

**MONEY TALKS AND WE KNOW WHAT WALKS:
A PRIMER ON SUCCESSFULLY PROSECUTING
ENTITLEMENT FRAUD CASES**

MAJOR MITCHELL D. HERNIAK*

I. Introduction

You have been a trial counsel for sixteen months. You have a heavy caseload and ten contested panel cases. Although you have tried larceny cases, you have never prosecuted an entitlement fraud case. The Criminal Investigation Command (CID) contacts you about a suspected fraud case involving basic allowance for housing (BAH) and travel pay entitlements. The special agent briefs you that it appears the service member has stolen \$30,000 over a twenty-four month period by claiming his wife lives with his two children in Baltimore, Maryland, while he is stationed in Japan. The special agent presents two large file folders. As you peruse the documentation, you notice leave and earnings statements, printouts from finance, and defense enrollment eligibility reporting system (DEERS) documentation, but no witness interviews. Although CID insists it is a clear case of fraud, you have no idea what you are reviewing, how the documents relate to one another, how to draft the appropriate charges, how to successfully prosecute the case, or whether a crime has been committed. Where do you start?

Entitlement fraud results in significant financial losses to the U.S. government;¹ however, there is a void in secondary sources to assist the

* Judge Advocate, United States Army, presently assigned as Chief, Contract and Fiscal Law, United States Forces-Afghanistan. J.D., 2008, Indiana University School of Law-Indianapolis; B.S., 2004, Manchester College. Previous assignments include Student, 66th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, 2017-2018; Defense Counsel, United States Army Trial Defense Service, Pacific Rim Region, Yongsan, Republic of Korea, 2015-2017; Group Judge Advocate, 6th Military Police Group (CID), Joint Base Lewis-McChord, Washington, 2013-2015; Administrative and Contract and Fiscal Law Attorney, Headquarters, United States Army Training and Doctrine Command, Fort Eustis, Virginia, 2011-2013; Trial Counsel, 19th Expeditionary Sustainment Command, Daegu, Republic of Korea, May 2010-August 2011; Chief, Legal Assistance, 19th Expeditionary Sustainment Command, Daegu, Republic of Korea, August 2009-May 2010. Member of the bar of Indiana. This paper was submitted in partial completion of the Master of Laws requirements of the 66th Judge Advocate Officer Graduate Course.

¹ Telephone Interview with Mr. Michael L. Ashby, Financial Management Specialist,

inexperienced trial counsel in navigating an entitlement fraud case. This primer fills the void by providing trial counsel a process to investigate and prosecute entitlement fraud cases.

This primer addresses navigating an entitlement fraud case from investigation to prosecution. Though there are many entitlements, this primer focuses on BAH, family separation allowance (FSA), and permanent duty travel pay (PDTP). Part II addresses pre-preferral research and documentation collection. Part III addresses the decision to charge and the drafting of appropriate charges. Part IV addresses evidence presentation, and Part V provides recommended guidance for effective case presentation.²

II. Pre-preferral Research and Documentation Collection

A. Understanding the Entitlements at Issue

The first step to successfully prosecuting an entitlement fraud case is to identify the entitlements at issue and their legal framework. This section offers an analysis of the entitlement rules for BAH, PDTP, and FSA, as well as the Department of the Army and Department of Defense Forms used to process the entitlements.

1. *The Joint Travel Regulations—BAH and PDTP*

The most common entitlements at issue in an entitlement fraud case are BAH and PDTP. The Joint Travel Regulations (JTR)³ govern BAH

U.S. Air Force (Dec. 12, 2017) [hereinafter Ashby Interview]. While serving as a Military Pay Systems Analyst with the Defense Finance and Accounting Service from May 2014–Jan. 2017, Mr. Ashby tracked almost \$14 million in fraudulent basic allowance for housing (BAH) and Family Separation Allowance (FSA) entitlements. *Id.*

² Due to page limitations, this primer does not address other forms of entitlement fraud including fraud based on a fraudulent marriage and fraud involving do-it-yourself moves. While this primer specifically focuses on entitlement fraud cases within the U.S. Army, the principles may be applied within any service, and where appropriate, references are provided to service-specific forms.

³ U.S. DEP'T OF DEF. TRAVEL MGMT. OFF., JOINT TRAVEL REGULATIONS at Intro 1 (1 Mar. 2019) [hereinafter JTR] (“The JTR implements policy and laws establishing travel and transportation allowances of Uniformed Service members and Department of Defense civilian travelers . . . The JTR applies to Uniformed Service Active and Reserve

and PDTP. The JTR is updated monthly; therefore, trial counsel must ensure they examine the version in effect at the time of an alleged offense.⁴

a. Housing Allowances—BAH

To determine whether a case involving BAH merits prosecution, trial counsel must understand the following JTR rules: (1) general rules for a housing allowance; (2) definitions of dependents; and (3) assignment situations. Service members on active duty and entitled to basic pay are “authorized a housing allowance based on [their] grade, rank, location, and whether he or she has any dependents.”⁵ The BAH rate is based on the grade, dependency status, and location of the *service member* not dependents.⁶ Unless a different rule applies, BAH will be paid for the service member’s location.⁷

The first question is whether the service member has a qualifying dependent. The JTR contains definitions for dependents.⁸ Absent exceptions, lawful spouses and legitimate, unmarried, minor children always qualify as dependents.⁹ However, trial counsel must be aware there are other dependent scenarios including secondary dependents, dependent parents, adopted children, children born out of wedlock, and stepchildren.¹⁰ Furthermore, different rules apply to dependents other than

Component members and their dependents.”). Like the Uniform Code of Military Justice, the JTR is a base document applicable to all service members.

⁴ DEF. TRAVEL MGMT. OFF.: THE DoD CENTER FOR TRAVEL EXCELLENCE, <http://www.defensetravel.dod.mil/site/travelreg.cfm> (last visited Mar. 20, 2019). This website contains the most up-to-date version of the JTR as well as a link to archived copies that allows counsel to review the version in effect at the time of an offense. The JTR references cited herein are current as of March 2019.

⁵ JTR, *supra* note 3, para. 1001.

⁶ *Id.* para. 100902B (“Ordinarily a housing allowance is paid based on the member’s PDS However, the Service may determine that a member’s assignment to a PDS or the circumstances of that assignment requires the dependent to reside separately.”).

⁷ *Id.*

⁸ *Id.* app. A, at A9-11 (listing eleven different dependent scenarios).

⁹ *Id.* para. 100201A. Examples of exceptions include: “A minor child who is entitled to basic pay as a member on active duty in a Uniformed Service” and “A former spouse to whom the [service member] is paying alimony.” *Id.* paras. 100201B2, 100201B7.

¹⁰ JTR, *supra* note 3, paras. 100210A3, 100204, 100205. The JTR defines a secondary dependent as “[a]n incapacitated child over age 21, a ward of the court, or an unmarried child over age 21 and under age 23 (full time in college)” *Id.* para. 100210A3. Furthermore, in-fact dependency determinations in accordance with applicable service regulations are required for secondary dependents and dependent parents. *Id.* paras. 100201A3, 100204. Although dependency determinations are not required for adopted

lawful spouses and children born in wedlock. For example, a service member claiming BAH for a child born out of wedlock must provide proof of parentage.¹¹ For the entitlement to apply, trial counsel must understand what, if any, documentation is required and may be needed as evidence. Once trial counsel determine whether the service member has a lawful dependent, one must examine the assignment situation and location rules.

