



# Office of Command Counsel Newsletter

October 2000, Volume 2000-5

## 500th AMC-Level Protest Resolved

## Command Legal Program

**T**he resolution of the 500th AMC-Level Protest under the AMC Alternative Dispute Resolution (ADR) Program was recognized at a September 5, 2000 ceremony at Headquarters, AMC.

**General John G. Coburn** presided over the ceremony. **General Coburn** recalled that at first Headquarters, Department of the Army was reluctant to grant authority to decide cases in-house. The CG opined that the deciding factor in the Pentagon's approval to conduct a pilot program was the respect that HQDA has for **Ed Korte** and our legal community,

**Ed Korte**, AMC Command Counsel recited the splendid history of the AMC-Level Protest Program, which includes being named one of the "Ten Best Government Procurement Practices" by the Office of Federal Procurement Policy.

Subsequently, **President Clinton** issued Executive Order 12979 entitled "Agency Procurement Protests" on 25 October 1995, directing that Federal agencies adopt a similar ADR protest resolution procedures.

Also in attendance and addressing the attendees were Army General Counsel **Chuck Blanchard**, whose comments underscored that AMC is a leader in the development and the execution of ADR initiatives; and,

**Dan Gordon**, Associate General Counsel, General Accounting Office, who spoke of his belief that the AMC-Level Protest Program significantly contributes to the integrity of the procurement process.

To commemorate the 500th Protest observance, **General Coburn** signed a memorandum to the AMC major subordinate commanders, provided as Encl 1 and at page 4.

The Command Legal Program for 2001-2 will be the main topic of discussion at the October AMC Chief Counsel Workshop, scheduled for Gettysburg, Pennsylvania.

Stay tuned for more information in the December Newsletter, which will highlight the role each of us will play in design and implementation of the latest CLP.

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# HARVEY REZNICK Dies

**Harvey Reznick**, Chief, Adversary Proceedings Division, Legal Office, U.S. Army Aviation and Missile Command, died of an apparent heart attack at his apartment in Madison, AL on Wednesday, 6 September 2000.

Harvey was a native of University City, MO. He received his bachelor's degree from Washington University in 1964 as well as a law degree in 1967.

His career with AMC began in November 1968 when, following his graduation from law school, he was hired as a general attorney by William Pemberton, Chief Counsel, U.S. Army Mobility Equipment Command, St. Louis, MO.

In November 1972, Joyce Allen selected Harvey for a procurement law position with the U.S. Army Aviation Systems Command (AVSCOM), which later became the U.S. Army Aviation and Troop Command (ATCOM).

In November 1977, he was promoted and selected for assignment as the System Attorney for the Advanced Attack Helicopter Program, the then largest Army R&D program. In September 1988, he was promoted to GM-15 and assigned to supervise a branch within AVSCOM's Procurement Law Division.

Harvey became Chief, Procurement Law Division in May 1989, following the death of Joyce Allen. He held that position until June 1995, when he was selected to be Chief Counsel, U.S. Army Aviation and Troop Command. He served in that capacity until his reassignment when ATCOM and MICOM merged to become the U.S. Army Aviation and Missile Command (AMCOM) at Redstone Arsenal, AL.

Harvey's career was marked by many outstanding professional accomplishments, reflective of his legal skill and intelligence, but more than any other quality, his actions demonstrated his uncommonly large measure of basic decency and respect for others. He was awarded the prestigious Joyce I. Allen Attorney of the Year Award in 1998.

Harvey and his family kept their residence in Clayton, MO, where he returned regularly to be with his wife, Pamela, and their three sons, Josh, David and Matt.

His funeral was held Friday, 8 September in University City, MO. Many of his co-workers and friends traveled from Huntsville, AL to the funeral. He will be sorely missed by his many co-workers, clients and friends.

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

# Acquisition Law Focus

## Oral Presentations

The increased use of oral presentations as a source selection technique can be traced to the acquisition reform initiatives flowing from the enactment of the Federal Acquisition Streamlining Act of 1994, Pub L. No. 103-355, 108 Stat. 3243 (FASA) and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub L. No. 104-106, 110 Stat. 186 (FARA).

