manual (PRM). A provider’s request for a hearing, submitted with an original and one copy, normally follows the model form found in the Provider Reimbursement Manual (see Exhibit 1).

The requirements applicable to a hearing request by “other entities” also must be made in writing within 180 days after receipt of the NPR, but the amount in dispute must be at least \$1,000 and may only be made to the fiscal intermediary. They have no right to a hearing before the PRRB.

There are some fiscal intermediaries that have additional minor, administrative requirements that a provider must meet to perfect a request for a hearing, but this information would be specifically delineated in the notice sent to the provider.

The decision concerning a provider’s right to a hearing (i.e., whether the jurisdictional requirements have been met) is unilaterally made by the fiscal intermediary hearing officer or the PRRB, depending on where the provider’s hearing request is made.

The intermediary hearing officer has exclusive jurisdiction to decide disputes where the amount involved is over

\$1,000 but less than \$10,000. That said, there are many significant procedural differences between appeals of contract disputes and appeals of Medicare reimbursement disputes. For example, consider the issue of an appeal that is filed untimely. Under the Contract Disputes Act, timeliness is jurisdictional, i.e., an untimely appeal forfeits the contractor's right.³ Untimely appeals of Medicare reimbursements, though, may still be permitted to go forward where the hearing officer "finds good cause has been established⁴." The extension of time to file an appeal may not, however, be extended past three years after the date the NPR was received by the provider.

Almost anyone can represent a provider at an intermediary hearing⁵, although an organization may not be a representative. Moreover, almost anyone can be an Intermediary Hearing Officer, whether or not they work for the fiscal intermediary⁶. Although the individual "should be knowledgeable in the field of health care payment," the only requirement for a hearing officer is impartiality, specifically, no "involvement in the intermediary determination on which the hearing has been requested." This contrasts sharply with the qualifications of judges on the agency boards of contract appeals.

The intermediary hearing officer alone determines the amount in dispute. If the amount is judged to be less than \$1,000, the appeal will be dismissed without either a hearing or pre-hearing conference (though HCFA does review such determinations⁷). If the amount is determined to be \$10,000 or greater, the entire appeal will simply be transferred without prejudice to the PRRB⁸.

Contrary to the formal litigation experienced at the agency boards of contract appeals, the intermediary hearing itself is non-adversarial. As the Provider Reimbursement Manual states⁹:

The purpose of the hearing is not to oppose the provider (entity); it is to ascertain by an independent and impartial examination the facts in the case and to make a reasoned judgment on the validity of the contentions asserted by the provider (entity).

Unlike judges at agency boards of contract appeals, intermediary hearing officers have no authority to administer oaths or subpoena evidence¹⁰. Hearings on the record are permitted when requested by a provider. However, the hearing officer will grant the request only if he can conclude that "the record will be complete enough to support a sound decision without oral testimony¹¹." Where a hearing will be held, the hearing officer may call a pre-hearing conference to handle preliminary arrangements and reduce the matters in dispute. There is no discovery, as that term is normally understood in litigation, because there are no depositions or interrogatories¹². However, a provider is permitted to examine and copy all evidence on which the fiscal intermediary's decision is based.

The intermediary hearing officer's jurisdiction is much narrower than that of a judge of an agency board of contract appeals. For example, the hearing officer is largely restricted to considering the questioned payments only, and may not con-

sider any corollary issues arising out of the provider agreement, the interim rate of payment established by the fiscal intermediary, the validity of any cost limits or indices established by HCFA (or for that matter, any HCFA regulations, instructions or rulings), or even matters concerning the assigned diagnosis related group (DRG) coding of individual patient cases. In fact, there are seventeen specific areas that are beyond the jurisdiction of the hearing officer to consider¹³. Obviously, it was HCFA's intent that a hearing officer decide only the propriety of the intermediary's determination of reimbursement being appealed, and nothing more.

The notice of the hearing follows the format shown in Exhibit 2. As for the conduct of the hearing itself, the rules of evidence do not apply¹⁴:

The hearing officer is explicitly given authority to disregard the rules of evidence applicable to court procedure and is to consider the use of such evidence proper so long as it is of probative value and the provider (entity) or other party has been given the opportunity to refute it.

The hearing officer must also establish a thorough record. "Since the hearing is non-adversarial in nature, the hearing officer has the primary responsibility for creating the record on which the decision will be based¹⁵."

After the participants have introduced themselves, the hearing normally begins with an opening statement by the hearing officer, who relates the following¹⁶:

- The identification of the hearing (caption of the case, participants, and so on);
- The provider's hearing rights, including (if appropriate) having the hearing held at an intermediary's local office;
- Identification of the hearing officer, the authorization for the hearing, a brief statement about the subject matter and the finality of the decision, and a statement that the decision must comply with Title XVIII of the Social Security Act as well as HCFA's regulations and instructions;
- A statement that the rules of evidence are not applicable and that the proceedings will be conducted in an orderly manner;
- A statement that a formal record will be made, which will consist of both the documentary evidence and a transcript of the hearing;
- The parties may submit briefs after the close of the hearing;
- A procedural chronology of significant events in the case;
- The applicable laws, regulations, HCFA rulings and instructions; and finally
- The issues to be resolved.