Assignment situation and location rules are found within chapter ten of the JTR.¹² Generally, a housing allowance is based on a “[service member’s] PDS [primary duty station] or the home port for a member assigned to a ship or afloat unit.”¹³ However, as with dependency, variables affect the BAH location. In particular, trial counsel overseas must examine rules addressing unaccompanied or restricted tours.¹⁴ The JTR contains rules specifying when BAH may be based on a dependent location as opposed to a service member’s location, how to determine the location, and what is required to validate the location.¹⁵ For example, a case may involve a situation where a service member’s dependent no longer resides at a designated place, but the service member claims BAH for that location. If, prior to permanent change of station (PCS), the service member was authorized to move his dependents to a designated location a subsequent relocation at personal expense may not abrogate the service member’s entitlement to BAH for the previous location.¹⁶

children, children born out of wedlock, and stepchildren, proof of parentage is required. *Id.* para. 100205.

¹¹ *Id.* para. 100205 (“For a child born out of wedlock, a birth certificate with the Service member’s name cited is required. If the Service member’s name is not stated on the birth certificate or on a court-order, obtain a signed statement of parentage from the Service member . . .”).

¹² *Id.* paras. 100901-100915.

¹³ *Id.* para. 100902.

¹⁴ *Id.* para. 100904 (“Member with a Dependent Serves an Unaccompanied/Dependent Restricted Tour or ‘Unusually Arduous Sea Duty Tour.’”).

¹⁵ *Id.*

A Service member with a dependent who serves an unaccompanied or dependent restricted tour OCONUS or “unusually arduous sea duty” [OCONUS] is authorized a with-dependent housing allowance based on the dependent’s location. The housing allowance may be based on the old PDS if the dependent remained in the residence shared with the Service member before the PCS, did not relocate, and is not in Government quarters.

Id.

¹⁶ *Id.* para. 100904F (“If the dependent relocates at personal expense from a designated place in a BAH area to a different location in a BAH area that is not at or near the

To determine what location is claimed for BAH, trial counsel must obtain and review the service member's most recent Department of the Army Form 5960 (Form 5960).¹⁷ Form 5960 is significant because it is an official form the service member completes listing marital and dependency status, current dependent address, and most importantly, certifies that all listed information is correct.¹⁸ Also, Form 5960 contains a statement notifying the signatory of the penalties for making a false official statement¹⁹ and will assist in proving the mens rea elements of larceny,²⁰ and false official statement.²¹ Although the service member may have multiple dependents in multiple locations, the key is to examine which address is claimed for BAH, and whether the JTR dependency and location conditions are satisfied.²² Therefore, trial counsel should focus on the address claimed for BAH and not the number of addresses.

member's PDS, continue BAH based on the previously authorized location (either old PDS or dependent location before the move)."). Based on the author's professional experience, the correct BAH location under this provision is open to interpretation. Trial counsel need to work with Defense Finance and Accounting Services (DFAS) personnel and be prepared for the possibility of being provided different potentially conflicting interpretations.

¹⁷ U.S. Dep't of Army, DA Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ), and/or Variable Housing Allowance (VHA) (Sept. 1990) [hereinafter Form 5960]; *See also* U.S. Marine Corps NAVMC 10922 (EF), Dependency Application (Apr. 2001); U.S. Dep't of Air Force, AF Form 594, Application and Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) or Dependency Determination (Nov. 1990); U.S. Dep't of Homeland Security, U.S. Coast Guard, CG-2025, BAH/Housing Worksheet (Sept. 2010).

¹⁸ Form 5960, *supra* note 17, at Block 12 ("I certify ALL information regarding this authorization is correct. I will immediately notify the FAO/HRO of any changes in the information above, due to divorce, marriage, death, living in government quarters [sic] etc. which could affect by [sic] BAQ or VHA entitlement.").

¹⁹ *Id.* ("IMPORTANT: Making a false statement or claim against the US Government is punishable by courts-martial. The penalty for willfully making a false claim or a false statement in connection with claims is a maximum fine of \$10,000 or imprisonment for 5 years, or both.").

²⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 64b(1)(d) (2019) [hereinafter MCM] ("That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property . . .").

²¹ MCM, *supra* note 20, pt. IV, ¶ 41b(1)(d) ("That the false document or statement was made with the intent to deceive.").

²² Form 5960, *supra* note 17. For example, a service member's current spouse may be located in Baltimore. However, he may have a dependent child from a previous marriage living in New York City. If the service member is claiming BAH for New York City as opposed to Baltimore, then he must have an appropriate custody arrangement in order to properly claim BAH for that location.

b. Permanent Duty Travel Pay—PDTP

When a service member undergoes a PCS, PDTP entitlements are controlled by the JTR and the Department of Defense Financial Management Regulation (FMR).²³ Two commonly claimed entitlements are dependent per diem and dislocation allowance (DLA).²⁴ A service member is authorized per diem for dependents who travel under authorized PCS orders.²⁵ A DLA is paid to eligible service members to partially reimburse for the movement of a household.²⁶ Fraud arises when dependents are not entitled to PCS travel, and when although entitled, dependents do not travel or relocate.

Using the same analytical framework as for BAH, trial counsel must determine whether the service member has a qualifying dependent. If the service member has a qualifying dependent, trial counsel need to examine the PCS orders to determine whether dependent travel was authorized. If travel was authorized, the next step is to determine the claimed travel entitlements.

To determine the claimed travel entitlements, trial counsel must examine the service member's Department of Defense Form 1351-2 (Form 1351-2).²⁷ This is the travel voucher completed following PCS travel, generally when in-processing to a new unit. On Form 1351-2, the service member annotates dependent status, claims for DLA and per diem, the dependents' address on receipt of orders, and where and when dependents' travelled.²⁸ By examining this form and working with travel pay personnel, trial counsel can determine claimed entitlements and

²³ JTR, *supra* note 3, paras. 050101–0534; U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 9 (June 2017) [hereinafter DoD FMR].

²⁴ JTR, *supra* note 3, paras. 050303, 050104, 050501–050509.

²⁵ *Id.* para. 050303.

²⁶ *Id.* para. 050104.

²⁷ U.S. Dep't of Def., DD Form 1351-2, Travel Voucher or Subvoucher (May 2011) [hereinafter Form 1351-2].

²⁸ *Id.*

amounts.²⁹ Finally, the instructions portion provides a warning³⁰ regarding the penalties for providing false claims, which assists in proving the mens rea elements of larceny³¹ and false official statement.³²

2. DoD Financial Management Regulation—FSA

The next entitlement likely to be at issue is FSA. FSA is primarily governed by the FMR.³³ Its purpose is to “provide compensation for added expenses due an enforced separation” of the service member from his family.³⁴ It applies to qualifying members inside and outside of the United States.³⁵ Unlike BAH, FSA is paid at a flat rate of \$250 per month.³⁶ Assuming a service member meets all criteria for enforced separation, FSA applies regardless of BAH location. Therefore, irrespective of listing a fraudulent BAH location, a service member separated from a qualifying dependent is likely still entitled to FSA; therefore, in many cases a larceny specification for FSA is inappropriate.³⁷

Fraudulent claims for FSA arise when service members claim they are not legally separated or divorced, when they do not have custody of a child for purposes of dependency that entitles them to FSA, or when separation is not incurred due to enforced family separation. Trial counsel should ask

²⁹ Interview with Supervisory Financial Analyst, Defense Finance and Accounting Service (DFAS) (Jan. 23, 2018) [hereinafter DFAS Interview]. Travel pay transactions are completed and stored in the Integrated Automated Travel System (IATS). *Id.* For the Army, travel pay entitlements are processed at DFAS–Rome. *Id.* Although local finance personnel will likely not have access to IATS, they should have the capability to communicate directly with DFAS to obtain transaction records and documentation. *Id.*

³⁰ Form 1351-2, *supra* note 27 (“There are severe criminal and civil penalties for knowingly submitting a false, fictitious, or fraudulent claim (U.S. Code, Title 18, Sections 287 and 1001 and Title 31, Section 3729).”).

