



# Office of Command Counsel Newsletter

December 2001, Volume 2001-6

## Newsletter Index Brought to you by CECOM

## Revised Partnering Guide Issued

### From the Editor:

Several of you have asked me to produce a Newsletter Index for easy research and retrieval of articles of interest.

During the pre-electronic area a cumulative Index was produced semi-annually,

When we went to electronic desk top publishing, your asleep-at-the-wheel editor did not continue the practice. My defense is that I never thought I would learn desk top publishing so why even think about a cumulative Index to something I would never be able to do?

Luckily, we have more astute and focused counsel in the AMC Legal Community.

CECOM has been a leading proponent of Newsletter contributions, so it is no surprise that without being asked (I would never have the nerve) they created an outstanding AMC Command Counsel Newsletter Index covering issues 97-1 through the June 2001 edition 01-3.

The Belvoir Legal Branch

of the CECOM legal community, headed by **John Metcalf** is responsible for this herculean effort. John gives credit to a summer hire **Marna Palmer** for leading this effort.

The Index is in two sections.

### Part I: Topic and Alphabetical Title of Article.

### Part II: Listed by Topic and Most recent Article.

The Index was sent to each AMC Legal Office during the first week in December. It will also be uploaded to the AMC Office of Command Counsel Web Site by our WebMaster **Josh Kranzberg**.

On behalf of all of us in the AMC legal community who will benefit from the Index a great deal of thanks to **Ms. Palmer, Mr. Metcalf** and to the **CECOM** legal community.

We are pleased to announce the publication of the revised AMC Partnering Guide, which includes a new section on Lessons Learned, new examples of various Partnering tools developed, and updated tips and pointers,.

The Guide will soon be uploaded to the AMC Command Counsel Home Page.

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# Patents and Baseball

The Department of Commerce's United States Patent and Trademark Office joins in the celebration of this year's World Series by recognizing some patents and trademarks relative to baseball.

Baseball is America's pastime.

The thousands of patented inventions associated with the sport are testament to that. Most recently patents have been issued on a way to improve a batter's swing (patent #6,306,050); a swing speed indicator (patent #6,173,610) that measures the batter's swing using a digital readout that can be slipped onto any bat; a baseball trainer, which helps pitchers practice by indicating a "strike" or "ball" as well as the speed of the pitch by using a microcomputer (patent # 5,566,964); and a glove (patent #5,113,530) with inflatable chambers which softens the impact of an incoming baseball or softball.

There are also numerous patents for softball and t-ball. Design patent # 418,569 is for a t-ball matt, which helps chil-

dren position themselves to hit the ball. Patent #4,993,708 covers a batting tee. Design patent #402,414 is for a helmet that can be used for a player to pull their ponytail through while playing softball, t-ball or little league baseball.

Trademarks also play an important role in baseball and are seen on and off the field. Most professional team logos, equipment and even mascots, have trademark registrations.

The New York Yankees, which have won the most World Series Championships, have a very well known and recognized logo, which has trademark registration #1898998 for use on baseball shirts. The Arizona Diamondbacks, a relatively new team, has several trademark applications pending, including serial #76161641 for baseball uniforms and

other sport-related clothing. Trademarks for baseball equipment include Rawlings (registration #1149932) and Wilson (registration #1553005) for sporting good equipment such as baseballs, gloves, and bases.

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Check out the Newsletter on the Web at [http://www.amc.army.mil/amc/command\\_counsel/](http://www.amc.army.mil/amc/command_counsel/)

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

# Acquisition Law Focus

## OMB Circular A-76 Case Law Rights in Computer Software

The CECOM Legal Office provides a compendium of cases interpreting the provisions of OMB Circular A-76. Included are Federal court cases and decisions by the General Accounting Office. The period covered is 1993-2001.

Several of the more interesting and meaningful decisions deal with the issue of whether a Federal employee union has standing to sue alleging violations of the provisions of the Circular (Encl 1)

## CLE 2002 Information in the February 2002 Newsletter

DOD Intellectual Property ("IP") Policy generally provides that:

- Contractors keep ownership, or title, to Computer Software developed under DOD contracts;
- Government receives a nonexclusive license to use Computer Software delivered under DOD contracts;
- License Rights in commercial computer software should be similar to those customarily provided to the public provided the Government's needs are satisfied.