The FAR Part 15 Rewrite (Federal Acquisition Regulation: Part 15 Rewrite: Contracting by Negotiation and Competitive Range Determination, 62 Fed Reg 51, 224 (1997)), for the first time, explicitly recognized oral presentations as a source selection technique in negotiated procurements by providing for them in FAR 15.102.

Among the few conditions placed on oral presentations in the new FAR Part 15 is that the Contracting Officer maintain a record of oral presentations to document what the agency relied on in

making the source selection decision. FAR 15.102(e)

Two recent decisions by the Comptroller General clearly illustrate that the failure to comply with this FAR provision will result in the General Accounting Office (GAO) sustaining a protest challenging the reasonableness of an agency's source selection decision.

As the above two decisions indicate, the use of oral presentations can become a double-edged sword. Although they are an effective means of streamlining, simplifying and enhancing the acquisition process, when used, the oral presentations, as well as the balance of the evaluation, the strengths and weaknesses of the competing proposals, any tradeoffs made and the rationale for the source selection decision, must be thoroughly documented (Encl 2).

POC for this article is CECOM-Ft. Monmouth's **William Kampo**, DSN 992-3381.

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# Acquisition Law Focus

## CG Memo re 500th AMC-Level Protest

**SUBJECT:** Recognizing the Success of the U.S. Army Materiel Command's Alternative Dispute Resolution (ADR) Protest Program

1. The U.S. Army Materiel Command's Protest Program is widely regarded as this Command's most successful Alternative Dispute Resolution Program initiative.

Designed and administered by the Office of Command Counsel with the cooperation and support of our HQ AMC Acquisition professionals and AMC's subordinate commands and activities, this program has recently achieved a significant milestone warranting recognition and commendation. The U.S. Army Materiel Command has successfully resolved the 500<sup>th</sup> protest filed with this headquarters using the AMC ADR Protest Procedure. In deciding to recognize this event as a major milestone, we must understand that the achievement here is the successful resolution of contractor concerns legitimately raised in the course of our extensive contractual operations without recourse to

time consuming and expensive formal litigation. The AMC Protest Program has afforded 500 contractors an informal forum where fair resolution is consistently attained using an expeditious and economical ADR procedure.

2. The AMC ADR Protest Program has been a resounding success providing us an effective tool to resolve contractor protests with minimal impact on mission requirements. These protests have been resolved in an average of 17 workdays. Our contractors and their industry associations have heralded this AMC forum as a most worthwhile alternative to formal litigation and the Office of Federal Procurement Policy has recognized the AMC Protest Program as "One of the Ten Best Practices in the Federal Government." The President issued Executive Order No. 12979 entitled "Agency Procurement Protests" on 25 October 1995 directing that federal agencies adopt similar ADR protest resolution procedures.

3. The AMC Command Counsel and his attorneys are commended for their outstanding efforts in developing

and administering this highly successful program. I also commend the acquisition personnel of this headquarters who have actively supported the program and you, the MSC Commanders and your personnel who have worked so closely with our headquarters on these cases to ensure the success of our ADR program. Together you have effectively addressed contractor concerns and dramatically reduced the impact of protest litigation. Your professionalism and conscientious efforts to preserve the integrity of the AMC acquisition mission are reaffirmed this day as I sign this "Memorandum of Recognition" commending your contributions to the success of our ADR Program. As we pass this 500<sup>th</sup> milestone, I extend to each of you my thanks for a job well done - knowing that you will do all that you can to continue accomplishing the goals of this program.

4. AMC — Your Readiness Command . . . Serving Soldiers Proudly!

/S/

JOHN G. COBURN  
GENERAL, USA  
Commanding

# Acquisition Law Focus

## The Arsenal Act in Court- *Staffing Shall Means Shall* International Agreements

In what may be perceived by many as a blow to the Arsenal Statute, the United States District Court for the Central District of Illinois has granted the Government's motion for a summary judgment in a lawsuit filed by the American Federation of Government Employees (AFGE).

This lawsuit, AFGE v. Cohen, was brought by the AFGE as a result of reductions in force that were caused by the Army's decision to award two projects to the private sector.

AFGE alleged that these awards were made in violation of the requirements of the Arsenal Statute, 10 U.S.C. 4532(a), in that no cost comparison had been performed to demonstrate that production at a Government-owned facility could not be done on an economical basis.

