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CDC Policy Memo 1-13

From: Chief Defense Counsel of the Marine Corps
To: Distribution List

**Subj: UPDATED DETAILING AND INDIVIDUAL MILITARY COUNSEL
DETERMINATION AUTHORITY FOR COUNSEL ASSIGNED TO THE
MARINE CORPS DEFENSE SERVICES ORGANIZATION**

Ref: (a) MCBul 5400 of 31 Aug 12
(b) MCBul 5800 of 11 Mar 13
(c) MCO P5800.16A W/CH 1-6 (LEGADMINMAN)
(d) JAGINST 5800.7E (JAGMAN)
(e) JAGINST 5803.1C (Rules of Professional Conduct)
(f) MCBul 5813 of 2 Jul 12

1. Purpose. To update detailing and individual military counsel (IMC) determination delegation authority within the Marine Corps Defense Services Organization (DSO) in light of the Commandant directed legal reorganization that was approved in reference (a) and implemented by reference (b) and to cancel Chief Defense Counsel (CDC) Policy Memo 7-11.

2. Discussion. Reference (c) identifies the Chief Defense Counsel of the Marine Corps (CDC) as the Officer-in-Charge of the DSO and the detailing and IMC determination authority for defense counsel assigned to the DSO. Additionally, reference (c) authorizes the CDC to delegate these authorities to Regional Defense Counsel (RDC) and Senior Defense Counsel (SDC) subject to certain restrictions that are incorporated into the delegation rules established below. This policy memo supersedes and cancels CDC Policy Memo 7-11.

3. Policy. A defense counsel will not establish an attorney-client relationship, as defined by section 0131b(3) of reference (d), with any individual unless detailed, assigned, or otherwise authorized to do so by his or her detailing or IMC determination authority. Once established, the attorney-client relationship may only be severed under the provisions of Rule for Courts-Martial (R.C.M.) 505 and 506 and reference (e). Unless the attorney-client relationship is properly severed, or he or she is otherwise properly relieved, a defense counsel shall continue to represent an accused through the completion of applicable post-trial matters as outlined in reference (c).

a. Detailing. Detailing authority includes the authority to detail a counsel to a court-martial case, an administrative separation board, or other due process proceeding in which the detailing of counsel is specifically authorized by departmental or service regulations and, for the CDC and

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RDCs, authorization to form an attorney-client relationship and to remove a counsel from a case for good cause under the provisions of R.C.M. 505 and Rule 1.16 of reference (d).

1) Detailing Authority within the DSO. Detailing authorities may detail defense counsel from the DSO to cases subject to procedures set forth in Chapter 2 of reference (b), paragraph 2 below, and the following billet-specific delegation:

a) CDC – The CDC may detail defense counsel from the DSO, and auxiliary defense counsel made available for a particular case, to cases supported by the DSO. The CDC may also remove a counsel, who has formed an attorney-client relationship from a case for good cause under the provisions of R.C.M. 505 and Rule 1.16 of reference (d). Additionally, the CDC may authorize a defense counsel to form an attorney-client relationship with officers and staff non-commissioned officers (SNCOs) pending nonjudicial punishment (NJP) when the NJP may lead to a board of inquiry or an administrative separation. The CDC will appoint a substitute CDC for detailing purposes when the CDC is on leave or otherwise unavailable to execute detailing responsibilities.

b) RDCs – RDCs may detail defense counsel assigned to their Legal Services Support Section (LSSS), except themselves, and auxiliary defense counsel made available by the Legal Services Support Team (LSST) or LSSS OIC for detailing to cases arising in their Legal Services Support Area (LSSA). However, RDCs are not authorized to detail themselves to any case or to detail counsel to cases involving an accused above the grade of O-5 or cases alleging violations of Article 118(1) or (4). RDCs may also remove a counsel, who has formed an attorney-client relationship from a case for good cause under the provisions of R.C.M. 505 and Rule 1.16 of reference (d). In cases with multiple co-accused forwarded for detailing by an SDC, the RDC will normally detail defense counsel and auxiliary defense counsel to these cases from their LSSA. While the preference is to have Marines defend Marines, RDCs may request that Navy defense counsel be detailed by a local Navy Defense Service Office in exceptional situations. RDCs will maintain a record of all cases detailed to counsel within their region and other cases involving accused assigned to commands supported by their LSSS utilizing the Case Information System (CIS) on the DSO's SharePoint website. RDCs may authorize defense counsel in their region to form an attorney-client relationship with officers and SNCOs pending NJP when the NJP may lead to a board of inquiry or an administrative separation. RDCs will appoint a substitute RDC and substitute SDCs for detailing purposes when the RDC or an SDC is on leave or otherwise unavailable to execute detailing responsibilities.