³¹ MCM, *supra* note 20.

³² *Id.*

³³ DoD FMR, *supra* note 23, vol. 7A, ch. 27 (Nov. 2017). *See also* U.S. DEP’T OF ARMY REG. 55-46, TRAVEL OVERSEAS para. 2-4 (14 June 2017) [hereinafter AR 55-46] (providing Army-specific guidance on when service members are entitled to FSA).

³⁴ DoD FMR, *supra* note 23, para. 270101. The FMR provides for three types of enforced separation: “(1) Family Separation Allowance-Restricted (FSA-R);” “(2) Family Separation Allowance-Ship (FSA-S);” and “(Family Separation Allowance-Temporary (FSA-T).” *Id.* para. 270203A. As such, trial counsel must ensure they understand the basis for the FSA payment.

³⁵ *Id.*

³⁶ *Id.* para. 270203B.

³⁷ *See infra* App. B. This appendix provides an example and rationale for when charging larceny based on FSA is inappropriate.

two questions: (1) does the service member have a qualifying dependent; and (2) was the service member separated from the dependent due to enforced family separation? Like the JTR, the FMR contains a definition for dependents.³⁸ While the most common categories will be a spouse or an unmarried child under the age of twenty-one, the FMR lists eight dependent scenarios.³⁹ Additionally, the FMR provides the criteria for an unmarried child considered to be in the custody of the service member.⁴⁰ If there is a qualifying dependent, trial counsel must determine if there is an enforced separation. The FMR details enforced separations.⁴¹ Trial counsel must be aware that FSA is generally not payable when separation is due to personal convenience.⁴²

In determining whether a service member is entitled to FSA, trial counsel must examine the service member's Department of Defense Form 1561 (Form 1561).⁴³ Like Form 5960, this form is significant because it is completed by the service member. The form requires the service member to list the complete, current dependent addresses and certify the dependents do not fall into a category disallowing FSA.⁴⁴ By signing, the service member acknowledges the requirement to notify a commanding officer if dependency status changes or if there is no longer a separation.⁴⁵ Although not containing a warning about false claims or statements, the form assists in proving mens rea elements because the service member

³⁸ DoD FMR, *supra* note 23, at DEF 10–11.

³⁹ *Id.*

⁴⁰ *Id.* para. 270202A1 (providing criteria for legal custody and the requirement that actual physical custody is “precluded due to an enforced family separation described under paragraph 270203.”).

⁴¹ *Id.* para. 270203.

⁴² *Id.* paras. 270401A, 270401C (discussing situations that amount to personal convenience); *See also In re Harda*, 56 Comp. Gen. 805, 807 (1977) (finding that a service member stationed OCONUS was not entitled to FSA when his spouse failed to accompany him due to a legal separation.).

⁴³ U.S. Dep’t of Def., DD Form 1561, Statement to Substantiate Payment of Family Separation Allowance (FSA) (Dec. 2017) [hereinafter Form 1561].

⁴⁴ *Id.*

⁴⁵ *Id.*

I understand that I must notify my commanding officer immediately upon any change in dependency status and if my sole dependent or all of my dependents move to or near this station or if my dependent(s) visit at or near this station for more than 90 continuous days (more than 30 continuous days in the case of FSA-T (Temp) or FSA-S (Ship) while I am in receipt of FSA.

Id.

completes and signs the form. If, after examination of the form and other evidence, the service member was not separated from a qualifying dependent, a larceny charge is appropriate.

3. Army Regulation 55-46—Designated Place Moves

Along with the JTR, for Army specific cases, Army Regulation 55-46 (AR 55-46) controls “designated place” moves for service members serving unaccompanied tours overseas.⁴⁶ A designated place move is a relocation of dependents to a location other than that of the service member.⁴⁷ When service members are required or elect to serve an unaccompanied tour, they have the option of either leaving their family at the current location or moving their family to a designated place.⁴⁸ However, such moves require PCS orders to contain the following language, “Travel of your Family members to your overseas duty station at Government expense is not authorized during this tour. You are authorized to make a designated place move to (authorized place).”⁴⁹

For cases involving unaccompanied tours overseas, AR 55-46 should be examined in conjunction with the JTR as well as the definition of “designated place” in the JTR.⁵⁰ A service member serving an

⁴⁶ AR 55-46, *supra* note 33.

⁴⁷ The term “designated place move” is not defined in the JTR or AR 55-46. However, both regulations define “designated place” and list the process for dependent relocation to a designated place. *See* JTR, *supra* note 3, para. 050814; AR 55-46, *supra* note 33, paras. 2-7–9.

⁴⁸ AR 55-46, *supra* note 33, para. 2-9. For example, a service member stationed at Fort Hood who receives orders for an unaccompanied tour in Korea may elect to leave his family at Fort Hood or move his family to New York City, i.e., the designated place.

⁴⁹ *Id.* para. 2-9c. In a real case, the parentheses contain the designated place, e.g., New York, New York. This annotation makes it clear where the service member may move dependents and claim BAH.

⁵⁰ JTR, *supra* note 3, at A14–15:

[A] place in CONUS/non-foreign OCONUS area . . . [T]he foreign OCONUS place to which dependents are specifically authorized to travel under pars. 050814, 050903 or 050907, when a member is ordered to an unaccompanied/dependent restricted tour. This is limited to the native country of a foreign born spouse for DoD Services and Coast Guard . . . [T]he OCONUS place at which a member is scheduled to serve an accompanied tour after completing an unaccompanied or dependent-restricted tour, and to which dependents specifically are authorized to travel under par. 050809, 050814, 050903, or par. 050907 . . . [T]he OCONUS place in the old

unaccompanied tour overseas will be paid BAH based either upon the former PDS or a designated location.⁵¹ For BAH to be paid for a designated location, the service member must certify that “is the place at which the dependents intend to establish a bona fide residence until further dependent transportation is authorized at Government expense.”⁵² Chapter 2 of AR 55-46 provides a process by which the service member makes the requisite certification. If the language is absent from the PCS orders, it will assist in proving a larceny by showing the service member did not have authorization to move his dependents at government expense and claim BAH for a location other than the former PDS.

Once trial counsel have properly framed each entitlement and understand the analytical framework, it is essential to begin collecting documentation pre-preferral.

B. Pre-preferral Documentation Collection

After framing the entitlements, trial counsel should focus on pre-preferral documentation collection. Collecting documentation pre-preferral accomplishes four goals: (1) it assists in determining whether a crime has been committed; (2) it alleviates potential tolling of the speedy trial clock;⁵³ (3) it ensures counsel are prepared to prove their case; and (4) it can drive efficient case resolution, e.g., the defense may want to negotiate quickly.

A common focus will be proving a service member’s dependents live at an address other than that claimed. In addition to Form 5960, useful

PDS vicinity at which dependents remain under par. 050809, while a member serves a dependent restricted/unaccompanied tour . . . [T]he CONUS, non-foreign OCONUS, or foreign OCONUS place to which dependent are specifically authorized to travel under par. 050804 or par. 050805, when early return of dependents is authorized. This is limited to the native country of a foreign born spouse for DoD Services and Coast Guard.