Within this broad framework, DOD IP policy, procedures and regulations are found at FAR Part 27, DFARS Part 227 and the associated contract clauses.

The Government's license rights in Noncommercial Computer Software are divided into four (4) broad categories:

The enclosed paper addresses and discusses these categories.

POC is CECOM's **George Tereschuk**, DSN 992-9795 (Encl 2).

## List of Enclosures

1. OMB Circular A-76 Case Law
2. Rights in Computer Software
3. Is McKinney Still Applicable to DOD Leases
4. Patent Term Extension
5. End-Use Certificates-Guidance to KOs
6. Handling Post-Award Problems
7. Impact of DA Policy on Commerical Item
8. ARL-FED Lab Program Re competed
9. Joint Statement Against Discrimination
10. Soldiers' & Sailors; Relief Act
11. Being Mobilized-Worried About Your Job?
12. DOD Telecommuting Labor Relations Policy
13. Env Law Spec Wkshop
14. The Military & the Endangered Species Act
15. Coordinating Environmental Agreements
16. Covered Relationships
17. The Lexis Corner

## Is McKinney Still Applicable to DOD Leases? End-Use Certificates

TACOM ARDEC Counsel **Jerry Williams**, DSN 880-6598 provides an article asking the above-captioned question. Sec. 2812 of the National Defense Authorization Act For Fiscal Year 2001 may have subtly removed any statutory requirement that DoD agencies provide HUD with notification that property will be made available for leasing under 10 USC 2667.

Under the Stewart B. McKinney Homeless Assistance Act (42 USC 11411), agencies are required to identify to HUD any property or buildings that are "excess property or surplus property or that are described as unutilized or underutilized in

surveys by the heads of land-holding agencies under section 202(b)(2) of the Federal Property and Administrative Services Act of 1949 4USC 483(b)(2))." 41 CFR 101-47.801 establishes the standards that executive agencies shall use in identifying unneeded federal property, and 45 CFR 12a.1 defines "excess," "surplus," "unutilized," and "underutilized" property in the use of federal property to assist the homeless.

Mr. Williams suggests that Section 2812 of the FY01 Defense Authorization Act may have struck previous requirements found at 10 USC 2667(a) (Encl 3)

## Patent Term Extension: What to do and What to Avoid

Under the Trade-Related Aspects of Intellectual Property Rights (TRIPs) of General Agreement on Trade & Tariffs (GATT), a great change was brought about to the term of an issued utility or plant patent. The old certainty of 17 years from the date of issue, no matter how long the pendency of the application, was replaced by a term that

began on the issue date of the patent and ran for 20 years from the earliest effective filing date of the application that matured into the patent.

AMCOM's **Hay Kyung Chang (Anne Lanteigne)**, DSN 746-8922, provides a paper describing the impact of the American Inventors Protection Act of 1999 and its patent term adjustment provisions (Encl 4)

TACOM-ARDEC counsel **Kenneth Hanko** DSN 880-6587 has provided a paper offering practical guidance to contracting officers regarding end-use certificates.

For a number of years, the United States has required foreign purchasers of armaments and other equipment on the U.S. Munitions List to provide assurances against third party transfer and certain uses without the consent of the United States Government ("USG"). These are commonly referred to as EUCs.

The International Traffic in Arms Regulations ("ITARs") (which contains the U.S. Munitions List), requires the execution of a "nontransfer and use certificate".

In the Foreign Military Sales context, similar assurances are included in the terms and conditions of the LOA. Direct commercial sales require an authorized representative of a foreign country to provide comparable assurances in the form of a separate EUC (Encl 5).

## Handling Post-Award Problems:

CECOM's **Arnold Schlisserman** DSN 992-9809 provides an article discussing the various post-award problems that arise, such as constructive changes, delays in contract performance, acceptance of non-compliant items, and other forms of government conduct that causes the contractor's costs to increase. Potential remedies and options are explored.

