



UNITED STATES MARINE CORPS
CHIEF DEFENSE COUNSEL OF THE MARINE CORPS
MARINE CORPS DEFENSE SERVICES ORGANIZATION
HEADQUARTERS MARINE CORPS (CODE JAD)
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From: Chief Defense Counsel of the Marine Corps
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**Subj: DETAILING AND INDIVIDUAL MILITARY COUNSEL DETERMINATION
AUTHORITY FOR COUNSEL ASSIGNED TO THE DEFENSE
SERVICES ORGANIZATION**

Ref: (a) MCO P5800.16A W/CH 1-6 (LEGADMINMAN)
(b) Marine Corps Legal Services Strategic Action Plan 2010 to 2015
(c) JAGINST 5800.7E (JAGMAN)
(d) JAGINST 5803.1C (Rules of Professional Conduct)

1. Purpose. To continue to implement Change 6 to reference (a) and reference (b) by reinforcing that Marine defense counsel will not establish an attorney-client relationship unless authorized to do so and by delegating detailing and individual military counsel (IMC) determination authority within the Marine Corps Defense Services Organization (DSO).

2. Discussion. Reference (a) 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, Change 6 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 the temporary detailing authority issued on 4 October 11.

3. Policy. A Marine defense counsel will not establish an attorney-client relationship, as defined by section 0131b(3) of reference (c), 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 (RCM) 505 and 506 and reference (d). Unless the attorney-client relationship is properly severed, or he or she is otherwise properly relieved, a Marine defense counsel shall continue to represent an accused through the completion of applicable post-trial matters as outlined in reference (a).

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 RDCs, authorization to form of an attorney-client relationship. Detailing authority also

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includes the authority to remove a counsel from a case for good cause under the provisions of RCM 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 will appoint a substitute CDC for detailing purposes when the CDC is on leave or otherwise unavailable to execute detailing responsibilities. The CDC will normally not detail RDCs or SDCs to represent a client that has a conflict of interest with a client of a subordinate defense counsel for whom the RDC or SDC is the fitness report reviewing officer or reporting senior. If an RDC or SDC is detailed to a case that creates a conflict of interest with a client of a subordinate defense counsel, the RDC or SDC may not review or write the fitness report of that subordinate defense counsel. The CDC may authorize a defense counsel to form an attorney-client relationship with officers and staff non-commissioned officers pending nonjudicial punishment when the NJP may lead to a board of inquiry or an administrative separation.

b) RDCs - RDCs may detail defense counsel assigned to their region, and auxiliary defense counsel made available for a particular case, to cases from commands supported by their region; however, RDCs are not authorized to detail themselves to any case. RDCs will appoint a substitute RDC for detailing purposes when the RDC is on leave or otherwise unavailable to execute detailing responsibilities. RDCs may not detail counsel to cases involving an accused above the grade of O5 or cases alleging violations of Article 118(1) or (4). RDCs may only detail SDCs who write fitness reports on subordinate defense counsel to represent clients who have a conflict of interest with a client of a subordinate defense counsel with the consent of the CDC. If an SDC is detailed to represent a client with a conflict of interest with a client of a subordinate defense counsel, the RDC will become that subordinate defense counsel's reporting senior. RDCs may authorize defense counsel in their region to form an attorney-client relationship with officers and staff non-commissioned officers pending NJP when the NJP may lead to a board of inquiry or an administrative separation. In cases with multiple co-accused, the RDC will, subject to paragraph 2 below, detail non-local defense counsel and, auxiliary defense counsel made available for detailing, to these cases. While the preference is always to have Marines defend Marines, RDCs may request that Navy defense counsel be detailed by a local Navy Legal Services 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 region utilizing the defense case tracking system in the DSO's Sharepoint portal until a successor system is fielded by the DSO.

c) SDCs – SDCs may detail defense counsel assigned to their location, including themselves, to cases from commands supported by their location. RDCs will appoint a temporary SDC for detailing purposes when the SDC is on leave or otherwise unavailable to execute detailing responsibilities. SDCs may not detail counsel to the following: cases

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involving a commissioned officer accused above the grade of O3, a chief warrant officer accused above the grade of CWO2 or an enlisted accused above the grade of E7; 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. In cases with multiple co-accused, when the number of co-accused exceeds the capacity of a particular location, the SDC will forward the additional case files to the RDC for detailing. SDCs will maintain a detailing record of all cases detailed to counsel within their office and other cases involving accused assigned to commands supported by their location utilizing the defense case tracking system in the DSO's Sharepoint portal until a successor system is fielded by the DSO.

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; 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 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 arrest under RCM 305;

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

iii. Five days after being served an administrative separation/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 accused's summary court-martial convening authority, the responsible staff judge advocate, the cognizant prosecution section and the responsible RDC as soon as practicable after detailing the defense counsel.

d) To ensure that a Marine 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, case complexity, anticipated end of tour date, and traditional officer duties when assigning counsel to a particular case. Once a Marine defense counsel is slated for reassignment by the applicable SJA, OIC, or

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Director, 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 SJA, OIC, or Director. If the detailing authority and the SJA, OIC, or Director 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.

e) Marine defense counsel are normally only detailed to represent an accused assigned to an organization that is supported by that Marine defense counsel's Law Center or LSSS. However, for situations such as organizations without local defense counsel, conflict-of-interest cases, gaps in defense counsel coverage, or when unique requirements of a case arise, non-local defense counsel may be detailed by the responsible RDC or the CDC on a case-by-case basis. Non-local counsel is defined as a counsel located more than forty miles from another DSO branch office. Prior to detailing a non-local counsel to a case, the authorized detailing authority shall:

i) Get approval from the convening authority's SJA for travel and other expenses associated with detailing a non-local defense counsel to the case; and,

ii) Consult with the non-local defense counsel's SDC and the SJA, OIC, or Director, and consider the impact that detailing the non-local defense counsel will have on the needs of that organization.

iii) If the convening authority will not agree to fund travel and other expenses associated with detailing the non-local counsel or the non-local counsel's SJA, OIC, or Director objects, 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.

f) An accused in a non-capital case is not entitled to be represented by more than one military counsel, and normally only one Marine defense counsel will be detailed to a particular case. Prior to detailing a second Marine defense counsel to any case, the detailing authority shall consult with the local SDC and the SJA, OIC, or Director, and consider the impact detailing a second Marine defense counsel will have on the needs of that organization.