As background, the Arsenal Statute states:

"The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an eco-

nomical basis." In the AFGE litigation, one of the defenses raised by the Government was that notwithstanding the use of the term "shall" in the Arsenal Statute, the statute is really permissive rather than mandatory. It did not take the Court long to dispose of this defense by concluding that "shall" means "shall" and hence, the statute is mandatory in nature.

The Court, however, found the remainder of the Arsenal Statute to be much more ambiguous, with the Secretary of the Army having discretion to determine what "supplies" fall within the purview of the law.

As an exercise of this discretion, it would seem the Secretary has the sufficient authority to determine whether an end item should be acquired as a "system" or acquired utilizing component breakout and as long as that authority was exercised in a reasonable manner, that exercise of authority would be upheld by the courts.

OSC's **John Seeck**, DSN 793-8462, has written an excellent article on the District Court decision (Encl 3 ).

AMC Counsel **Louis Rothberg**, DSN 767-8147, has prepared an article describing the requirements and components applicable to the future staffing of International Agreements (Encl 4).

The paper details that the text of an International Agreement must include

- a) a precise description of the background information being given by the US to the foreign partner--and its value;
- b) state whether the foreign entity is providing the US non-financial contributions;
- c) the dollar value of each contribution; and,
- d) the specifics on both the non-financial and financial aspects of the agreement.

The paper also defines what the term "equitable" means with respect to international agreements, stating that this is interpreted through staffing by legal, resource management and the scientific communities.

## Electronic Signatures-- New Law

The purpose of the Electronic Signatures in Global and National Commerce Act (ESGNA) is to permit and encourage the expansion of electronic commerce through free market forces rather than governmental restrictions and mandates by promoting the validity, integrity and reliability of such transactions.

### Particulars:

The bill will replace pen and paper signatures and gives validity and reliability to the use of electronic signatures.

E-signatures can take several forms: a name typed at the end of a document, a digitized image of a handwritten signature, or a "digital signature" composed of a string of letters and numbers that can be unscrambled with encryption software.

ESGNA preempts state laws by setting a national benchmark for electronic signatures.

According to the bill, no document will be denied le-

gally binding status just because it is in electronic form.

The law will help e-commerce thrive by giving the consumer confidence and trust that their transaction is secure and legally binding.

The Inslee Amendment to the bill adds an "opt in" provision, meaning businesses are required to get consumer consent before substituting electronic copies of contracts, loans, etc. for paper ones.

Once consumers do "opt in" they can do everything from open a brokerage account and sign a check to finalize a mortgage online.

The law gives the Government the ability to do e-signatures when it comes to commercial transactions, which will make their contractual dealings faster and easier than the traditional pen and paper method.

Both the potential positive and negative of the act are outlined in a paper written by **Rebecca Frantz**, CECOM, DSN 992-9792(Encl 5).

## Duplication of Sustainment Costs & Sole Source Awards

CECOM's **Jignasa Desai**, DSN 992-9827, has written an excellent article addressing Comptroller General decisions concluding that the duplication of sustainment costs, when properly substantiated under the appropriate circumstances, are plausible justifications for a sole source award.

Consequently, Justifications and Approvals (J&As) which cite duplication of sustainment costs as the reason for a sole source award should be reviewed in order to discern both:

- 1) a detailed explanation of the applicable recognized exception to the competition rule; and

- (2) actual analysis and data substantiating the claim of duplicative costs.

This review should be performed on a case by case basis.

Several decisions are cited and analyzed (Encl 6).

## Watch What You Sign... Watch Where You Click

This is inspired by an actual incident with an AMC employee and a foreign contractor, but it has application for a great many of us, especially as we increasingly use the internet.

An ARL employee wished to attend a conference on Urban Warfare sponsored by an overseas company. He filled out a registration form on the company's website, intending that the company would send an invoice which he could then provide to contracting. Contracting would then execute a purchase order which, when accepted by the company, would become a binding commitment.