Id.

⁵¹ *Id.* at para. 100904.

⁵² *Id.* at A14-15 (“To receive allowances associated with a designated place move, the member must certify that the designated place is the place at which the dependents intend to establish a bona fide residence until further dependent transportation is authorized at Government expense.”).

⁵³ MCM, *supra* note 20, R.C.M. 707.

documentation that can be obtained from the local military personnel division includes the service member's PCS orders, record of emergency data,⁵⁴ and service member's group life insurance forms.⁵⁵ These forms are generally completed during in-processing and are required to be updated annually.⁵⁶ Both forms require the service member to list addresses. Often, the primary dependent for BAH purposes will be an individual the service member lists as an emergency contact and as a beneficiary. Although these forms do not drive entitlements, if the listed addresses differ from the address or addresses listed on Form 5960, this will assist in proving mens rea elements.⁵⁷ Furthermore, the service member's Army Military Human Resource Record (AMHRR), should contain documentation of finance and personnel records reviews.⁵⁸ This documentation shows dates of reviews, whether the service member was present during the review, and any noted errors.⁵⁹

Additional documentation to prove a dependent's address includes lease agreements, title or deed information, and school records. To obtain these records, trial counsel must be prepared to enlist the assistance of military law-enforcement or contact the source directly. Additionally, trial counsel should be prepared to utilize the government's subpoena power

⁵⁴ U.S. Dep't of Def., DD Form 93, Record of Emergency Data (Jan. 2008) [hereinafter Form 93].

⁵⁵ Office of Servicemembers' [sic] Group Life Insurance, SGLV 8286, Servicemembers' [sic] Group Life Insurance Election and Certificate (Oct. 2017) [hereinafter Form 8286].

⁵⁶ U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCES RECORDS MANAGEMENT para. 3-7 (7 Apr. 2014); United States Army Human Resources Command, [https://www.hrc.army.mil/site/assets/directorate/TAGD/Required%20Documents%20Posted%20\(20180221\).pdf](https://www.hrc.army.mil/site/assets/directorate/TAGD/Required%20Documents%20Posted%20(20180221).pdf) (last visited Mar. 23, 2019) (providing a list of documentation required to be placed in a service members' Army Military Human Resource Record).

⁵⁷ Form 93, *supra* note 54; Form 8286, *supra* note 55. Trial counsel should pay close attention to the instructions accompanying these forms because it appears it is legally permissible to list an address other than a dependent's current address. For example, on a Form 8286, a service member may list his mother-in-law's address for his spouse because someone may always be reached at the address. Although his spouse does not live at the listed address, it may not qualify as a false statement due to a lack of intent to deceive. *But see* United States v. Suthanaviroj, No. 200000763, 2002 WL 1750802, at *4 (N-M Ct. Crim. App. July 22, 2002) (affirming conviction for false official statement for a Form 93 when service member admitted he believed listing accurate information on a Form 93 would change his housing allowance.).

⁵⁸ U.S. Dept. of Army, Finance Records Review (Sept. 2016) [hereinafter FRR]; U.S. Dept. of Army, Personnel Records Review (Jan. 2014) [hereinafter PRR].

⁵⁹ FRR, *supra* note 58; PRR, *supra* note 58. Both forms contain spaces for finance or personnel clerks to annotate whether the service member was present during annual reviews and whether any errors were noted. *Id.*

either at a preliminary hearing or after referral,⁶⁰ and if necessary, petition the military judge for a warrant of attachment.⁶¹

If marital status or child custody is at issue, trial counsel will need to obtain certified records. A non-exclusive list of potentially helpful certified records includes records of marriage, divorce, child custody agreements, and tax returns. These records assist in proving a lack of qualifying dependents for entitlements,⁶² e.g., BAH at the with-dependent rate and FSA. These documents can often be researched online and certified copies can be ordered either by phone or by mail.⁶³ Trial counsel should be prepared to utilize the subpoena power provided in the Uniform Code of Military Justice (UCMJ).⁶⁴ Once the appropriate documentation is obtained, these records are admissible under hearsay exceptions⁶⁵ and are self-authenticating.⁶⁶

Tax returns may assist in demonstrating the lack of a qualifying dependent in cases involving BAH and FSA. To obtain tax returns for use in a criminal investigation, an order from a federal district court judge or magistrate is required.⁶⁷ The order may only be obtained through an application from “The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States attorney, any special prosecutor appointed under section 593 or title 28 . . . or any attorney in charge of a criminal division organized crime

⁶⁰ MCM, *supra* note 20, R.C.M. 703(g)(3)(D) (“A subpoena may be issued by (i) the summary court-martial; (ii) the trial counsel of a general or special court-martial; (iii) the president of a court of inquiry; (iv) an officer detailed to take a deposition; or (v) in the case of a pre-referral investigative subpoena, a military judge or, when issuance of the subpoena is authorized by a general court-martial convening authority, the detailed trial counsel or counsel for the Government.”).

⁶¹ MCM, *supra* note 20, R.C.M. 703(g)(3)(H)(i) (“The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.”).

⁶² See JTR, *supra* note 3, paras. 100201A, 100210A3, 100204, 100205; FMR, *supra* note 23, at DEF 10–11..

⁶³ See, e.g., The Official Website of the City of Indianapolis and Marion County: Marion County Clerk of the Court, <http://www.indy.gov/eGov/County/Clerk/Pages/home.aspx> (last visited Mar. 14, 2018) (providing online searches of marriage and divorce records and forms for ordering certified copies).

⁶⁴ See MCM, *supra* note 20, R.C.M. 703(g)(3)(D), R.C.M. 703(g)(3)(H)(i).

⁶⁵ MCM, *supra* note 20, MIL. R. EVID. 803(8).

⁶⁶ MCM, *supra* note 20, MIL. R. EVID. 902(2).

⁶⁷ I.R.C. § 6103(i)(1)(A) (2016).

strike force established pursuant to section 510 of title 28”⁶⁸ Given this requirement, trial counsel should coordinate with their office’s Special Assistant to the United States Attorney (SAUSA) to determine whether the local Assistant United States Attorney (AUSA) is willing and able to obtain a court order. Critically, trial counsel will need to consider analogous federal offenses to enable application before a federal judge.⁶⁹ Finally, trial counsel must consider the necessary lead-time in obtaining tax documents.⁷⁰

When addressing claims of PDTP and movement of a household and dependents, trial counsel should obtain the service member’s application for shipment of personal property,⁷¹ bills of lading for household goods transportation, and the full travel voucher submission with all supporting

⁶⁸ I.R.C. § 6103(i)(1)(B) (2016) (upon application, a federal judge or magistrate may issue an order if)

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed, (ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and (iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act . . . and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

⁶⁹ Compare Telephone Interview with Captain (Capt.) Kathleen O’Hara, Judge Advocate, United States Marine Corps (Jan. 22, 2018) [hereinafter, Capt. O’Hara Interview]. While serving as a SAUSA, Capt. O’Hara successfully worked with the AUSA to obtain a court order for tax return information in a case involving questionable FSA payments for a service member who had claimed FSA following a divorce. *Id.* In this situation, the application for the order was possible because of related federal fraud provisions as opposed to a purely military offense. *Id.* Additionally, the AUSA had venue because the offense occurred within San Diego County. *Id.*, with Telephone Interview with Captain (CPT) Christopher Kim, Judge Advocate United States Army (Jan. 22, 2018). While serving as a SAUSA, a trial team was unable to successfully apply for a federal court order in a sexual misconduct-based case due to the lack of a sufficient analogous federal provision to provide appropriate jurisdiction. *Id.* Examples of analogous federal provisions include 18 U.S.C. § 641 (addressing stealing public money) and 18 U.S.C. 1001 (addressing false statements).