c) SDCs – SDCs may detail defense counsel assigned to their Legal Services Support Team (LSST), including themselves, to cases supported by the SDC's LSST or an element thereof. However, SDCs are not authorized to detail counsel to the following: cases involving a commissioned officer accused above the grade of O-3, a chief warrant officer accused above the grade of CWO-2 or an enlisted accused above the grade of E-7; cases alleging violations of Article 118; and national security cases as defined by section 0126 of reference (c). Additionally, SDCs who write fitness reports on subordinate defense counsel may not detail themselves to represent clients who have a conflict of interest with a client of a subordinate defense counsel for whom the SDC is the reporting senior. Prior to detailing counsel to

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“complex cases,” as defined by the responsible RDC, the SDC will consult with the RDC to ensure the right counsel is detailed to the right case. In cases with multiple co-accused, when the number of co-accused exceeds the capacity of the SDC’s branch office, the SDC will forward the additional case files to the RDC for detailing. SDCs will maintain a record of all cases detailed to counsel within their region and other cases involving accused assigned to commands supported by their LSST utilizing the DSO’s CIS. When an SDC is on leave or otherwise unavailable to execute detailing responsibilities, RDCs will appoint a temporary SDC for detailing purposes.

2) Detailing Considerations.

a) When detailing a defense counsel to a particular case, the detailing authority shall ensure that: 1) standard detailing criteria are used, including those specifically listed in reference (f); 2) the needs of the local commands are taken into consideration; 3) every accused receives zealous representation by a fully qualified counsel; and 4) every accused is detailed counsel in a timely manner.

b) The responsible detailing authority shall detail a defense counsel in writing, using the approved detailed letter in the Forms section on the DSO SharePoint, to a particular case as soon as practicable and in no case later than:

i. Ten days after being notified via e-mail, fax, or other written means by corrections personnel, command representatives, the military justice section, or some other government official that an accused has been placed in pretrial confinement or arrest¹ under R.C.M. 305;

ii. Five days after being served notice of preferred charges;

iii. Five days after being served an administrative separation or board of inquiry package; or

iv. As otherwise required by law or regulation.

c) The detailing authority will provide a copy of the detailing memorandum to the responsible staff judge advocate and the cognizant prosecution or administrative support section within seven days of detailing the defense counsel. The detailed counsel will provide the trial counsel or recorder the approved Notice of Representation from the Forms section on the DSO SharePoint within seven days of being detailed to a court-martial case or an administrative separation board.

d) Supervisory defense counsel will normally not be detailed to represent a client that has a conflict of interest with a client of a subordinate defense counsel for whom the supervisory counsel is the fitness report reviewing officer or reporting senior. Only the CDC may grant an exception to this general rule. If a supervisory defense counsel is detailed to a case that creates a

¹ SDCs will ensure that their branch office is on the distribution list of the local brig and confinement reports and these reports are reviewed daily to indentify newly-confined Marines or Sailors.

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conflict of interest with a client of a subordinate defense counsel, the supervisory defense counsel may not review or write the fitness report of that subordinate defense counsel. If a supervisory counsel is detailed to represent a client with a conflict of interest with a client of a subordinate defense counsel, the next-level supervisor will replace the that supervisory counsel in the subordinate defense counsel's fitness reporting chain.

e) An accused in a non-capital case is not entitled to be represented by more than one military counsel, and normally only one defense counsel will be detailed to a particular case. As explained in reference (f), the detailing of a second defense counsel "to contested and complex cases is encouraged" and detailing authorities may, at their discretion, detail a second counsel to such cases

f) To ensure that a defense counsel's workload is not so large as to interfere with his or her ethical obligations to any individual client, the detailing authority shall consider factors such as an individual counsel's experience and caseload, the location of the case and its complexity, anticipated end of tour date, and traditional officer duties when assigning counsel to a particular case. To the extent practicable, detailing authorities should detail defense counsel from the closest defense office to the location of the accused.

g) Defense counsel are normally only detailed to represent an accused assigned to an organization that is supported by that defense counsel's LSST. For situations such as organizations without defense counsel, conflict-of-interest cases, gaps in defense counsel coverage, or when unique requirements of a case arise, defense counsel may be detailed by the responsible RDC or the CDC to represent an accused assigned to an organization that is not normally supported by that defense counsel's branch office on a case-by-case basis subject to the procedures below.