When the opening statement is finished, the hearing officer asks whether any participant disagrees with anything

said up to that point, and clarifies disagreements as necessary. After the hearing officer's opening statement, the documentary evidence is introduced.

Because the provider is challenging the determination(s) made by the fiscal intermediary, it usually puts its case on first (in this respect, it acts as a quasi-plaintiff, although the proceedings are technically non-adversarial). The intermediary acts as a quasi-defendant in that it produces evidence to support its reimbursement determination.

Unlike a hearing before an agency board, the questioning of a witness is normally initiated by the hearing officer, followed by questions from the party's representative. Also, the hearing officer may summon witnesses whom the parties have not suggested, including experts¹⁷.

Briefs must be submitted within ten days after the hearing closes (one copy to the hearing officer and one copy to the other party). In contrast with trials before agency boards, copies of the hearing transcript are provided without charge¹⁸. Reply briefs, which are also called rebuttals, must be submitted within ten days from the date of the mailing of the brief (*not* the date the brief was received¹⁹). In government contract litigation, the general rule is that the record closes when the hearing concludes, but in appeals to an intermediary hearing officer the record closes when the decision is rendered.

There are special procedural rules applicable to providers that are owned by a chain, especially where several intermediaries serve the same chain provider. Perhaps the most important rule in this area is that where any one provider of the chain meets the requirements for a PRRB hearing (i.e., the amount disputed is \$10,000 or more), the provider may only appeal to the PRRB. An appeal to an intermediary hearing officer is not permitted.

As with Rule 12.3 (expedited) decisions by agency boards, decisions by intermediary hearing officers have no precedential value²¹, so each decision is *de novo*. The decisions generally follow a standard format (see Exhibit 3). Only HCFA releases hearing officer decisions (not intermediaries), but without the identifying information about the parties, all of which is deleted before publication²². In the decision, the parties are referred to generically, such as "The provider maintained that . . .", "The intermediary's position was supported by . . .", and so on.

HCFA will review the decision of a intermediary hearing officer/panel at the request of a provider. A request for such a review, which must be made in writing within 60 days after receipt of the decision, is sent to HCFA, Office of Eligibility Policy, BERB, 400 East High Rise, 6325 Security Boulevard, Baltimore, MD 21207. HCFA may also review such decisions on its own initiative. Invariably, HCFA will accommodate a provider's request to submit additional briefs and/or present oral arguments. HCFA's review decision is final as to both the intermediary and the provider, and there is no further appeal²³.

Provider Reimbursement Review Board (PRRB)

As noted above, the PRRB handles disputes involving

\$10,000 or more. Moreover, only providers (not intermediaries) can initiate an appeal to the PRRB²⁴. An appeal, containing all the required information discussed earlier, is addressed to: Chairman, Provider Reimbursement Review Board, Room 104, Professional Building, 6660 Security Boulevard, Baltimore, MD 21207. A copy of the appeal is, of course, sent to the intermediary. Providers may *not* fax their requests for a PRRB hearing²⁵. As with appeals to intermediary hearing officers, late requests may be granted for good cause²⁶.

When the PRRB receives a request for appeal, it responds in one of three ways:

- Acknowledgment and Request for List of Issues
- Acknowledgment
- Acknowledgment and Request for Final Determination

Each of these will be discussed in order and will only address individual provider appeals (there are different procedural rules applicable to group appeals that are not addressed in this article).

When a provider's appeal submission is complete, the PRRB will forward an Acknowledgment and Request for List of Issues. This letter asks the provider to compile and forward a list of issues (LOI) to the Board and the intermediary, and the time allowed may range from 15 to 60 days. The intermediary is granted a similar period of time to reply. If the provider does not respond in a timely fashion, its appeal may be dismissed²⁷.

When a provider's submission is incomplete in some way, the PRRB staff will send a mere Acknowledgment and identify the problem(s) requiring correction. Should a provider fail to include the intermediary's final determination, the PRRB will send an Acknowledgment and Request for Final Determination.

Assuming the provider's initial submission is complete, its LOI should document the Board's jurisdiction (timely appealed; amount in dispute exceeds \$10,000), set forth the substantive issues, and be signed by the provider's representative. A signature block is provided in the LOI for the intermediary.

The intermediary reviews the LOI and signs it if there is no impediment to the Board's jurisdiction, and if resolution of the issues by settlement is not possible²⁸. The intermediary then forwards one signed copy to the Board and the other to the provider. In this manner, the "pleadings" in the case are mutually prepared. Pleadings in agency board proceedings, on the other hand, consist of the contractor's Complaint and the Government's Answer, which initiate the adversary proceedings.