However, when he mentioned this intention to his supervisor, he was told that his branch had insufficient funds to send him that year. He immediately notified the company that he would not be able to attend and asked them to cancel his reservation. The company however, considered that it had a binding commitment based on his online registration. Nine months after the original exchange of e-mail the em-

ployee received notice from a foreign collection agency threatening his credit standing and legal action which would result in "levy execution upon your chattels and possessions" in the amount of 1,760 pounds sterling.

We may put to one side the question of whether the agency will decide it worth its while to finance a trans-Atlantic collection action. The more pressing question is whether a binding contract was actually formed.

Perhaps unsurprisingly, the evidence is ambiguous. Much of the form on the website makes it appear that submission of the form is binding. However, it also included the following: "Payment must be received before the conference date in order to guarantee your place."

ARL's interpretation of that sentence is that the company does not consider itself legally bound until payment is received. Since there must be mutual obligations for a contract to be binding, my conclusion is that no contract was formed.

(The conference company says that it finds this logic unconvincing. Legal has asked the company to provide some evidence of out of pocket expenses, since the researcher might feel a moral obligation to reimburse those. The company has treated this as if it were a request to audit its books and has refused even to assert specific expenses.)

This is still an on-going action, so we cannot report a final disposition. The point of this note is to serve as a warning. The ease and informality of the internet encourages many people to treat it in ways they would never dream of doing were they presented with a paper document. Despite the spread of government credit cards and the impetus to cut through red tape, there is still a reason why we have contract officers to execute contracts and attorneys to review them.

Thanks to ARL's **Bob Chase**, DSN 290-1599, for providing this article. We have asked Bob to keep us informed of developments.

## FLRA On-line

## REDS at Year 1

The FLRA has gone high-tech. The Authority has now made it possible to complete the following FLRA forms/petitions on line:

- \* FLRA Document 1014 - Statement of Standard Procedures in Representation Hearings Before Hearing Officer

- \* FLRA Form 21 - Petition

- \* FLRA Form 22 - Charge Against an Agency

- \* FLRA Form 23 - Charge Against a Labor Organization

- \* FLRA Form 24 - Petition for National Consultation Rights

- \* FLRA Form 26 - Petition for Consultation Rights on Government-wide Rules or Regulations

- \* FLRA Form 43 - Withdrawal Request

- \* FLRA Form 75 - Notice of Designation of Representative

While these forms can be completed on line, they must be printed and mailed to the appropriate General Counsel office serving your area. The forms are available on the Authority's web site at [www.flra.gov](http://www.flra.gov).

In September, the Office of Equal Opportunity, HQ AMC asked each AMC REDS Team to provide information on the results of implementation of the program since September 1999.

The results are impressive in that it appears that most REDS teams operating at the installation level have done an excellent job in the following areas:

- \* Briefing Commanders

- \* Briefing senior staff

- \* Developing REDS training materials--designed as a supplement to REDS Deskbook, based on local needs

- \* Training the workforce

- \* Defining scope of the REDS program--types of cases

- \* Finding third-party neutrals--they are easy to find

- \* Union support is exceptional

## Participants Favor REDS

Participants in the REDS process like the experience, in comparison to traditional dispute resolution. This is the main conclusion reached in reviewing the REDS evaluation surveys filled out by

management, employees and third-party neutrals.

One area of concern is the length of time between requesting a third-party and the beginning of the ADR procedure (such as Mediation).

## EEOC Mediation Program--Impressive Evaluation by Participants

The participant evaluation of the EEOC mediation program shows a high degree of participant satisfaction with the EEOC mediation program. Both the participant groups—charging parties and respondents—gave high marks to the various elements of the EEOC mediation program. A summary of conclusions and their implications are the following:

### Would Use Again

An overwhelming majority of the participants (91% of charging parties and 96% of respondents) indicated that they would be willing to participate in the mediation program again if they were a party to an EEOC charge. Participants, regardless of their satisfaction with the outcome of mediation, overwhelmingly indicated their willingness to return to mediation. This is a strong indication of their satisfaction with the EEOC mediation program. The fact that willingness to return was high, even among participants who did not receive what they wanted, indicates

that a fair and neutral process that provides participants with an opportunity to present their views may be even more important than the obtained outcome.

### Participants Advised about Process Ahead of Time

The participants expressed strong satisfaction with the information they received about mediation from the EEOC prior to their attendance at the mediation session. They also felt very strongly that they understood the process after the mediator's introduction of the process.