⁷⁰ Capt. O’Hara Interview, *supra* note 69. Following the issuance of the order, the order was served on the IRS, and the documents were not received until shortly before the start of trial. *Id.*

⁷¹ U.S. Dep’t of Def., DD Form 1299, Application for Shipment and/or Storage of Personal Property (Sept. 1998).

documentation.⁷² These documents will either support or reject a service member's claim. For example, a service member may apply to ship a certain weight of household goods to a particular address. This should be compared to the bill of lading to determine what amount was delivered and to what address. The bill of lading can be obtained from the local transportation office while the travel documents will be obtained through the local finance office.⁷³

In order to prove amounts paid, trial counsel should obtain the service member's leave and earnings statements and finance printouts for travel pay claims. Both may be obtained at the local finance office or the Defense Finance and Accounting Service (DFAS).⁷⁴

While the aforementioned list contains the most common documentation for an entitlement fraud case, it is not exhaustive. Trial counsel should consider additional documentation such as in-processing sign-in sheets to prove attendance at a finance brief, briefing slides used by finance, and records of pay inquiries initiated by the service member.

III. The Charging Decision and Drafting of Appropriate Charges

After relevant pre-referral research and documentation collection is complete, trial counsel must decide whether charging is appropriate, draft appropriate charges, and avoid the pitfalls of unreasonable multiplication of charges (UMC) and exact amount charging. When contemplating these decisions, trial counsel should consider three principles: (1) whether a crime was committed; (2) command and prosecutorial objectives; and (3) what can and should be charged.

⁷² Form 1351-2, *supra* note 27. Supporting documentation accompanying the travel voucher may include hotel receipts, rental car receipts, flight receipts, toll receipts, etc. *Id.* Also, a lack of this documentation may refute a service member's claim that his dependents actually travelled to a certain location.

⁷³ DFAS Interview, *supra* note 29. Individual finance offices normally retain hard copy documentation until it is uploaded into the Corporate Enterprise Document Management System; however, electronic copies will be archived with DFAS. *Id.* Most documents are retained for ten years. *Id.*

⁷⁴ Ashby Interview, *supra* note 1 ("Leave and earnings statements are stored in the Defense Joint Military Pay System or DJMS. Leave and earnings statements dating back to 1991 can be obtained.").

A. Determining Whether a Crime Was Committed

Trial counsel must first determine whether a crime was committed. Though seemingly obvious, this step is critical because one must consider whether erroneous entitlements were paid due to misunderstandings either in paperwork or entitlement rights. Equally, if not more important, trial counsel must determine whether an entitlement is lawfully being paid pursuant to JTR and FMR rules.⁷⁵

The following steps are useful in determining whether a crime was committed. First, speak to finance personnel conducting briefs for incoming service members and sit through a finance brief. This assists in understanding the clarity of the brief or lack thereof, and if needed, obtaining witnesses and documentation.⁷⁶ Second, determine whether the service member initiated a pay inquiry⁷⁷ to attempt to correct the entitlement. Third, prior to drafting charges, speak with finance, and if possible, DFAS personnel. This is recommended because trial counsel are likely not familiar with the JTR's more nuanced provisions.⁷⁸ This step also assists with witness identification pre-preferral. After these steps, trial counsel must consider command and prosecutorial objectives.

⁷⁵ See JTR, *supra* note 3, para.100904. This is especially critical when deciding whether to prosecute service members serving unaccompanied overseas tours given dependents may have moved to a designated location entitling the service member to a higher BAH rate.

⁷⁶ Yongsan Finance Office, Finance (2015) (unpublished PowerPoint presentation) (on file with author). This PowerPoint presentation provides an example of how service members are instructed step-by-step to complete Form 5960, Form 1561, and Form 1351-2.

⁷⁷ E.g., U.S. Dep't of Army, DA Form 2142, Pay Inquiry (Apr. 1982) (requiring the service member to list the nature of the pay inquiry and requiring the local finance office to provide a description of the cause and action taken). For the Army, local policies for submitting a pay inquiry vary. For example, to submit a pay inquiry, it is a common requirement for Soldiers in the rank of Specialist (SPC) and below to obtain the approval of a commander or first-line noncommissioned officer supervisor. If this is the case, trial counsel should also seek to interview the supervisor providing approval.

⁷⁸ JTR, *supra* note 3; DFAS Interview, *supra* note 29. For example, there are several portions of the JTR that discuss waivers through a "secretarial process." That process is not well defined within the JTR; however, it involves an approval process through each service component's personnel branch. DFAS Interview, *supra* note 29. Within the Army, requisite approvals are obtained at Army G-1 and communicated back to DFAS. *Id.*

B. Considering Command and Prosecutorial Objectives

When considering command and prosecutorial objectives, trial counsel need to manage the expectations of the command. Entitlement fraud cases tend to result in low confinement terms.⁷⁹ On the other hand, entitlement fraud cases frequently result in a punitive discharge.⁸⁰ Trial counsel should discuss potential outcomes versus the resources required to prosecute and determine whether more efficient and economic courses of action achieve a desired outcome, e.g., General Officer Memorandum of Reprimand and a separation action.⁸¹ If prosecution remains the goal, trial counsel must determine what and how to charge.

C. Determining What Can and Should be Charged

Entitlement fraud cases most commonly involve charges of false official statement, false claims, and larceny.⁸² In making the charging decision, trial counsel should begin by determining the theory of liability for larceny, i.e., whether the larceny is based on a wrongful taking or wrongful withholding.⁸³ This step is critical because while most entitlement fraud cases are based upon a wrongful taking by false

⁷⁹ Review of 117 Entitlement Fraud Cases involving BAH between 1953 and 2017 (on-file with author). Of the 117 entitlement fraud cases reviewed, only 19 cases carried a term of confinement for more than one year regardless of amount and only 17 cases carried a term of confinement of one year regardless of amount.

⁸⁰ *Id.* Of the 117 cases reviewed, 108 cases included a punitive discharge.

⁸¹ This assertion represents an example based on the author's recent professional experience as Defense Counsel, Trial Defense Service—Yongsan Field Office, from 29 March 2015–20 July 2017 [hereinafter Professional Experience]. During the aforementioned timeframe, the author represented six clients at courts-martial charged with entitlement fraud and observed two additional entitlement fraud cases. Of the eight cases, only one carried a sentence of a bad-conduct discharge and confinement for more than six months. Of the remaining cases, two ended in a full acquittal and five carried sentences of less than six months confinement and no punitive discharge. When balanced against the amount of resources required for prosecution, adverse administrative action may be more efficient while meeting the goals of the command.

⁸² 10 U.S.C. §§ 907, 921, 924 (2018). Although these are the most common offenses charged, entitlement fraud cases may also involve the offenses of altering public records, forgery, and impersonation under 10 U.S.C. § 904, 10 U.S.C. § 905 and 10 U.S.C. § 906. Trial counsel should resist the urge to charge violations of Article 92, UCMJ, as neither the JTR, nor the FMR are punitive regulations.

⁸³ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-46-1, notes 2, 7 (10 Sept. 2014) [hereinafter BENCHBOOK].

pretense,⁸⁴ cases based upon wrongful withholding⁸⁵ may not be accompanied by false official statements or false claims.⁸⁶ Therefore, the theory of liability drives the charging decision.