After the PRRB receives a complete LOI, it schedules the case for a hearing on its monthly calendar. A Notice of Month of Hearing and Request for Position Papers is forwarded to the provider and intermediary²⁹, unless a jurisdictional issue exists which the PRRB would address and resolve first.

At this point, a ninety-day process concentrates on the preparation and submission of position papers, accomplished in accordance with the following sequence of events. Ninety days before the position papers are due at the Board, the pro-

vider sends the intermediary a draft position paper. Within sixty days, the intermediary then sends the provider its draft position paper. Both the provider and intermediary then have thirty days to prepare and submit their final position papers, which they send to the Board (six copies) and each other. Tardy submissions, by the way, work against the provider. For example, if the provider is late with its draft position paper to the intermediary, the intermediary still gets sixty days to respond and the date on which the final position papers are due at the Board remains unchanged. Accordingly, to the extent a provider is late with its draft position paper, that is that much less time it has to prepare its final position paper³⁰.

With respect to the position papers themselves, the Provider Reimbursement Manual states:

The position papers must:

- Cover all issues adequately and concisely;
- Give a summary of the facts and circumstances surrounding the disputed issues to permit the Board to gain a clear understanding of the differences in the parties' positions;
- Cite relevant statutory provisions, regulations, HCFA rulings and other controlling authority;
- Identify the monetary amounts of each item in dispute and set forth the computations;
- Enumerate the facts with respect to issues in dispute to which the parties have stipulated as being in agreement;
- Contain all documentary evidence and corroboration which support their respective positions;
- In the case of the intermediary only, contain all relevant documents which formed the basis for the determination; and
- Contain such other items or statements which would assist the Board.

The PRRB considers the position papers to be very important, so important that the submission of an inadequate position paper may be grounds for dismissal of the appeal³¹.

The Board consists of five members appointed to three-year terms by the Secretary of the Department of Health and Human Services. No member can be appointed for more than two consecutive terms. One member of the Board is required to be a Certified Public Accountant³², and two are required to be representatives of providers. All members must be knowledgeable about the Medicare payment system.

Unlike appeals to intermediary hearing officers, there is traditional discovery in an appeal to the PRRB, including depositions, interrogatories, requests for the production of documents, subpoenas for non-party witnesses, and so on.. On this subject, attorneys probably snicker at the following guidance in the Provider Reimbursement Manual³³: "The Board rules upon all discovery questions and is guided by the Federal Rules of *Court Procedure*" (emphasis added). Assumedly, the Federal Rules of Civil Procedure was intended.

Recall the stringent limitations on the jurisdiction of

the intermediary hearing officer discussed above. For the PRRB, there are no such limitations. They can (and do) consider questions to the application and/or validity of governing laws, regulations, HCFA rulings, interpretations, and so on. They also resolve questions concerning their own jurisdiction³⁴.

The rules concerning representation before the Board are the same as for an intermediary hearing. As with appeals before intermediary hearing officers, one-sided (ex parte) communications with the Board are strictly prohibited³⁵.

At the hearing — which is adversarial — the parties are the provider, the intermediary, and any other "interested person" (as defined in PRM1 2922.2). HCFA is not a party. Normally, an "interested person" is not accorded the status of a party to the proceedings, but the Board may designate a person or organization as an intervenor. One point of similarity is that both agency board appeals and PRRB appeals both permit hearings on organization as an intervenor³⁶. One point of similarity is that both agency board appeals and PRRB appeals both permit hearings on the record³⁷.

Opening and closing arguments are not normally seen in agency board proceedings, but they are common at PRRB hearings. Also, the PRRB follows a more aggressive briefing schedule, requiring post hearing briefs within 20 days after receipt of the hearing transcript.

PRRB decisions follow the general format shown in Exhibit 4, are available to the public³⁸ and can be found by year at the following website: www.hcfa.gov/regs/prrb.htm. While the PRRB encourages settlement between the provider and the intermediary, it takes no part in these initiatives³⁹. In other words, there are no PRRB ADR procedures.

Either on its own motion or at the request of a party (or even HCFA itself) within sixty days of its announcement, PRRB decisions may be reviewed and modified by the HCFA Administrator, to whom the HHS Secretary's authority has been delegated. Such action is generally taken on the recommendation of the Administrator's Office of the Attorney Advisor. Of course, PRRB decisions may also be appealed to the U.S. district court of proper jurisdiction⁴⁰. However, only providers may obtain judicial review⁴¹.

Conclusion

Appeals under Medicare contracts are far more informal and fact-specific than their government contract dispute counterparts, and are (theoretically) non-adversarial in nature at the intermediary level as well. There are no rules of evidence and few rules of procedure. The facts of a case are determined more cooperatively, and not as adversarially, than in contract litigation. This being the case, the dispute resolution procedures are completely unlike those procedures of formal litigation found at agency boards of contract appeals. Whether before an intermediary hearing officer or the PRRB, Medicare providers are accorded abundant due process rights (reasonable notice and an opportunity to be heard). Accordingly, knowledgeable advocacy on Medicare cost issues is more important to a successful appeal than are trial skills.