### Prompt Scheduling

The vast majority of the participants agreed that their mediation was scheduled promptly. The EEOC's prompt scheduling of mediation sessions is indicative of effective program management. It also increases the chances of dispute resolution since parties

get together in a timely fashion before they hardened their positions.

### Opportunity to Present View

An overwhelming majority of the participants felt that they had a full opportunity to present their views during mediation. Thus, the "voice factor," an essential element of procedural justice, was present in the EEOC mediation process.

### Satisfaction with Mediator

The participants were very satisfied with the role and conduct of the mediators. They felt strongly that the mediators understood their needs, helped to clarify their needs, and assisted them to develop options for resolving the charge. They felt even more strongly that the procedures used by the mediators were fair.

The full Executive Summary of the EEOC Report is provided for you(Encl 7 ).

# Red Cross -- Special Status

Have you ever wondered about our support to blood drives sponsored by the American National Red Cross?

Recently, an employee in HQ AMC asked about this, and wondered whether the Red Cross has some special status. Research indicates that the Red Cross does enjoy a special status that is reflected in JER 3-212f. However, this status is different that you might think.

Here is the response provided by **Mike Wentink**, HQ ANC Ethics Team Chief, DSN 767-8003.

## Special Status

You asked if the Red Cross enjoys any special status. The answer is yes. Below (see enclosure) are a number of relevant statutory and regulatory citations. But, this status, and support that comes with the status, is in direct relationship to the Red Cross mission to carry out activities supplementing and otherwise assisting the Army in its programs relating to the health, welfare, recreation, and morale of military personnel and their dependents.

It is our policy to facilitate the accomplishment of this mission and to tender to the Red Cross the services, facilities and privileges whenever the Army has accepted the cooperation and assistance of the Red Cross. So, when the Red Cross sets up shop on our installations to provide support, or when the Red Cross deploys to war zones, etc., we are expected to provide various types of support to the Red Cross and Red Cross personnel.

## Fundraising

But, when the Red Cross is out fundraising, or seeking donations of blood, they do not have a special status.

In such situations, the Red Cross is treated like anyone else. When the Red Cross seeks support for its blood drives, we can provide some support, such as providing space and informing (not soliciting or coercing or promoting) our personnel that the event is taking place and where, as long as we are willing to do such for similar types of organization events (there probably are no other organizations other than local hospitals).

Like any other non-Federal entity event, this support is subject to the criteria set out in JER 3-211a (DoD 5500.7-R), i.e.: it cannot interfere with duty performance or readiness; community relations or other local DoD/Army/AMC or community interests are served; it is appropriate to associate ourselves with the event; there is no law or regulation that prohibits the support, and there is no charge (there are some exceptions to the latter factor).

## Excused Absences

Finally, JER 3-300d permits "agency designees" (supervisors/commanders) to permit excused absences for reasonable periods of time for their employees to voluntarily participate in community service activities, such as blood donations. This time off is not an award or inducement for participating, rather it is the time necessary for the employee to participate.

Accordingly, there is no objection if the CG wishes to support periodic Red Cross blood drives.

Mike's full opinion with regulatory cites is provided (Encl 8).

# Private Associations

As explained in previous **ETHICS ADVISORIES**, there are a number of ethical issues that we must consider when we deal with POs. For example, employees who are officers, directors or active participants in POs, are disqualified from participating in official Army matters that affect their PO. We may not use our official position to endorse or promote a PO, encourage employees to join specific POs, or to help sell a PO's insurance or other products. We must also avoid bias or preferential treatment in our dealings with POs.

### Official Relationship

But, does this mean that we cannot have any sort of "official relationship" with POs?

After all, there are quite a number of POs that were created by Army and/or other DoD employees to help themselves in their professional development and to better perform their duties; POs whose ideologies, views, and goals track with the Army.

These are organizations that have developed credibility within their respective pro-

fessions, Government and industry over a period of time. Often, they are a great resource for training. They also establish standards, positions and the like with respect to issues that we deal with in such areas as auditing, law, accounting, engineering, testing and electronics. Accordingly, there is often much to be gained by having an official "presence" with these organizations.