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 (c) sets forth standards for determining the availability of a requested IMC. Chapter 2 of reference (a) explains that as the OIC of the DSO, the CDC is the determination authority under section 0131b(2) of reference (c) for all IMC requests for Marine 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.

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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 (c), Chapter 2 of reference (b), paragraph 2 below, and the following billet-specific delegation:

a) IMC Requests for the CDC - the SJA to CMC is the determination authority on IMC requests for the CDC.

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. The CDC will appoint a temporary CDC for IMC determining purposes when the CDC is on leave or otherwise unavailable to execute these responsibilities. For IMC availability purposes, an RDC's organization is limited to the region the RDC is assigned.

c) 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 O5 and cases alleging violations of Article 118(1) or (4). RDCs will appoint a temporary RDC for IMC determining purposes when the RDC is on leave or otherwise unavailable to execute these responsibilities.

2) Considerations for IMC determinations:

a) Unless the case is a capital case for which the sentence of death may be adjudged under RCM 1004 or a national security case as defined by section 0126 of reference (c) or the counsel has an authorized 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.

b) Before taking action on an IMC request for an SDC or DC, the determination authority will consult with both the convening authority's SJA and the requested IMC's SJA, OIC, or Director, and consider the impact the approval will have on the operational needs of the requested IMC's organization, as well as the requested IMC's anticipated rotation date, caseload, and experience, the case complexity, collateral duties assigned to the requested counsel, and the officer's training and education requirements.

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. Prior to approving such a request, the detailing authority shall consult with the detailed counsel's SDC and SJA, OIC, or Director, and consider the impact of approving the request for associate counsel will have on the operational needs of that organization.

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c. Representation at Initial Review Officer Hearings. Unless the accused has previously been detailed a defense counsel, SDCs shall ensure a defense counsel is assigned to represent Marines and Sailors assigned to commands supported by their locations at initial review officer (IRO) hearings conducted under RCM 305. Such representation is a limited attorney-client relationship related solely to the IRO hearing and the defense counsel advising an accused concerning pretrial confinement should limit this advice to the legal issues and factual background surrounding pretrial confinement. While the communications between the accused and counsel in conjunction with the IRO hearing may be privileged and confidential and forms a limited attorney-client relationship related solely to the IRO hearing, advising an accused of his rights concerning pretrial confinement or speaking on behalf of an accused at an IRO hearing does not, in and of itself, establish an attorney-client relationship for any other purpose. Marine defense counsel shall ensure the accused understands that these privileged communications do not establish an attorney-client relationship for any purpose other than the IRO hearing unless the lawyer has previously been detailed by proper authority to serve as defense counsel or otherwise form an attorney-client relationship.

d. Administrative Process Advice. Marine defense counsel may provide confidential legal advice to Marines and Sailors facing non-punitive and/or administrative corrective action such as non-judicial punishment, summary courts-martial, an adverse entry into their service record book, notification of initiation of administrative separation processing and/or other similar administrative procedures. Senior Defense Counsel should normally require the individual seeking this administrative process advice to bring all paperwork related to the legal issue before making a counsel available to provide the requested counseling. Senior Defense Counsel may contact commands, as needed, to obtain appropriate documentation when an individual has been provided an incomplete package. While the communications between the Marine defense counsel and the individual receiving the administrative process advice may be privileged and confidential, discussing the factual background surrounding the issue, reviewing the paperwork related to the administrative procedure, contacting the command to seek clarification about the administrative procedure, providing technical explanations regarding basic principles of military law or discussing courses of action related to the exercise of a due process or regulatory right does not in and of itself establish an attorney-client relationship under section 0131b(3) of reference (c); nor does it constitute an assignment of that Marine defense counsel as that individual's defense counsel or personal representative for the purposes of the applicable administrative procedure. Marine defense counsel shall ensure the individual receiving the legal advice understands that these privileged communications do not establish an attorney-client relationship unless the Marine defense counsel has been detailed by proper authority to serve as defense counsel or personal representative of the accused.

e. Article 31 Advice. Marine defense counsel may provide privileged and confidential legal advice to Marines and Sailors who have been advised of their rights under Article 31(b) of the Uniform Code of Military Justice and elect to exercise their right to consult with counsel. While the communications between the Marine defense counsel and the individual regarding Article 31(b) advice may be privileged and confidential, discussing the factual background surrounding the allegation, advising an accused whether or not to make a statement, assisting the

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accused in preparing a statement, providing technical explanations regarding basic principles of military law or other similar actions does not establish an attorney-client relationship under section 0131b(3) of reference (c) nor does it constitute an assignment of that Marine defense counsel as the individual's defense counsel. Marine defense counsel shall ensure the individual receiving the Article 31(b) advice understands that these privileged communications do not establish an attorney-client relationship unless the Marine defense counsel has previously been detailed by proper authority to serve as the individual's defense counsel or personal representative or otherwise form an attorney-client relationship.

4. Conclusion. This CDC Policy Memo is effective immediately .



J. G. BAKER

Distribution List:

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