Exhibit 1
Request for Intermediary Hearing

[Date]

[Intermediary Hearing Officer]

Re: [Provider]
Provider No. XX-XXXX
Cost Year Ending XXXX

Dear _____:

This is a request for a hearing for the above-named provider.

This request is made within and pursuant to the regulations governing provider payment appeal (42 C.F.R. Part 405, Subpart R). The date of the Notice of Amount of Program Reimbursement for the above cost report period is _____.

[The provider should identify the specific item(s) in the intermediary's determination with which it disagrees; give reasons why it believes the determination is incorrect; and include any materials it believes will support its position.]

The amount of Title XVIII program payment in controversy for each item and a calculation of that amount for the above cost report period is as follows:

[list and detail]

The attached material is submitted in support of the request for hearing.

Signature of representative

On behalf of:

Name of Provider.

Address of Provider

Signature of Responsible Official

Index of Supporting Documentation
Submitted by [Provider] in
Request for Hearing dated _____.

1. Issues in Dispute
2. Summary of Case
3. Arguments Supporting Provider's Contentions
4. Documentation Supporting Arguments
5. Regulations and Other References Applicable to the Dispute

Exhibit 2
[Intermediary]
Notice of Hearing

[Provider Representative]

[Date]

Re: Name of Provider
Provider No. XX-XXXX
Cost Year Ending XXXX

This refers to the Request for Hearing in the above-captioned matter dated _____.

[Where the writer is the sole hearing officer.]

I have been appointed to act as the Intermediary Hearing Officer for [name of fiscal intermediary] to resolve this payment dispute.

I have scheduled a hearing for _____ at _____ o'clock to be held at [location].

If you are unable to appear at this time, or do not wish to appear personally but prefer to have a hearing on the record, please so indicate by return mail. If the time or location of the hearing as scheduled is inconvenient, I will be glad to reschedule it.

[Where the hearing will be before a panel.]

The following organizations are available to adjudicate the dispute, along with me [or other designated intermediary hearing officers]. Please select one [or two, where a five member panel is employed organization(s) to assist us in the deliberations.

[Tailor the paragraphs below for either a hearing officer or a panel:]

Please submit any and all documentation and corroborating evidence which may be used to support your contentions. In addition, if you desire, you may submit any briefs or memorandums which you feel may assist [me][us] in the consideration of the dispute.

You may raise any new issues or new evidence at any time prior to the initiation of the hearing. After the commencement of the hearing, new evidence or issues may not be raised or submitted without the panel's permission.

Any further attempts to reconcile, settle or negotiate the dispute with the intermediary may be done only with [my] [the panel's] consent and approval.

You may inspect, examine and copy at any time prior to the hearing any and all information contained in the [hearing officer's] [panel's] file which is material and relevant to the proceeding. Please contact my office in advance.

The hearing is conducted under the authority granted to the intermediary under 42 U.S.C. §1395 *et. seq.*, and 42 C.F.R. Part 405, Subpart R, §§405.1801-1833, and Health Care Financing Administration (HCFA) instructions. [My][Our] decision must comply with the provisions of Title XVIII of the Social Security Act, as well as the aforementioned regulations, HCFA rulings and general instructions.

The hearing is informal and non-adversarial in nature. Neither the intermediary nor the Health Care Financing Administration is a party to the proceeding. Therefore, neither has a financial interest in the hearing decision. In keeping with the informal nature of the hearing, [I][we] will allow into evidence any document or testimony which [I][we] feel is material and relevant to the outcome of the dispute. You do, however, have a right to examine or cross-examine any witness or examine any document which is introduced. You may also bring with you any witness whom you feel will assist the [hearing officer][panel] in ascertaining the facts.

Shortly after the close of the hearing, I [the panel] will issue a decision. The only appeal from my [the panel's] decision is to the Health Care Financing Administration.

Should you have any further questions, please feel free to contact me.

Intermediary Hearing Officer [or Chairperson of Hearing Panel]

Name of Fiscal Intermediary

Cf: Fiscal intermediary
HCFA, OEP, Hearing Staff

Exhibit 3
Intermediary Hearing Decision

Name of Intermediary:
Name of Provider:
Provider No. XX-XXXX
Cost Year Ending XXXX
Amount of Title XVIII Payment in Controversy:
Intermediary Hearing Officer(s):
Chairperson of Hearing Panel:
Date of Decision:

I. Authority of the [Hearing Officer][Panel]

(Statement that the decision is issued under the authority of Title XVIII of the Social Security Act and the Federal Regulations which implement that title (42 C.F.R., Part 405, Chapter IV) and is in compliance with both, as well as the rulings and instructions issued by HCFA).