The answer is "yes," there is room for an "official relationship" with such organizations. But, there is a right way and a wrong way to do this.

### A No

An employee may **not** be an officer, board member, or otherwise be involved in the management or operation of a PO as part of his or her official duties. Employees can do this only in their personal and private capacities, and then they are disqualified from participating in official matters that affect these organizations.

### Another No

An employee may **not** be

directed by his or her supervisor or commander to be an officer, director or other active participant in a PO in his or her personal and private capacity.

### A Yes

What we can do is this: in those cases where there is a strong and continuing DoD interest, heads of commands and organizations may assign an employee as an "official liaison" to a PO. As an "official liaison," the employee acts in his or her official capacity and represents the command and agency's interests to the PO. The "official liaison" attends board and other meetings for information on behalf of the command or organization, and may participate in discussions and even vote on matters of mutual interest. However, the PO must understand that such participation in no way binds the Army or the Federal government.

The complete Advisory compiled by **Mike Wentink** and Alex Bailey are provided for your information and use (Encl 9 ).

# Frequent Flyer Rules

In the 28 September 2000 edition of **USA Today**, there is a report of a defense official who is accused of using over \$4,000 worth of FFMs earned while on official travel, for personal travel. Although the report says that the Department of Justice (DOJ) has declined to prosecute, I suggest that the very fact that the matter was referred to DOJ for prosecution, demonstrates the importance of following the rules. The matter has been turned over to the employee's supervisor.

Hence, the AMC Ethics Team has updated a paper on Frequent Flyer rules to ensure that there are no memory lapses concerning the FFM rules. FFMs earned while traveling on official business belong to the Government, and we may not use them for our personal travel, to include travel while on permissive TDY. We may not give them away to a charity. FFM accounts for official travel should be kept separate from personal travel accounts. If we commingle our official and personal FFMs in a single account, all FFMs within the

account are considered to belong to the Government absent a clear accounting to the contrary (so, keep records!).

How do we use the FFMs earned while on official travel? We use them to reduce the cost of future official travel.

Can we use the official FFMs to upgrade our class of travel? Maybe, but probably not. Here are the rules with respect to upgrades:

We may never use official FFMs to upgrade to first-class, unless we are otherwise authorized to fly first-class in accordance with the JTR/JFTR and the SECARMY 9 Apr 99 travel policy. First-class travel requires Secretary of the Army approval. Here is an important point: if there are only two classes on a flight (as many (most?) flights seem to be today), the upper class is always considered to be first-class, whatever the airline might call it — even if the airline calls it “business-class.”

The complete Ethics Advisory of FF rules is included (Encl 10 ).

## Outside Legal Practice Rules

**The basic rule for civilian attorneys** is found in paragraph 4-17b, AR 690-200: “[N]o Army civilian attorney will engage in the outside practice of law without prior written approval of the QA.” The QA is the attorney's qualifying authority. For AMC civilian attorneys, the QA is the AMC Command Counsel. This rule does not apply to “teaching, lecturing or writing for publication ... [or] the infrequent, occasional rendering of legal advice or assistance without compensation to personal friends and relatives ... “ This rule is adopted in the AMC Command Counsel Policy Statement 96-1 dated 28 Feb 96, Outside Employment.

**The rule for uniformed attorneys** is found in paragraph 4-3c, AR 27-1: “An attorney of the JALS [Judge Advocate Legal Service] will not engage in private law practice without the prior written approval of TJAG.” Additional guidance is provided in paragraph 10-5, *JAGC Personnel Policies*.

The complete discussion with comments from **Mike Wentink** are provided (Encl 11 ).

## 3 Professional Conduct Reminders re Conflict of Interests

### I-Loyalty

“Client-Lawyer Relationship” governed by the conflict of interest rules. There are three of them: **Rule 1.7 Conflict of Interest: General Rule**; **Rule 1.8 Conflict of Interest: Prohibited Transactions**; and **Rule 1.9 Conflict of Interest: Former Client**. In addition, each of the rules makes cross-references to other rules.

### Multiple Clients-- Adverse Interests

We begin with the first part of **Rule 1.7**.