For larceny by false pretense, UMC should be avoided.⁸⁷ At a finance in-brief, service members generally complete and submit Forms 5960 (or service equivalent), 1561, and 1351-2. All three may contain false statements regarding dependent status, dependent location, and dependent travel; however, whether each merits a separate specification may depend on the subject matter and timing.⁸⁸ For example, Forms 5960 and 1561 require certification of dependent status and location; therefore, the subject matter of the false representation is the same.⁸⁹ If both forms were completed and submitted on the same date, a recommended best practice

⁸⁴ *Id.* para. 3-46-1d, note 2 (“A criminal ‘false pretense’ is any misrepresentation of fact by a person, who knows it to be untrue, which is intended to deceive, which does in fact deceive, and which is the means by which value is obtained from another without compensation.”).

⁸⁵ *Id.* at note 7; *United States v. Helms*, 47 M.J. 1, 6-7 (C.A.A.F. 1997) (“We now hold that once a servicemember [sic] realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the servicemember [sic] has committed larceny.”).

⁸⁶ For example, a service member with dependents may submit a correct Form 5960 listing a zip code for El Paso; however, finance inputs a zip code for San Antonio. When discovered, the service member intentionally fails to correct the error. Although the service member begins committing a larceny at the moment he forms the intent to steal, he never provided a false official statement or made a false claim.

⁸⁷ *See United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (listing the following factors for a UMC analysis “‘Did the accused object at trial?’”; (2) “‘Is each charge and specification aimed at distinctly separate criminal acts?’”; (3) “‘Does the number of charges and specifications misrepresent or exaggerate the appellant’s criminality?’”; (4) “‘Does the number of charges and specifications unfairly increase the appellant’s punitive exposure?’”; and (5) “‘Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?’” *Id.* (quoting *United States v. Quiroz*, 53 M.J. 600, 607 (N-M Ct. Crim. App. 2000)).

⁸⁸ *See, e.g. United States v. Wright*, 44 M.J. 739 (A. Ct. Crim. App. 1996) (finding an unreasonable multiplication of charges for two false statements to law enforcement related to the same victim despite a fifteen to twenty minute time difference); *United States v. Bartelle*, No. 13-0420, 2015 WL 7170012, at*3 (A. Ct. Crim. App. Nov. 12, 2015) (finding an unreasonable multiplication of charges for three false statements made during one law enforcement interview about a relationship with another service member); *But see United States v. Oliver*, No. ACM 38858, 2017 CCA LEXIS 59, at *31-32 (A.F. Ct. Crim. App. Jan. 27, 2017) (finding no unreasonable multiplication of charges for specifications aimed at differing versions of events during the same interview of a homicide investigation).

⁸⁹ *See Wright*, 44 M.J. 739.

is to draft one specification.⁹⁰ Contrarily, the Form 1351-2 differs in subject matter because the service member is claiming dependent travel.⁹¹ Consequently, a separate specification for falsehoods on Form 1351-2 is warranted. Given differing Service court interpretations of UMC, trial counsel should consider prior rulings by their respective military judge and appellate courts.⁹²

A UMC situation may also arise when charging both a false official statement and a false claim. False official statement requires specific intent⁹³ and a false claim requires specific knowledge;⁹⁴ however, both are often based on the submission of a form. For false claims, trial counsel must consider the underlying basis of the false claim. For instance, if a false claim for BAH is based upon the submission of Form 5960 listing the service member's dependent as residing at a false location it is likely the two offenses are aimed at the same misconduct.⁹⁵ A charging strategy that chooses either the false claim or the false official statement avoids unnecessary motions practice for offenses carrying the same maximum

⁹⁰ See *infra* Appendix A and Appendix B. These appendices provide examples of a recommended and not recommended charging scheme with accompanying rationales.

⁹¹ Form 1351-2, *supra* note 27.

⁹² See *infra* Appendix A and Appendix B.

⁹³ BENCHBOOK, *supra* note 83, para. 3-31-1c(4) (“That the false (document) (statement) was made with the intent to deceive.”).

⁹⁴ *Id.* para. 3-58-2c(3) (“That the claim was (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged).”). The offense of Presenting a False Claim is found at 10 U.S.C. § 924. The most current, official version of the Benchbook still cites 10 U.S.C. § 932.

⁹⁵ BENCHBOOK, *supra* note 83, para. 3-31-1d (“‘Intent to deceive’ means to purposely mislead, to cheat, to trick another, or to cause another to believe as true that which is false.”); BENCHBOOK, *supra* note 83, para. 3-58-2d,

‘False’) (‘Fraudulent’) (‘False and Fraudulent’) mean intentionally deceitful. (It) (They) refer(s) to an untrue representation of a material fact, that is, an important fact, made with knowledge of its untruthfulness and with the intent to defraud another. The test of whether a fact is material is whether it was capable of influencing the approving authority to (pay) (approve) (approve and pay) the claim.

Given the similarity between the definitions of intent to deceive and false and fraudulent, the submission of a single form, e.g., Form 5960, for the purpose of fraudulently obtaining BAH, the purpose is one in the same, i.e., to deceive or defraud. The UMC situation is created because a false official statement charge and a charge for presenting a false claim are aimed at the same conduct.

punishment⁹⁶ and are likely to be UMC for findings or at least merged for sentencing purposes.⁹⁷

It is also recommended that trial counsel avoid exact amount charging. When charging a larceny, whether the amount stolen is under or over \$1,000 increases the maximum punishment.⁹⁸ Entitlement fraud cases often involve amounts over \$1,000.⁹⁹ Although it can be enticing to view monthly LESs and add the total dollar amount stolen, this can create unnecessary problems, and it is recommended trial counsel draft specifications listing the amount as “more than \$1,000.”

First, exact amount charging may hinder plea negotiations or create problems during plea inquiries. For plea negotiations, a service member may be willing to admit a larceny, but insist the intent to steal did not begin until a later date than alleged thereby changing the charged amount.¹⁰⁰

⁹⁶ MCM, *supra* note 20, pt. IV, ¶¶ 41d(1), 71d(1) (providing a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years for both false official statement and false claims). This practice is recommended for cases where the completion and submission of a form are one in the same, e.g., the completion of the Form 5960 is also the submission of a claim for BAH.

⁹⁷ *E.g.*, United States v. Curtis, No. 20130289, 2015 CCA LEXIS 192, at *4 (A. Ct. Crim. App. Apr. 20, 2015) (finding UMC for false official statement and false claim addressing the same document and same lie.); United States v. Roosa, No. 20100879, 2013 CCA LEXIS 373, at *8 (A. Ct. Crim. App. Apr. 30, 2013) (finding UMC for false official statements and false claims based on the same document.); United States v. Perkins, No. 32547, 1997 CCA LEXIS 579, at *6-7 (A.F. Ct. Crim. App. Nov. 4, 1997) (addressing false official statements and false claims based on a Form 1351-2, it was stated, “[T]his Court cannot discern how one can present a false claim without also making a false official statement. The claim is an official statement and, if false, a false official statement.”). *But see* Curtis, 2015 CCA LEXIS 192, at *4; United States v. Smith, No. 200600156, 2007 WL 3025072, at *2-3 (N-M Ct. Crim. App. Oct. 16, 2007); United States v. Suthanaviroj, No. 200000763, 2002 WL 1750802, at *8 (N-M Ct. Crim. App. July 22, 2002). These cases demonstrate that courts generally treat larceny as a criminal act distinct from false official statement or false claim. Therefore, UMC will likely not be an issue for larceny and false claims or false statements.