The article concludes by stating that the most important points to take away from this discussion are that our responsibilities don't end with the award of the contract.

Good communication within the Government and between it and the contractor through the application of effective "Partnering" processes will avoid many post-award problems.

When they can't be avoided, however, the Legal Office can help the Contracting Officer get to a resolution that will be both fair and final (Encl 6).

## Impact of DA Policy on Commercial Items

In a memorandum dated 5 January 2001, issued by the Under Secretary of Defense for Acquisition and Technology, a Department of Defense (DoD) review found inconsistent commercial item determinations and weak market research among the obstacles that exist to broadening the use of commercial items within the DoD.

By memorandum dated 26 March 2001, Subject: Commercial Acquisitions, the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology) issued an Implementation Plan for Increasing the Use of FAR Part 12. It announced a policy that all services (with the exception of services under FAR Part 36) were presumed to be commercial and that FAR Part 12 policies and procedures would be used to buy these services.

CECOM's **Marla Flack**, DSN 992-5057, provides an article that addresses and discusses two issues related to the DA Policy (Encl 7).

## ARL Recompetes FED Lab CTA Program

The mid 1990s presented the DoD research community with a unique set of circumstances, the Defense budget was being significantly reduced, while breakthroughs in various technologies offered opportunities for improving American warfighting capabilities. The Army Research Laboratory (ARL) attempted to address this situation with the implementation of the Federated Laboratory (Fed Lab) Program. The goal of Fed Lab was to establish a collaborative research environment bringing together the best researchers from academia, industry and the government.

The program was deemed a significant success and was just recently recompeted and expanded in 2001. This article discusses the lessons learned, and details the arduous process of implementing the successor to Fed Lab, the Collaborative Technology Alliances (CTA) Program.

POC is ARL Counsel **Pat Emery**, DSN 290-1696 (Encl 8).

## Joint Non-Discrimination Statement Issued

In response to the September 11, 2001 terrorist attacks, the US Department of Justice, US Department of Labor and the US Equal Employment Opportunity Commission published a joint statement to “reaffirm the Federal government’s commitment to the civil rights of all working people.”

The policy was issued in part because these agencies continued to receive reports of incidents of harassment, discrimination, and violence in the workplace against individuals who are, or are perceived to be, Arab, Muslim, Middle Eastern, South Asian, or Sikh.

The policy states: “When people are singled out for unfair treatment or are harassed based on their national origin, immigration status, ethnicity, or religious affiliation, practices, or manner of dress, we must act quickly to address and redress these acts of discrimination” (Encl 9).

## Supreme Court Rules on Penalties When Disciplinary Actions Are Pending

The United States Supreme Court held unanimously (opinion by O’Connor; concurrences by Thomas and Ginsburg) that the Merit Systems Protection Board’s practice of reviewing pending disciplinary actions to support a penalty’s reasonableness under the Civil Service Reform Act is not contrary to law.

Gregory was fired from her position as a letter technician with the Postal Service in Georgia, because she allegedly overestimated the delivery time of her route by approximately one and one-half hours. At her grievance proceeding, the Merit Systems Protection Board (Board) affirmed Gregory’s termination, holding that the penalty was justified by Gregory’s prior disciplinary record, part of which consisted of pending disciplinary action at the time.

Gregory appealed to the United States Court of Appeals for the Federal Circuit, which reversed the Board’s determination that Gregory’s termination was reasonable. The Court of Appeals held invalid the Board’s consideration of pending disciplinary actions against Gregory.

The United States Supreme Court reversed, holding that the Board had wide latitude in fulfilling its obligation to review agency disciplinary actions under the Civil Service Reform Act. The Court concluded that the Board’s practice of considering pending disciplinary actions was not arbitrary, because a contrary practice would result in undue delay. Furthermore, the practice is not inconsistent with any law. The Board is therefore not required to accept the Federal Circuit’s rule in order to meet its statutory obligations.