**Rule 1.7 Conflict of Interest: General Rule.**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

The comments accompanying the discussion of this rule highlights the concept of loyalty as an essential element in the lawyer’s relationship with clients.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent.

The full treatment of this issue is provided (Encl 12 ).

### II-Interests Interests & Responsibilities

**Rule 1.7 Conflict of Interest: General Rule**

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. Comment and Discussion at Encl 13.

### III-Transactions Prohibited Transactions

This complex issue has several related issues, all tied to the principle that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

The full Professional Conduct reminder is at Encl 14.

Thanks to **Mike Wentink** for these Professional Conduct Reminders.

## Environmental Law Focus

# Are Your Underground Tanks Compliant?

EPA has hit the Army's Fort Lewis with the military's largest proposed fine for alleged underground storage tank (UST) violations. EPA Region X officials say the move should send a clear signal to other potential violators that the agency is prepared to take tough action to prevent irrevocable damage to

aquifers relied upon for drinking water. Most drinking in the Fort Lewis, WA, area comes from relatively shallow groundwater sources that are particularly vulnerable to contamination, according to EPA. The agency in its complaint cited more than half of the base's regulated USTs. EPA proposed the \$470,000

penalty against the base Sept. 18. The agency cited violations at 32 of the base's 62 regulated tank systems. Many of the violations relate to in-operative or malfunctioning leak detection equipment, according to Acting Regional Administrator Chuck Findley in a press statement.

# Active BRAC Sites: DOD Issues Interim Land Use Controls Policy

DOD environment chief **Sherri Goodman** signed an interim policy in August that provides a framework for addressing land use controls (LUCs) at both active bases and those being transferred out of federal control, such as closing bases. The policy includes detailed guidance that cover specific LUC issues encountered at active bases and at BRAC sites. LUCs are any type of physical, legal or administrative mechanism that restricts the use of, or limits access to, real property to

prevent or reduce risks to human health or the environment, the interim policy says. The term includes institutional controls, which are discussed in the National Contingency Plan and are primarily legal mechanisms, according to the interim policy. "The intent of this policy is to ensure that land use activities in the future remain compatible with the land use restrictions imposed on the property during the environmental restoration process," the interim policy says. The

document is the first DOD policy on land use controls. The policy comes several months after EPA issued an interim policy on land use controls at BRAC sites that requires transferring agencies, such as DOD, to put procedures in place that allow EPA to determine if land use controls will perform as expected. The policy can be obtained on-line from the DoD Environmental Cleanup web site, as <http://www.dtic.mil/envirodod/brac/>

# Environmental Law Focus

## Air Base Charged With Deliberate Crimes

Don't let this happen to your installation. Residents in Tennessee have filed a \$2.5 billion class action lawsuit alleging that Arnold Air Force Base has knowingly released hazardous waste and explosive methane gas into the communities around the facility. The suit asks a federal judge to act to protect the 1,500 students at Coffee County Central High School from the threat of a methane explosion. The suit seeks \$2 billion in compensatory damages and \$500 million in punitive damages. The suit also alleges that water consumed by local residents has been poisoned with dangerous

chemicals including birth defect causing trichloroethylene (TCE), and that methane seeping from a landfill on the base threatens the safety of many local residents. The suit alleges that Arnold Air Force Base made the intentional decision not to place methane controls on the landfill, thereby allowing methane to migrate "into a residential community, causing one explosion and serious injury." The suit also attributes cancer cases around the base to the release of TCE into the ground and water in concentrations many times higher than the minimum set by the EPA

## First Non-BRAC FOSET for AMC Post Signed

The Army recently signed the Finding of Suitability for Early Transfer (FOSET) for transfer of 940 acres at Volunteer Army Ammunition Plant to the City of Chattanooga and Hamilton County, Tennessee. This was the first non-BRAC FOSET to be approved by the Army.

The FOSET was the result of significant review and support from the Army Materiel and Operations Support Command's legal offices. Upon approval of the Early Transfer by the Governor of Tennessee, the Army transferred the property for \$7.5 million, in a ceremony attended by the Secretary of the Army.

## ELD Bulletins for August & September 2000

Environmental Law Division Bulletins for August (Encl 15) and September (Encl 16) 2000 are provided.

