

## Professional Conduct Reminder #3

The first two PCR's focused on Rule 1.13 in AR 27-26, "Army as Client." PCR #00-01 explained that, except when duly appointed to represent an individual as a defense counsel or legal assistance officer, the Army lawyer represents the Army acting through its authorized officials. Then PCR #00-02 continued with additional extracts that helps the Army lawyer deal with an Army official who intends to proceed in a manner that will violate a legal obligation to the Army or violate law. The lawyer shall proceed as is reasonably necessary in the best interest of the Army taking into account all of the facts and circumstances. In addition, whenever it is apparent that the Army's interests are adverse to those of the official, the lawyer shall explain the identity of The Army as the client. [My suggestion: Be alert. It might be wise to alert the official much earlier than "whenever it is apparent," or in other circumstances, for example, when an Army official comes into your office and prefaces his or her remarks that there is an expectation of confidentiality between you and the official. At that time, you need to ensure that the employee understands that there is no "personal" attorney-client/confidentiality relationship between you.]

What now follows are some extracts from the "*Comment*" to the Rule.

"For purposes of these Rules, an Army lawyer normally represents the Army acting through its officers, employees or members, in their official capacities. It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibility exists...

"When one of the ... Army [officials] communicates with [you] the Army's lawyer on a matter relating to [your] representation of the organization on the organization's official business, the communication is generally protected from disclosure to anyone outside the Army by Rule 1.6. This does not mean, however, that the [official] is a client of the lawyer. It is the Army, and not the [official] which benefits from Rule 1.6 confidentiality. The Army's entitlement to confidentiality ... may not be asserted by an [official] as a basis to conceal personal misconduct from the Army.

"When [Army officials] make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decision concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer may have reason to know that the Army may be substantially injured by the action of an [official] that is in violation of law or directive."

### My Comments:

1. Even though confidentiality protects communications from disclosure "to anyone outside the Army," this does not mean that such communications may be discussed freely with anyone "inside the Army." Also, just because there is no attorney-client relationship with the individual

official does not mean that the conversation is subject to publication and public scrutiny. We still need to exercise discretion and ensure that there is really a "need to know." Unnecessary disclosure to officials within the Army could invite censure under the rules (e.g., the attorney's casual disclosures within the Army could lead to disclosure to others outside the Army). And, from the perspective of the individual official, it might be that we can accomplish our job, satisfy our fiduciary relationship to the Army, and comport with the Rules of Professional Conduct, and still extend a modicum of privacy to our conversation with the individual.

2. I disagree with the proposition that "[d]ecisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." Well, perhaps the "as such" modifier saves the statement. But, as part of the command or organization that we support, I consider us to be full partners with the command and its management. This means that we do not strictly limit ourselves to rendering legal advice. See Rule 2.1 Advisor: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." However, it is extremely important that, when we do stray into these other considerations, it is clear to the client that such advice is not a legal opinion.

**Final Comment:** In response to PCR #00-02, an AMCCC attorney pointed out that this Rule requires difficult judgement calls involving all of the unique facts and circumstances of each situation. True. It is not the usual case where it will be absolutely clear that a course of action will result in a violation of a duty to the Army or a violation of law -- it might be the lawyer's "opinion" that it is, but that usually all that it is: opinion! The fact that the client's (Army's) official has decided on a course of action that is contrary to a legal opinion or that the lawyer disagrees with for other reasons is not sufficient to require the lawyer to advise the official that his or her interests are at risk, are adverse to the interests of the Army, and that the official should seek personal counsel. The lawyer might ask for reconsideration, consult with his or her supervisor, but the wrath of Rule 1.13 will arise in only the most compelling of situations involving criminal conduct.

What is the starting point? How should a lawyer deal with these issues? The starting point is always with the lawyer's supervisory attorney. Use the technical chain for resolving these issues. Remember, each case must be dealt with and resolved on its own merits taking into account all of the facts and circumstances. The decision to draft a statement of work for a \$100,000 procurement in a certain way that the attorney believes will be susceptible to a sustainable protest is a lot different from a decision to spend \$100,000 of appropriated funds for drink and food and entertainment for the attendees at the commander's birthday party, or from a decision to participate in a contract matter notwithstanding a conflict of interest.

What is the ending point? Did the lawyer act reasonably in the best interest of the client (the Army)?

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