II. Statement of Issues

III. Statement of the Evidence (including Listing of Evidence)

IV. Provider's Contentions

V. Intermediary's Position

VI. Findings

- a. Citations to applicable laws, regulations, HCFA rulings and instructions
- b. Rationale

VII. Conclusion

- a. Hearing Officer's Decision as to each issue (itemized):
- b. Statement as to the finality of the Decision, subject to appeal to HCFA and to reopening provisions.

The hearing transcript will have a cover page identifying it with this hearing.

Exhibit 4
Provider Reimbursement Review Board
Hearing Decision
(Decision No.)

Date of Hearing - (month)/(day)/(year)

(Name of Provider)

Provider No. XX-XXXX

vs.

(Name of Intermediary)

Cost Reporting Period Ending - (month)/(day)/(year)

Case No. XX-XXXX

Index

- I. Issue
- II. Statement of the Case and Procedural History
- III. Provider's Contentions
- IV. Intermediary's Contentions
- V. Citation of Law, Regulations & Program Instructions
- VI. Findings of Fact, Conclusions of Law and Discussion
- VII. Decision and Order

Endnotes

- 1 - See 42 C.F.R. §405.439(h)(1).
- 2 - 42 C.F.R. Part 405, Subpart R.
- 3 - 41 U.S.C. §603.
- 4 - Medicare Publication 15-1 is the Provider Reimbursement Manual, Part I, which is abbreviated as PRM1. The reference here is to PRM1 2911.1B. The entire Provider Reimbursement Manual, as well as many other Medicare publications, may be downloaded from the HCFA website (www.hcfa.gov). Subsequent references will be to PRM1 rather than the counterpart regulation in 42 C.F.R. Part 405, Subpart R.
- 5 - PRM1 2912.1 states that a provider may be represented by almost any "representative of its choice," except individuals disqualified from appearing before DHHS proceedings and others prohibited by law such as U.S. Government employees.
- 6 - PRM1 2913.
- 7 - PRM1 2914.4C.
- 8 - PRM1 2914.
- 9 - PRM1 2914.6.
- 10 - PRM1 2914.8.
- 11 - PRM1 2914.5.
- 12 - PRM1 2914.2B.
- 13 - PRM1 2914.7.
- 14 - PRM1 2915, 2915.2.
- 15 - Ibid.
- 16 - PRM1 2915.1.
- 17 - PRM1 2915.1C.
- 18 - PRM1 2915.4.
- 19 - PRM1 2915.1J.
- 20 - PRM1 2914.9.
- 21 - PRM1 2916.
- 22 - PRM1 2951.
- 23 - PRM1 2917A.
- 24 - PRM1 2920B.
- 25 - PRM1 2921A.
- 26 - PRM1 2921.1.
- 27 - PRM1 2921.2B.
- 28 - PRM1 2921.3C.
- 29 - PRM1 2921.3D(1)(a).
- 30 - PRM1 2921.4D.
- 31 - PRM1 2921.5.
- 32 - 42 C.F.R. §405.1845a.
- 33 - PRM1 2924.2A.
- 34 - PRM1 2924.5.
- 35 - PRM1 2922.4.
- 36 - FRCP 24(a).
- 37 - PRM1 2925.7; Rule 11, Uniform Rules of Board Procedure.
- 38 - PRM1 2952. Only CY1998 and CY1999 decisions are presently on the website, but eventually all PRRB decisions will be posted.
- 39 - PRM1 2924.7.
- 40 - 42 U.S.C. §1395oo(f); Social Security Act §1878(f)
- 41 - PRM1 2928C.

BCABA LETTER AND RESOLUTION

August 27, 1999

Joan Strand, Esquire
President
The District of Columbia Bar
1250 H Street, N.W.
Sixth Floor
Washington, D.C. 20005-5937

Re: D.C. Bar's Re-classification of Judges

Dear Ms. Strand:

I am writing to you on behalf of the Boards of Contract Appeals Bar Association ("BCABA") to express concern regarding the District of Columbia Bar's recent re-classification of its judicial members under D.C. Bar Rule II, §4. The BCABA Board of Governors has gone on record as strongly opposing this recent re-classification. The BCABA requests that you review and reconsider this recent action.

The BCABA is a specialized bar association representing nearly 500 BCA judges and government and private sector procurement attorneys. Its mission and purpose is to promote the role, efficiency and efficacy, of the BCAs, and improve advocacy before them.

It is our understanding that the D.C. Bar's re-classification would create three classes of D.C. Bar members: 1) active; 2) "judicial"; and 3) inactive members. *Letter from Wilbur D. Smallwood to Bar Members*, undated, at 1. "Judicial members" would consist of "[j]udges of courts of record, full time court commissioners, U.S. Bankruptcy judges, U.S. magistrate

judges, and retired judges . . ." *Id.* (emphasis in original). The purpose of the amendment, in the words of the D.C. Bar's letter, "is to define the class of 'judicial' members, while limiting it to those who are judges or who are functioning in judicial capacities within federal, state or local court systems." *Id.* Mr. Smallwood states in his letter that:

As a result of this amendment administrative law judges or administrative hearing officers are no longer eligible for judicial classification in the District of Columbia Bar.