## Authority to Contract for Security Functions

## Mobilization Issues

CECOM's **Pamela McArthur**, DSN 992-4760 provides two articles relevant to the impact of mobilization of soldiers and civilian employees

**The Soldiers' and Sailors' Civil Relief Act (SSCRA)** is a federal statute (50 U.S.C. app. §§ 500-591), that allows military personnel, and sometimes military dependents, to postpone or suspend some civil obligations so they can devote their energy and attention to the defense needs of the Nation.

This article is intended to provide general information about portions of the SSCRA that many of our clients may come into contact with, but is not a substitute for seeing an attorney.

If you think your situation involves a protection under the SSCRA, see an attorney for a more detailed discussion about your rights and responsibilities (Encl 10).

## Telecommuting Policy

The DOD Telework Policy and Guide are available on the Interagency Telework Website, at <http://www.telework.gov/dodpolicy.htm> and <http://www.telework.gov/dodguide.htm> respectively.

**The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)** is a federal law that gives employees who leave a civilian job to perform military service the right to return to the civilian job held before entering military service(Encl 11).

USERRA protection applies if you meet all five of these tests:

1. Job. Did you have a civilian job before you went on active duty?
2. Notice. You must give notice to your employer.
3. Duration. As a general rule, you can be on active duty away from your civilian job for up to five years.
4. Character of service. USERRA protections apply if you are discharged with an Honorable or General discharge.
5. Prompt return to work  
\*\*\*\*\*

[www.telework.gov/dodguide.htm](http://www.telework.gov/dodguide.htm) respectively.

Also enclosed is DOD Labor Relations Guidance on Telecommuting provided as always by HQ DA's **David Helmer** (Encl 12).

HR 3162, USA Patriot Act, signed by the President on October 26, includes the following provision on contracting for guards. .

SEC. 1010. TEMPORARY AUTHORITY TO CONTRACT WITH LOCAL AND STATE GOVERNMENTS FOR PERFORMANCE OF SECURITY FUNCTIONS AT UNITED STATES MILITARY INSTALLATIONS.

(a) IN GENERAL- Notwithstanding section 2465 of title 10, United States Code, during the period of time that United States armed forces are engaged in Operation Enduring Freedom, and for the period of 180 days thereafter, funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into contracts or other agreements for the performance of security functions at any military installation or facility in the United States with a proximately located local or State government, or combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation.

# Environmental Law Focus

## Environmental Law Specialist Workshop Highlights

On 1 November 2001, the Army Environmental Law Division sponsored an excellent workshop to provide the latest information on the significant environmental issues facing the Army. The workshop topics included:

### a. Litigation Update

- Judgment Fund Availability
- Makua Range Litigation

### b. Restoration/Natural Resource Update

- Privatizing BRAC Cleanups
- NEPA Alternate Arrangement for Emergency Circumstances and ESA Update

### c. Compliance Update

- Payment of Administrative Fees for CAA Violations
- Fort Wainwright CAA Case
- Range CWA Permitting Update

### d. AEC Update

- New Army Alternate Procedures (AAP) for NHPA Section 106 Consultation.

A more detailed summary of the workshop presentations is provided at Enclosure 13.

If you have any questions, please contact **Stan Citron** at DSN 767-8043.

## The Military and the Endangered Species Act

The Department of Defense and the Fish & Wildlife Service recently prepared a fact sheet entitled "The Military and the Endangered Species Act – Interagency Cooperation".

The fact sheet provides a concise summary of the Endangered Species Act (ESA). It explains the ESA consultation process, the critical habitat designation process, and highlights useful DoD and other ESA guidance (Encl 14).

## AMC Environmental Agreement Coordination Policy

AMC issued guidance on coordinating environmental agreements on 6 April 2001. The guidance is an excellent resource for environmental attorneys who are faced with negotiating an environmental

agreement to resolve an environmental fine or other compliance issue. The guidance provides a concise summary of the Army notification requirements, the negotiation process, and the approval pro-

cess for environmental agreements. It also includes the draft DA Pam 200-1 Consent Agreement Checklist and the ELD CACO Checklist which provide useful information (Encl 15).