These Bulletins are now available electronically on the JAGC Net Environmen-

tal Forum, and will no longer be provided in the Newsletter. If you have not been granted access to the JAGC Net Forum, you need to contact the Environmental Law Division.

## New Army Reg on NEPA

Revised version of AR200-2 published in the September 7 Federal Register.

# Faces In The Firm

## Hello--Goobye

### Arrival

#### TACOM-ARDEC

**Robert Beam** recently joined the IP Division. Bob graduated from Temple University School of Law and joins ARDEC from private practice. Previously, Bob served as Patent Counsel for corporations in New York and New Jersey.

#### TACOM-Warren

The Business Law Division welcomes **Tiffany J.L. Hall** has a joint J.D. and Masters of Public Administration from the Southern Illinois University School of Law. She has been working for the Detroit Edison Class Action Office.

The other new hire, **Anna-Maria Martin**, is a graduate of Case Western Reserve University School of Law. She has been working for the past year as a Contract Specialist Intern at TACOM. She also worked as an intern for the U.S. Army JAG Corps and the Office of General Counsel for the U.S. Navy.

#### CECOM

**Janet K. Baker** has joined the CECOM Legal Office, Business Law Division C, Fort Huachuca Branch in Arizona. She is an experienced contracts attorney and came to legal from the post's Directorate of Contracting. She had previously worked as a contracts attorney for the Navy.

**Pam McArthur** has joined CECOM-Ft. Monmouth as the new Chief of Legal Services. She comes from the Fort Dix Legal Office and is also in the Army Reserves.

**1LT Michael Stephens** graduated from the 152d Basic Course and arrived at Fort Monmouth to work in the SJA Division.

#### HQ AMC

The Office of Command Counsel welcomes **Major Sandra Forston**, who will work with the Business Operations Law Division, arriving from an assignment with the Contract Appeals Division.

### Departure

#### HQ AMC

**Alex Bailey**, long time counsel in the General Law Division and formerly from ARL departed AMC in late September to assume a management position with the Department of Energy, a position earmarked for the SES.

#### CECOM

**CPT Walt Parker** departed the CECOM Legal Office and is now with the United States Army Claims Service, Tort Claims Division, Fort Meade, Maryland.

**CPT Sandy Baggett** completed her tour of active duty and has accepted a position with the Bronx District Attorney's Office.

#### OSC

**Bridget Stengel** resigned from Federal service to stay home with her family.

# Faces In The Firm

## Promotions & Awards

### HQ AMC

As part of the ceremony recognizing the resolution of the 500th AMc-Level Protest, **General Coburn** gave the AMC Commander's coin to the AMC Protest Litigation Branch:

**Vera Meza,**

**Josh Kranzberg,**

**Major Cindy Mabry,**

**Jeff Kessler,** graduate of the group

**Craig Hodge,**

and the former legal technician for the unit

**Debbie Arnold.**

These individuals wish to express their thanks for the exceptional legal work performed at the AMC command and activity level that forms the nucleus of the AMC Protest Team.

The Teamwork exhibited by those involved in defending protests is a model for field-Headquarters relationships.

### CECOM

**Ginny Turgyan** was selected for promotion to GS-9, Budget Analyst, in the CECOM Legal Office. Ginny's work in this difficult and complex area benefits all of us on a daily basis. We are very fortunate to be able to recognize the increased responsibilities and duties of this position. We are very fortunate that we were able to recognize the increased responsibilities and duties of her position and have it graded accordingly.

**Robert Russo,** Business Law Division B, was part of the CECOM Electronic Reverse Auctioning team selected as the CECOM Quality Team of the Quarter for the third Quarter FY00.

**Michael Russell,** Business Law Division C, Fort Huachuca Branch, received the Commander's Award for Civilian Service for his outstanding work supporting the Total Engineering and Integration Services (TEIS) program for the Information Systems Engineering Command, Ft. Huachuca, Arizona.

### AMCOM

Congratulations to **Karolyn E. Voigt,** who was recently promoted to GS-0905-15 Lead Attorney in the Acquisition Law Division.

## Death

It is with much sadness that we report the passing of **Mark Sagan's** mother, **Jocelyn J. Sagan,** on 5 September 2000.