Id.

Ordinarily, the BCABA will exercise restraint in commenting on administrative actions of another bar association. In this case, however, the BCABA feels compelled to comment because the Rule II, §4 change directly affects the respect and status of judges of the boards of contract appeals ("BCAs"), who are such a vital part of our bar association.

The BCA judges have always been accorded by the BCABA the highest degree of respect by virtue of their judicial status. The respect accorded these BCA members by the BCABA has been historical, deep, instinctive and constant.

With respect to their status, the Contract Disputes Act of 1978 ("CDA") (P.L. 95-563) bestowed statutory status on these judges. The CDA's legislative history refers to the boards as "quasi-judicial forums." *See Legislative History of the Contract Disputes Act*, P.L. 95-363, U.S. Cong. & Admin. News '78, (West Publ. April 1979) at 5247. The CDA legislative history refers to the BCA judges as judges:

The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in Government contract law, and often involve substantial sums of money.

Id. at 5260.

In fact, when functioning in their full hearing mode, the BCA's judicial function closely parallels the courts. *Id.* at 5263 ("The history of the existing boards has been one of increasing judicialization . . ."). In referring to the members of the boards and the Court of Claims, the legislative history refers to both as judges. *Id.* at 5266 ("Administrative judges in the agency boards and trial judges at the Court of Claims must be very sensitive when fixing a date from which to start interest charges . . .") (emphasis added). An additional defining attribute of BCA judges is their statutorily mandated independence from the agencies with which they are associated. *Id.* at 5247. Independent fact finding, application and interpretation of law against

those facts, and ultimate dispute resolution based on the record before it defines the quintessential judicial function. In short, BCA members are treated with the respect due judges because they are judges.

The BCA trial judges have also *earned* the respect the BCABA accords them. As noted in the legislative history, BCA judicial decisions provide the bulk of precedents in Government contracts law. BCA judges' specialized expertise in resolving government contracts cases, in applying law to fact and trying facts placed before them in the record is, with all due respect to the court, at least as respected as that of members of the Court of Federal Claims, or other federal courts. This earned respect is further reflected in the fact that the BCABA does not charge BCA judges dues, although many of them pay dues voluntarily. The BCABA has always treated its BCA judges as honorary members.

With respect to the re-classification itself, in at least one respect, the D.C. Bar's interpretation of its own rule change is confusing. If "[j]udges of courts of record" are judges, then BCA judges should quite obviously be included in the defined class of judicial members under the amendment. All board hearings are required to be on the record. The legislative history of the CDA stated that "Section 11 . . . gives the boards of contract appeals of the agencies power to administer oaths, authorize depositions, and discovery, and issue subpoenas. . . . It is the intent of this increased authority to improve upon the quality of the board records, and to insure that the tools are available to make complete and accurate findings . . ." *Id.* at 5265. Because board proceedings and decisions are on the record, and have been since passage of the CDA, and before it, it would seem consistent to include BCA judges as judicial members and not exclude them.

Drawing a distinction between the word "court" and "board" in the absence of any substantive distinction in functions of the respective members of these tribunals may be perceived by our mutual members as arbitrary. No doubt unintentionally, the recently announced amendment to the D.C. Bar Rules has the clear potential to diminish, unnecessarily and arbitrarily, the hard-earned prestige and respect of the BCA judges in the community they serve so well. The D.C. Bar letter did not cite a rationale, compelling circumstance or even routine need for this action.

While we do not comment on the ramifications of the newly-amended Rule on non-BCA adjudicatory officials, the BCABA, through its Board of Governors, strongly disagrees with this action with respect to BCA judges. The BCABA finds this action of the D.C. Bar so contrary to our own traditions that the BCABA Board felt compelled to take action regarding it. We request you, as the D.C. Bar President, take a personal interest in this issue. Through your personal intervention, we further request that the D.C. Bar reconsider this re-classification and adopt a definition of "judicial members" that expressly includes administrative judges serving as members of the BCAs, and possibly other similarly situated, hard-working adjudicators. A copy of the resolution adopted unanimously by the BCABA Board of Governors on this issue is enclosed.

Thank you for your consideration of these views. Please call me at 202-862-5969 if you have any questions regarding this matter.

Sincerely,

David P. Metzger
President
Boards of Contract Appeals
Bar Association

DPM:eet

Enclosure:

BCABA Board of Governors' Resolution

Action of the BCABA Board of Governors

Notice hereby having been waived, the Board of Governors of the Board of Contract Appeals Bar Association considered the following resolution:

RESOLVED, that the BCABA opposes the District of Columbia Bar's recent re-classification of its judicial members because it results in exclusion of BCA judges from judicial membership of that Bar association. The Board determines that such an act could potentially diminish the prestige of, and impose adverse economic and other consequences on, BCA judges. The Board directs the BCABA President to register the Board's strong disagreement with this action in the form of a letter to the President of the District of Columbia Bar.