# Ex-Client Rules Apply When Lawyer Joins Government

## Covered Relationships

Even though there is no rule expressly addressing potential conflicts of interest that may arise when a lawyer leaves private practice to take a government job, the District of Columbia bar's ethics panel has cautioned that government attorneys may be conflicted out of projects that are substantially related to matters they handled for former clients (District of Columbia Bar Legal Ethics Comm., Op. 308, 6/26/01).

Government attorneys also are prohibited from revealing their former clients' confidences, the committee said, or using client information in a way that would work to the former client's disadvantage.

The panel stressed, how-

ever, that the principles of imputed disqualification — which prohibit all lawyers in a firm from representing a client if any one of them would be prohibited from doing so — do not apply to block a disqualified government lawyer's colleagues from pursuing the matter. Vicarious disqualification would have “draconian effects” on the government's ability to secure legal services, the committee said. In this instance, the opinion recommends that the government agency adopt voluntary screening measures to insulate the disqualified lawyer from any contact with the matter at issue.

Thanks to **Carrie Schaffner**, Ethics Counsel at TACOM-Rock Island, DSN 793-8444

By regulation, employees may not participate in official matters when someone with knowledge of the relevant facts would reasonably question their impartiality.

An employee could have an appearance of a conflict of interest when a member of the employee's household or someone with whom the employee has a “covered relationship” is a party to the official matter, or represents a party to that matter.

Additionally, an employee who is concerned that other circumstances would raise questions about the employee's impartiality should notify the agency to allow it to determine whether the employee should participate in a particular matter.

AMC Ethics Team Chief **Bob Garfield**, DSN 767-08003, provides an information paper on this important and reoccurring problem (Encl 16 ).

# The Lexis Corner--December 2001

Thanks to AMC Lexis representative **Rachel Hankins** for her latest issue for the Lexis Corner (Encl 17 ). [rachel.hankins@lexisnexis.com](mailto:rachel.hankins@lexisnexis.com).

This issue highlights several issues:

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- Explore

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per right corner) and check the box next to "Show floating pagination assistant."

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# Faces In The Firm

## Hello

### STRICOM

**Beverly Fisher** is STRICOM's new Paralegal Specialist. She previously worked in STRICOM's Human Resources Division.

### AMCOM

**Carol Howard**, who has been assigned as the secretary for the Acquisition Law, Branch C.

**Georgia M. Kirkland**, has been assigned in the Claims office for JAG. She comes to us from CIC.

**CPT Anthony C. Adolph** is assigned to the Acquisition Law Division, Branch A

**1LT Douglas Moore**, who has been assigned to the JAG office.

**1LT William W. Carpenter** assigned to the JAG office

**SGT Ronnie W. Yates** assigned to the JAG office, comes from Ft. Poke, LA

**PVT Rachel L. Arnold**, assigned to the JAG office, comes to us from AIT.

### CCAD

**Alejandro Lopez** from the Corpus Christi City Attorney's Office.

**Ken Muir** from the Immigration and Naturalization Service in Harlingen, TX.

**Edwin Richards** from the Legal Office at Camp Zama, Japan.

**Jerry Parr**, GS-09 Paralegal Specialist from the Illinois Secretary of State Office in Springfield, IL.

**Delmi Castillo**, GS-06 Secretary from the CCAD Training Office.

## Promotions

### AMCOM

Congratulations to **Debbie Moore**, who has been promoted to Chief, Plans and Operations.

Congratulations **Rhenda Miltner** who has been promoted to GS-9 in the Legal Library.

## STRICOM'S Laura Cushler activated and deployed

**Laura Cushler**, STRICOM Attorney-Advisor, was recently activated as a JAG with the Florida National Guard. She is currently stationed at Ft. Bliss, Texas. Please keep her in your thoughts and prayers

## Temporary Assignment as JAG Reservists

HQ AMC welcomes **MAJ Art Lees**, who many will remember for his days as an attorney with Vint Hill Farms Station. Art is assigned to the Business Law Operations Division.

Also **MAJ Al Glamba** who is a Contract Law Attorney at Fort Lewis, Washington now temporarily assigned to the General Law Division.