⁹⁸ MCM, *supra* note 20, pt. IV, ¶¶ 64d(1)(a), 64d(1)(b) (providing a maximum punishment of a bad-conduct discharge, total forfeiture, and confinement for one year for larceny of military property of \$1,000 or less and a maximum of dishonorable discharge, total forfeiture, and confinement for ten years for larceny of military property over \$1,000).

⁹⁹ Professional Experience, *supra* note 81. The author represented six clients at courts-martial charged with entitlement fraud. All six cases involved amounts over \$10,000.

¹⁰⁰ *Id.* In negotiation of a plea deal for a BAH fraud case, trial counsel charged an exact amount where the beginning date for the intent to steal was in question. *Id.* Although ultimately resolved, the parties initially reached an impasse when the trial counsel refused

Therefore, the specification must be amended or a mutually agreeable deal may be lost. On the other hand, if a deal is reached, the amount charged can threaten a providence inquiry if counsel are not cognizant of how the amount was calculated. Even if counsel agree, during sentence deliberation, a military judge may attempt to confirm the total.¹⁰¹ If the military judge arrives at a different total and cannot resolve the total with counsel, and most importantly the accused, a mutually beneficial agreement can fail.

Second, in panel cases, exact amount charging can affect trial counsel credibility.¹⁰² If evidence of amount is incongruent with the charged amount, panel members may question case integrity. If an exact amount is charged, trial counsel should expect panel members to add totals. If the totals are off, this can unnecessarily affect trial counsel credibility.

Exact amount problems are avoided by drafting specifications using the language “over \$1,000” or similar language to indicate an amount over \$1,000.¹⁰³ Not only does this alleviate problems with amount, it allows presentation of damning evidence. Trial counsel may still admit LES statements or travel pay amounts as relevant evidence of larceny or as aggravating evidence during sentencing and avoid imprecise mathematical calculations.¹⁰⁴ Trial counsel retain credibility while amplifying the larceny.

to amend the charge sheet to read “over \$500” (using the 10 U.S.C. § 921 provision in effect in 2016) as opposed to a specific amount. *Id.*

¹⁰¹ *Id.* Following deliberation on a sentence in an exact amount charging case, a military judge re-opened a providence inquiry after reaching a different amount than that on the charge sheet. *Id.* The military judge accepted the plea by excepting the charged amount and entering a lower amount still over \$500. *Id.*

¹⁰² MCM, *supra* note 20 ¶ 64b(1)(c) (“That the property was of a certain value, or of some value . . .”).

¹⁰³ See MCM, *supra* note 20, R.C.M. 307(c)(3) discussion (H)(iv) (2019) (“Exact value should be stated, if known. For ease of proof an allegation may be ‘of a value not less than . . .’ If only an approximate value is known, it may be alleged as ‘of a value of about . . .’”).

¹⁰⁴ BENCHBOOK, *supra* note 83 para. 3-46-1c; MCM, *supra* note 21, R.C.M. 1001(b)(4) (“The trial counsel may present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty . . . [including] evidence of financial . . . impact on or cost to any person or entity who was the victim of an offense . . .”).

IV. Evidence Presentation

For evidence presentation, it is recommended trial counsel focus on judicial notice,¹⁰⁵ business records,¹⁰⁶ absence of business records,¹⁰⁷ public records,¹⁰⁸ and attestation certificates.¹⁰⁹ Furthermore, trial counsel must identify witnesses with the requisite knowledge of military pay systems and processes.

It is recommended trial counsel request judicial notice of pertinent JTR and FMR sections. Judicial notice educates panel members and allows trial counsel to refer to and request panel members review the relevant rules while deliberating. However, caution should be taken to not overload the panel. For example, chapter ten of the JTR, addressing housing allowances, is eighty-five pages.¹¹⁰ If the intent is to allow and remind the panel members the service member claimed an entitlement for an improper dependent, judicial notice should be sought for only Part B.¹¹¹

For the presentation of business records and accompanying attestation certificates, trial counsel must focus on the correct witness with knowledge of relevant finance systems. Different systems are used to maintain different pieces of pay and entitlement data.¹¹² For example, LES statements are obtained through the Defense Joint Military Pay System (DJMPS).¹¹³ However, travel pay transactions are stored and retrieved through the Integrated Automated Travel System.¹¹⁴ Defense counsel may attack the foundation for a business record by challenging witness

¹⁰⁵ MCM, *supra* note 20, MIL. R. EVID. 202(a).

¹⁰⁶ MCM, *supra* note 20, MIL. R. EVID. 803(6).

¹⁰⁷ MCM, *supra* note 20, MIL. R. EVID. 803(7).

¹⁰⁸ MCM, *supra* note 20, MIL. R. EVID. 803(8).

¹⁰⁹ MCM, *supra* note 20, MIL. R. EVID. 902(11).

¹¹⁰ JTR, *supra* note 3.

¹¹¹ *Id.* paras. 100201–100208.

¹¹² DFAS Interview, *supra* note 29. Different finance systems are used by the different Service components. *Id.* The Army, Navy, and Air Force use the Defense Joint Military Pay System (DJMS). *Id.* The Coast Guard uses the Integrated Personnel Pay System. *Id.* The Marine Corps uses the Marine Corps Total Force System. *Id.* Trial counsel need to identify the pay system being used and ensure to use witnesses with knowledge of the relevant system. For example, defense counsel may attack the witness's knowledge of how data is entered into a system or retrieved from a system.

¹¹³ *Id.* DJMS warehouses all payroll data and transactions. *Id.* The data stored is data provided by the service member and entered by finance personnel. *Id.*

¹¹⁴ *Id.*

knowledge of the system and the trustworthiness of the record.¹¹⁵ These problems are avoided if trial counsel become educated on what systems are at issue and who can testify as to knowledge of the system as opposed to simply obtaining a document from finance.

V. Presenting a More Compelling Panel Case

While entitlement fraud cases may border on the mundane, trial counsel can tell a captivating story about the misconduct through evidentiary foundations. A recommended approach is to avoid filing a lengthy motion to pre-admit evidence. For example, when laying a business record foundation for a Form 5960, trial counsel may use the witness to discuss the steps to complete the form and the warnings the form provides for false information. This assists in creating a full picture of every step the accused took to commit the larceny, false statement, or false claim. In contrast, the pre-admission of evidence deprives the panel of the benefit of hearing the foundation. Thus, the panel may be deprived of details such as how the document was completed and what assistance was offered.

Second, pre-admitting most or all of the documentary evidence may raise cumulative presentation objections.¹¹⁶ For instance, if trial counsel pre-admits a Form 5960, defense counsel may object if the trial counsel then attempts to elicit testimony regarding the foundation for the document. Once again, this may result in panel members being deprived of details of the foundation that enhance the description of the alleged misconduct. Preserving the opportunity to elicit foundational testimony allows trial counsel to have witness testimony tell the story of the service member's alleged misconduct. This, in turn, allows the trial counsel to construct and present a cohesive, comprehensible case.

¹¹⁵ MCM, *supra* note 20, MIL. R. EVID. 803(6), MIL. R. EVID. 803(7), MIL. R. EVID. 803(8).

¹¹⁶ MCM, *supra* note 20, MIL. R. EVID. 403 (“The military judge may exclude relevant evidence if its probative value is substantially outweighed by . . . *undue delay, wasting time, or needlessly presenting cumulative evidence.*”) (emphasis added). If this occurs, trial counsel also risk reducing credibility if several witnesses are called to testify and then quickly dismissed due to relevance objections.

