



UNITED STATES MARINE CORPS
CHIEF DEFENSE COUNSEL OF THE MARINE CORPS
MARINE CORPS DEFENSE SERVICES ORGANIZATION
755 S. COURTHOUSE RD, STE 1000
ARLINGTON, VA 22204-2482

5817
CDC
15 Mar 12

CDC Policy Memo 02-12

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

Subj: ADVISING CLIENTS OF POTENTIAL CONFLICTS OF INTEREST

Ref: (a) Sixth Amendment to the U.S. Constitution
(b) Discussion of R.C.M. 502(d)(6)
(c) JAGAINST 5803.1C
(d) CDC Policy Memo 7-11 (Detailing and IMC Rules)

Encl: (1) Conflict-Free Counsel Advice Form
(2) Notice of Change of Counsel Due to Client Consent
(3) Notice of Change of Counsel for Good Cause
(4) Notice of Finding of No Good Cause to Sever Despite Conflict of Interest

1. Purpose. To establish standard procedures within the Marine Corps Defense Services Organization (DSO) for advising clients of a defense counsel's potential conflict of interest and memorializing the client's preference of counsel in order to assist the detailing authority under RULE FOR COURTS-MARTIAL 505(d)(2)(B)(iii) and the military judge under R.C.M. 901(d)(3) in deciding whether good cause exists to sever the attorney-client relationship due to the potential conflict of interest.

2. Discussion.

a. Pursuant to references (a) – (c), a client has the right to be represented by conflict-free counsel. A client may waive the right to conflict-free counsel in certain circumstances. In order to make an informed decision about waiving this right, the client must be adequately informed of the conflict of interest and explained the material risks of and reasonably available alternatives to being represented by the conflicted counsel prior to making this important decision. The client's informed consent should be confirmed in writing.

b. When a defense counsel discovers an actual or potential conflict affecting a client's right to conflict-free counsel, the defense counsel must immediately notify his or her supervisory attorney and the detailing authority. When discovered after the formation of the attorney-client relationship, the defense counsel must disclose the conflict of interest to the client to determine if the client wants to sever the attorney-client relationship or waive the conflict of interest. If the client wants to sever the attorney-client relationship, the conflicted counsel will be excused by the detailing authority, and a new counsel will be detailed. In court cases, the military judge will

Subj: ADVISING CLIENTS OF POTENTIAL CONFLICTS OF INTEREST

be notified of the change of defense counsel. If the client wants to waive the conflict of interest, the detailing authority and, in court cases, the military judge will independently determine if 1) the waiver is knowing and voluntary and 2) whether, in spite of the waiver, the conflict still provides good cause to sever the attorney-client relationship.

3. Policy.¹ Upon discovery of a potential conflict of interest, the defense counsel will immediately consult with his supervisory counsel to ensure compliance with references (a)- (c).

a. Conflicts discovered prior to forming an attorney-client relationship. If the defense counsel has not formed an attorney-client relationship with the client, the defense counsel will not meet with client and the case will be re-detailed to a conflict-free counsel under reference (d).

b. Conflicts discovered after forming the attorney-client relationship. If the defense counsel has already formed an attorney-client relationship with the client, the conflict may provide good cause to sever the attorney-client relationship. The defense counsel will utilize enclosure (1) to adequately inform the client of the nature of the conflict, the material risks of and reasonably available alternatives to continued representation by a conflicted counsel and to obtain an informed decision whether the client wants a new counsel or not.

1) Client requests new counsel. If the client desires to have new counsel detailed and the detailing authority agrees, then a new counsel will be detailed under R.C.M. 505(d)(2)(B)(iii) and reference (d). In a court case, the military judge will be provided a copy of enclosures (1) and (2) to ensure circumstances for the change of counsel are memorialized on the record. *See United States v. Hutchins*, 69 M.J. 28 (C.A.A.F. 2011).

2) Client requests to waive the conflict of interest. If the client desires to continue to be represented by the conflicted counsel, the detailed counsel must obtain informed consent from the client, confirmed in writing. Enclosure (1) will be used to memorialize this important decision; the italicized portions must be tailored to fully explain the nature of the conflict to the client. When the conflict is personal to the defense counsel,² the advice regarding waiving the right to conflict-free counsel must come from a disinterested attorney.³ When completed, a copy of enclosure (1) will be provided to the detailing authority and military judge for their independent assessments whether the conflict, notwithstanding the requested waiver, provides good cause to sever the attorney-client relationship. If the detailing authority finds good cause to sever the attorney-client relationship, the detailing authority will detail a new counsel under R.C.M. 505(d)(2)(B)(iii) and reference (d). In a court case, the military judge will be provided a

¹ CMC (JAR) has provided tremendous assistance in drafting this policy memo.

² A conflict is personal, if the defense counsel own self-interest lies in pursuit of a financial or personal interest. Examples include conflicts affecting fitness reports (*see US v. Lee*, 70 M.J. 535 (N-M.C.C.A. 2011)), sexual relationships with clients (*see U.S. v. Cain*, 59 M.J. 285 (C.A.A.F. 2004)), a book deal (*see United States v. Hearst*, 638 F.2d 1190 (9thCir. 1980)); job with prosecutor's office (*see Garcia v. Bunnell*, 33 F.3d 1190 (9thCir 1994); resignation request before trial (*see United States v. Hutchins*, 69 M.J. 282 (CAF 2011); retirement request (*see United States v. Wuterich*, 2011 CCA Lexis 12, (Jan 7, 2010)); a prior attorney-client relationship with an adverse party, or the like. When in doubt, the defense counsel should assume the conflict is personal.

³ Neither the detailed counsel's supervisory attorneys nor the detailing authority may provide the disinterested advice to the client. The disinterested attorney need not be a member of the DSO.

Subj: ADVISING CLIENTS OF POTENTIAL CONFLICTS OF INTEREST

copy of enclosures (1) and (3) to ensure circumstances for the change of counsel are memorialized on the record. If the detailing authority does not find good cause to sever the attorney-client relationship, the detailing authority will provide the military judge with a copy of enclosures (1) and (4) to allow the military judge to make a final determination on the record under R.C.M. 901 whether the conflict of interest disqualifies the detailed counsel. *See United States v. Lee*, 70 M.J. 535 (N-M.C.C.A. 2011). If the military judge disqualifies the conflicted counsel, the detailing authority will promptly detail a new counsel under reference (d).



J. G. BAKER

Distribution List:

SJA to CMC

JAR

Legal Chief of the Marine Corps

LSSS OICs and Law Center Directors

All members of the DSO

NMCTJ Code 52, OJAG

Navy DCAP