Adopted unanimously this 27th day of August, 1999.

BCABA FIRST ANNUAL EXECUTIVE POLICY FORUM

by

David P. Metzger; Terry L. Albertson; Honorable
Stephen M. Daniels;
and Arthur H. Hildebrandt¹



The BCABA held its first Annual Executive Policy Forum on August 6, 1999 in Washington, D.C. Representatives attended from the boards of contract appeals, Gold Medal firms of the BCABA, offices of the Chief Trial Attorneys and other government agencies.²

The BCABA conducted the Executive Policy Forum pursuant to a resolution of the Board of Governors. The resolution called for an annual event, in which members of the BCABA's three communities – judges, government and private sector attorneys – discussed “the role of the BCAs, improving service of the BCAs to government contractors in resolving disputes, improving effectiveness and efficiency of advocacy before the BCAs, and other purposes as the BCABA President or the Judicial Conference may adopt.”³ The resolution left invitation of participants to the BCABA President, and noted that the event is to be independent of the BCABA's Annual Program.

The participants authorized a non-attribution summary of the discourse of the Policy Forum, attempting to foster candid discussion while providing BCABA members the benefits of a high-level interchange. This article attempts to capture some of the dialogue.

Usefulness of the Boards

A private practitioner commented that his clients' biggest problem in Government contracting is securing, from knowledgeable Government personnel, an authoritative decision when unexpected matters arise. The boards do a very good job of providing such decisions, he said, and their availability prompts personnel at the operating level to be more attentive to their responsibilities. A Government attorney agreed that the boards are efficient dispute resolution forums, expert at resolving factual and legal problems for litigants, with holdings that are predictable, which is often helpful in making litigation unnecessary. There was general agreement that the structure of the boards, as established in the Contract Disputes Act, works well and is not in need of repair.

Alternative Dispute Resolution

A Government attorney commented that the boards, even in their litigation mode, constitute a form of dispute resolution alternative to courts. A private practitioner said that relative to the Court of Federal Claims, the boards offer faster, less costly, less formal, and more efficient dis-

pute resolution. A judge noted that balancing fair process with informality is not easy. The more informal proceedings increasingly used by the boards as "ADR" to their own standard formats have pros and cons, participants said. Although they are sometimes effective in bringing resolution to disputes, the pressure of deadlines imposed in litigation can also be an effective means for settling cases.

Some judges noted that in addition to offering mediation and informal, early neutral case evaluation, boards are experimenting with less structured forms of hearings. One example is the round-table hearing, in which participants are permitted to ask questions of one another.

Judicial Involvement in Developing Cases

Both private and Government attorneys urged board judges to take greater control over the development of cases, especially during discovery. Some participants suggested that boards issue scheduling orders early in each case. Other counsel proposed limited discovery by restricting, through a standard order, the number of written discovery requests and depositions. A judge urged that parties bring their specific concerns about excessive discovery to the boards, by telephone wherever possible, for prompt rulings. Another judge suggested that input from parties themselves (as well as from their lawyers), as to requests for discovery or extensions of time for filings, might be useful for assessing whether the requests are being made to make the lawyers' lives easier or to advance the resolution of the disputes.

A variety of opinions was offered as to whether judges should force parties to adhere to pre-established schedules, even where the parties jointly propose postponements. There was no support for mandating expedited development of cases and issuance of board decisions, similar to the former provision of the Competition in Contracting Act mandating bid protest decisions by the GSBCA within 45 days.

Motion Practice

Commentators from all three communities agreed that as a means of raising and resolving preliminary matters, telephone conferences are preferable to motion practice. Judges said that motions for summary relief are excessive in both number and length and, because material facts are often in dispute, those motions are generally denied. The filing of such motions close in time to a scheduled hearing was particularly criticized as without purpose. Attorneys urged judges to rule on motions more quickly; a short but prompt denial was preferred to no ruling at all.

"Riding the Circuit"

A private practitioner asked what criteria judges use in deciding when and where to hold hearings. Judges responded that hearings are generally held wherever the majority of witnesses are located, and that when such a location is in doubt, they usually schedule sessions to impose the smallest financial burden on small businesses. Bifurcating hearings between (and even among) locations is also possible. A Government attorney urged the boards to make greater efforts to ensure that contractors understand that hearings may be held outside Washington. Some lawyers suggested that the boards make more clear that hearings are usually open to the public and publish their hearing schedules. Some judges noted that a published schedule would quickly become inaccurate because hearings are sometimes postponed, or need for them obviated by settlement. Consequently, the judges recommended that individuals interested in observing a hearing call board clerks to obtain information on scheduling.

Board Decisions

Some practitioners urged that board judges write more concise decisions, eliminating non-essential facts. Support was also voiced for more prompt decisions. Judges noted that each judge has his or her own style and speed in writing. Some commentators favored single-judge decisions, because they can be issued more quickly, and others favored the traditional three-judge panel decisions, as more consistent and predictable. Varying thoughts were also expressed as to whether explanatory decisions are always necessary, or whether, where jointly requested by the parties, a board might simply issue an "up or down" decision.