h) As explained in paragraph 0145 of reference (B), the convening authority is responsible for the cost of travel, other than local travel as defined by the Joint Federal Travel Regulations, and per diem for a defense counsel. Prior to detailing a defense counsel to a case that will incur non-local travel costs, the authorized detailing authority shall get approval from the convening authority's SJA for travel and other expenses associated with the detailing decision. If the convening authority will not agree to fund the non-local travel and per diem costs associated with the detailing decision, the issue will be forwarded to the CDC for resolution. If the CDC cannot resolve the funding issue, it will be forwarded to the SJA to CMC for final decision.

i) Once a defense counsel is slated for reassignment, the detailing authority may not detail a defense counsel to a case that is anticipated to extend beyond the targeted reassignment date without the consent of the LSST OIC. If the detailing authority and the LSST OIC cannot reach an agreement on the detailing decision involving a case that will likely extend beyond the defense counsel's anticipated reassignment date, the matter will be forwarded to the CDC for resolution. If the CDC cannot resolve the matter, the CDC will forward the unresolved detailing matter to the SJA to CMC for final decision.

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3) Inability to Form an Attorney-Client Relationship. On occasion, most particularly with reserve administrative separation boards, a detailed counsel cannot, despite a good faith effort, locate the client and form an attorney-client relationship. In these situations, the detailed counsel shall notify the detailing authority of the inability to form an attorney-client relationship with the client and articulate the steps taken to locate the client. If the detailing authority is satisfied that all reasonable efforts have been exhausted to locate the client, the detailing authority shall notify the responsible trial counsel or recorder in writing, using the approved Notice of Inability to Form an Attorney-Client Relationship from the Forms Section on the DSO SharePoint, that the detailed counsel has been unable to form an attorney-client relationship and that the detailed counsel will not make appearance on behalf of the client at the hearing.

b. IMC Requests for Marines Assigned to the DSO. Article 38, UCMJ, provides an accused the right to be represented by a military counsel of his or her own selection, if that counsel is reasonably available. Section 0131 of reference (d) sets forth standards for determining the availability of a requested IMC. Chapter 2 of reference (c) explains that as the OIC of the DSO, the CDC is the determination authority under section 0131b(2) of reference (d) for all IMC requests for defense counsel assigned to the DSO, except for IMC requests for the CDC, and provides the CDC the authority to delegate IMC determination authority to the RDCs.

1) IMC Determination Authority within the DSO. Determination authorities may act on IMC requests for defense counsel from the DSO subject to the procedures set forth in section 0131 of reference (d), chapter 2 of reference (c), paragraph 2 below, and the following billet-specific delegation:

a) IMC Requests for the CDC – the Staff Judge Advocate to the Commandant of the Marine Corps is the determination authority on IMC requests for the CDC. For IMC availability determination purposes, the CDC’s organization is the DSO, not the CDC’s administratively-attached battalion.

b) IMC Requests for RDCs and the Officer-in-Charge, Defense Counsel Assistance Program – the CDC is the determination authority on IMC requests for RDCs and the OIC, DCAP. For IMC availability purposes, an RDC’s organization encompasses the LSSA of the LSSS assigned, not the administratively-attached battalion. The OIC, DCAP’s organization is the DSO, not his or her administratively-attached battalion.

c) IMC Requests for Cases Involving an Accused above the Rank of O-5 and Cases Alleging Violations or Attempted Violations of Article 118(1) or (4) – the CDC is the determination authority on IMC requests for cases involving accused above the rank of O-5 and cases alleging violations or attempted violations of Article 118(1) or (4).

d) IMC Requests for SDCs and DCs – RDCs are delegated determination authority on IMC requests for defense counsel within their region, except for cases involving an accused above the rank of O-5 and cases alleging violations or attempted violations of Article 118(1) or (4). For IMC availability purposes, an SDC or DCs organization is the LSST assigned and the location of the units supported therefrom, not the unit administratively assigned.

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2) Considerations for IMC determinations. Unless the case is one for which the sentence of death may be adjudged under R.C.M. 1004, a national security case as defined by section 0126 of reference (d), or the counsel has an existing attorney-client relationship with the accused, the requested counsel must either be located within the same judicial circuit or assigned to an organization within 500 miles where the proceedings are to be held in order to be found reasonably available.

3) Requests for associate counsel. If the requested defense counsel is made available as an IMC, the detailed defense counsel shall normally be excused from further participation in the case, unless the detailing authority approves a request from the accused that the detailed defense counsel act as associate counsel.

4. Conclusion. This CDC Policy Memo is effective immediately and CDC Policy Memo 7-11 is hereby cancelled.



J. G. BAKER

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