VI. Conclusion

For a new trial counsel, prosecuting entitlement fraud cases can be daunting and confusing with little assistance offered through secondary material. By analyzing the proper legal framework, trial counsel will be in a position to tailor the investigation to ensure effective pre-referral evidence collection, which allows for focused command and prosecutorial objectives. By following this process, if and when a decision is made to go to trial, trial counsel will be able to draft appropriate charges, in-line with command and prosecutorial objectives, and use the evidence to present a captivating and winning case.

Appendix A. Example of and Rationale for a Recommended Charging Scheme

This example is based upon the following fact pattern: On 1 January 2017, Staff Sergeant (E-6) service member undergoes a PCS from Fort Bliss, Texas, to South Korea. The service member is married, but is serving an unaccompanied, dependent restricted tour. Upon in-processing, the service member attends a finance brief and completes a Department of the Army (DA) 5960 for BAH, a Department of Defense (DD) 1561 for FSA, and a DD 1351-2 for PCS travel expenses. On both the DA 5960 and the DD 1561, the service member lists he is married and lists a current address for his spouse in Brooklyn, New York 11201. Furthermore, he lists his spouse moved from El Paso, Texas 79835; however, she never actually left El Paso. The difference in BAH at the with-dependent rate for El Paso and New York is \$2,712 per month (\$4,128 for Brooklyn - \$1,416 for El Paso). The service member also claimed \$3,000 in travel expenses for his spouse's alleged move to Brooklyn. At the time the suspected fraud is uncovered on 30 November 2017, the service member has been stationed in Korea for eleven months and has received \$29,832 of BAH to which he is not entitled.

Trial counsel drafts the following charges:

CHARGE I – A violation of the UCMJ, Article 107

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign official records, to wit: Department of the Army Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA), and Department of Defense Form 1561, Statement to Substantiate Payment of Family Separation Allowance, which records were false in that his spouse's current address was not Brooklyn, New York 11201, and was then known by the said Staff Sergeant (E-6) to be so false.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of Defense Form 1351-2, Travel Voucher or Subvoucher, which record was totally false in that his spouse did not relocate from El Paso, Texas, to Brooklyn, New York, and was then known by the said Staff Sergeant (E-6) to be so false.

CHARGE II – A violation of the UCMJ, Article 121

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about between 1 January 2017 and 30 November 2017, steal Basic Allowance for Housing, military property, of a value over \$500, the property of the U.S. Army.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, steal travel pay entitlements, military property, of a value over \$500, the property of the U.S. Army.

This type of charging scheme is recommended for the following reasons:

1. It avoids unnecessary UMC motions practice for false official statements.
2. It avoids unnecessary UMC motions practice for the false official statements and false claims.
3. It avoids specifications that will automatically result in an acquittal either by verdict or by operation of R.C.M. 917.
4. It eliminates problems associated with exact-amount charging.
5. It simplifies the government's case while carrying the same maximum punishment, i.e., dishonorable discharge, confinement for 30 years, and forfeiture of all pay and allowances, that is likely after successful defense motions practice discussed in Appendix B.
6. Although rulings may differ from case to case, there will generally not be a UMC issue for the larceny and false official statement charges because they are considered distinct criminal acts.

Appendix B. Example of and Rationale for a Charging Scheme NOT Recommended

This example is based upon the same fact pattern listed in Appendix A.

CHARGE I - A violation of the UCMJ, Article 107

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of the Army Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA), which record was false in that his spouse's current address was not Brooklyn, New York 11201, and was then known by the said Staff Sergeant (E-6) to be so false.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of Defense Form 1561, Statement to Substantiate Payment of Family Separation Allowance, which record was false in that his spouse's current address was not Brooklyn, New York 11201, and was then known by the said Staff Sergeant (E-6) to be so false.

Specification 3: In that Staff Sergeant (E-6), U.S. Army, did at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, with intent to deceive, sign an official record, to wit: Department of Defense Form 1351-2, Travel Voucher or Subvoucher, which record was totally false in that his spouse did not relocate from El Paso, Texas, to Brooklyn, New York, and was then known by the said Staff Sergeant (E-6) to be so false.

CHARGE II – A violation of the UCMJ, Article 121

Specification 1: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about between 1 January 2017 and 30 November 2017, steal Basic Allowance for Housing, military property, of a value of \$29,832, the property of the U.S. Army.

Specification 2: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about between 1 January 2017 and 30 November 2017, steal Family Separation Allowance, military property, of a value of \$2,750, the property of the U.S. Army.

Specification 3: In that Staff Sergeant (E-6), U.S. Army, did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, steal travel pay entitlements, military property, of a value of \$3,000, the property of the U.S. Army.

CHARGE III – A violation of the UCMJ, Article 124

Specification 1: In that Staff Sergeant (E-6), did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, by preparing a DA Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA), for presentation for payment, make a claim against the United States in the amount of \$45,408 for Basic Allowance for Housing, which claim was false and fraudulent in the amount of \$29,832 in that his spouse did not live in Brooklyn, New York 11201, and was then known by the said Staff Sergeant to be false and fraudulent.

Specification 2: In that Staff Sergeant (E-6), did, at or near Camp Humphreys, Republic of Korea, on or about 1 January 2017, by preparing a Department of Defense Form 1351-2, Travel Voucher or Subvoucher, for presentation for payment, make a claim against the United States in the amount of \$3,000 for Travel Pay Entitlements, which claim was false and fraudulent in the amount of \$2,750, in that his spouse did not travel from El Paso, Texas 79835 to Brooklyn, New York 11201, and was then known by the said Staff Sergeant to be false and fraudulent.

This type of charging scheme is not recommended for the following reasons:

1. Specifications 1 and 2 of Charge I allege false statements that were made at the same time and place and contained the same substance. Therefore, under a UMC analysis, it is highly likely these specifications will, at the very least, be merged for sentencing and possibly be merged into a single specification for findings. These two specifications lead to unnecessary motions practice, and a resulting merger will negate the prosecutorial benefit of arguing for a higher sentence.
2. The specifications of Charge II all allege exact amounts. This approach runs the risk of hindering plea negotiations and plea inquiries. Additionally, if any amount varies at a contested court-martial, trial counsel may lose credibility in front of a panel.

3. Specification 2 of Charge II will result in an acquittal either by verdict or operation of R.C.M. 917. FSA is paid at a flat rate of \$250 per month regardless of dependent location. Although the service member may be convicted of a false official statement for listing an incorrect address, because he was separated from his spouse he is nonetheless entitled to FSA.

4. The Specifications of Charges I and II will likely be merged for sentencing. Under a UMC analysis, there is a high probability the defense can successfully argue that the charges and specifications are aimed at the same criminal act, misrepresent the service member's criminality, and unfairly increase his punitive exposure. This will lead to unnecessary motions practice and the resulting merger will negate the prosecutorial benefit of arguing for a higher sentence.

5. The Specifications of Charge III create the aforementioned exact amount charging problems. It is unnecessary for trial counsel to create this problem for the following reasons:

(1) the false official statements which form the basis of the false claims can easily be proved;

(2) the false claim specifications allow for the same maximum punishment as the false official statement specifications; and

(3) it will create unnecessary motions practice.

6. Specification 2 of Charge III will result in an acquittal either by verdict or operation of R.C.M. 917. FSA is paid at a flat rate of \$250 per month regardless of dependent location. Although the service member may be convicted of a false official statement for listing an incorrect address, because he was separated from his spouse he is nonetheless entitled to FSA.