Civility in Board Proceedings

Participants generally agreed that board proceedings are usually marked by civil, professional conduct by counsel. In response to a question as to whether a board could bar a misbehaving lawyer from practicing before it, judges replied in the affirmative but expressed doubt about the likelihood of doing so. Judges also noted that they can, if necessary, refer instances of unethical behavior to state bar associations. *Pro se* litigants who enjoy "recreational litigation" were considered a greater problem, but even with regard to these individuals, judges commented that allowing them to "vent" is often (especially in ADR sessions) a necessary step to progress in resolving disputes. Judges were more concerned about the practice of contractors appointing claims consultants to positions within the companies so that the consultants can appear on behalf of the firms in board proceedings. No solution to this means of securing representation by non-lawyers was put forward.

The First Annual Executive Policy Forum was then adjourned.

[Note from the authors: The BCABA would like to thank all participants who took time from their very busy schedules to participate in this valuable interchange.]

¹ David P. Metzger is President of the BCABA and a partner in the firm of Holland & Knight LLP; Terry L. Albertson is a partner in the firm of Crowell & Moring LLP; Honorable Stephen M. Daniels is Chairman of the General Services Board of Contract Appeals; and Arthur H. Hildebrandt is Chief Trial Attorney, Department of the Navy.

² Attendees included Terry L. Albertson, Crowell & Moring LLP (a Gold Medal Firm); Frank Carr, Chief Trial Attorney, U.S. Army Corps of Engineers; Honorable Stephen M. Daniels, Chairman General Services Board of Contract Appeals; Richard O. Duvall, Holland & Knight LLP (a Gold Medal Firm); Honorable Beryl S. Gilmore, Energy Board of Contract Appeals (a Gold Medal Board); Arthur H. Hildebrandt, Chief Trial Attorney, Department of the Navy; Honorable Edward Houry, Chairman, Agriculture Board of Contract Appeals; Honorable Guy H. McMichael, III, Chairman, Veterans Administration Board of Contract Appeals; Honorable Norman D. Menegat, Postal Service Board of Contract Appeals; David P. Metzger, Holland & Knight LLP; Linda Oliver, Office of Federal Procurement Policy; Honorable Reba Page, Chairman, Army Corps of Engineers Board of Contract Appeals; Nicholas "Chip" Retson, Chief Trial Attorney, U.S. Department of the Army; Honorable Cheryl Scott Rome, Energy Board of Contract Appeals; Ronald A. Schechter, Arnold & Porter (a Gold Medal Firm); Jonathan D. Shaffer, Smith, Pachter, McWhorter & D'Ambrosio P.L.C. (a Gold Medal Firm); Honorable Thaddeus V. Ware, DOT Board of Contract Appeals; Thomas C. Wheeler, Piper & Marbury LLP (a Gold Medal Firm); and Honorable Paul Williams, Chairman, Armed Services Board of Contract Appeals.

³ The participants adopted the title "Annual Executive Policy Forum" as most accurately describing the event.

New Feature
Practice Tips Corner

By
Col. Nicholas "Chip" Retson, Chief, U.S.
Army Trial Team

- From the very beginning, Counsel should write and rewrite when necessary, a simple but accurate 1-3 paragraph statement of the case. This can help clarify the issues and properly focus the litigation team.
- Periodically test your assumptions.
- Prepare a jargon list of abbreviations and acronyms. It can also contain the names and addresses of individuals involved with the case. This can be given to a court reporter and made as an index or attachment to a brief.
- When using abbreviations in your motions and briefs, do not spell the word once and thereafter use the abbreviation. Instead, spell it out periodically throughout the document so that the Judge does not have to stop and comb through the previous material to again find the meaning of an obscure abbreviation.

TREASURER'S REPORT
by Peter A. McDonald

**BCA Bar Association
Statement of Financial Condition
For the Period Ending March 15, 1999**

Beginning Balance		\$ 5,157.13
Fund Income:		
Dues, annual meeting payments	\$ 275.00	
Subtotal		\$5,432.13
Fund Disbursements:		
<i>(none)</i>		
Ending Cash Balance		<u>\$ 5,432.13</u>

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

Annual Membership Dues: \$45.00 (\$30.00 for Government Employees) [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

SECTION I

Name: _____

Firm/Organization: _____

Dept./Suite/Apt. Street Address: - _____

City/State/Zip: _____

Work Phone: _____ Fax: _____

email address: _____

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 _____

SECTION III

Date: _____ Signature: _____

FORWARD THIS APPLICATION WITH A CHECK PAYABLE TO THE BCA BAR ASSOCIATION TO THE SECRETARY AT THE FOLLOWING ADDRESS:

James McAleese, Jr.
McAleese & Associates
8201 Greensboro Dr.
McLean, VA 22102
