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CDC POLICY MEMORANDUM 12-14

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

Subj: GUIDANCE ON WALK-INS AND IRO HEARINGS

Ref: (a) MCO P5800.16_ (series)
(b) CDC Policy Memo 2-14 (Detailing and IMC Rules)
(c) Article 31, UCMJ
(d) R.C.M. 305, MCM (2012 ed.)
(e) JAGINST 5803.1D (Rules of Professional Conduct)
(f) CDC Policy Memo 11-14 (Suicide Awareness and Response to Clients in Crisis)
(g) CDC Policy Memo 10-14 (Release of Counsel Due To Conflict of Interest)
(h) CDC Policy Memo 4-14 (New DSO Orientation Checklists)

Encl: (1) Information for Walk-In Defense Counseling
(2) Walk-in Counseling Roster
(3) AdSep / NJP / Court-Martial Flowchart

1. Purpose. To provide updated guidance for the provision of uniform and consistent "walk-in" defense counseling and representation at Initial Review Officer (IRO) hearings by defense counsel assigned to the Marine Corps Defense Services Organization (DSO), in order to ensure that Marines and Sailors receive the clear, consistent, and uniformly correct advice and assistance, while reinforcing that DSO attorneys may not form or establish an attorney-client relationship except when specifically authorized by their detailing authority.

2. Discussion.

a. Reference (a) tasks the Chief Defense Counsel of the Marine Corps (CDC) with establishing standards of practice for the delivery of Trial Defense Services Marine Corps—wide. This mandate includes "walk-in" services and representation at IRO hearings.

b. *Walk—In Defense Services*. "Walk—in" defense services play a crucial role in the defense of our Marines and Sailors. Ready, available, and suitable to the situation, they not only serve the best interest of the Marine seeking the service, but their timely and accurate application also facilitates the interests of good order and discipline. Walk-in defense counseling is intended to cover certain "gaps" in the legal system where a Marine or Sailor may require confidential legal advice, yet does not rate, or has not yet been detailed, his or her own defense counsel under reference (b). Walk—in services include but are not necessarily limited to:

(1) Confidential and privileged legal advice to Marines and Sailors facing non-punitive or administrative corrective actions such as nonjudicial punishment, summary courts-martial, "fast track" disposition packages, adverse entries into their service record books or officer qualification records, notifications of initiation of administrative separation processing, or other similar administrative procedures; and

(2) Confidential and privileged legal advice to Marines and Sailors who have been advised of their Article 31(b) rights under reference (c) and have elected to exercise their right to consult with counsel.

c. *IRO Hearing Representation*. Reference (d) accords Marines in pretrial confinement the right to request provision of military counsel for review of their continued confinement. In the absence of a preexisting attorney—client relationship, counsel are typically assigned for the limited purpose of representation during pretrial confinement proceedings (pre—referral). Like walk—in counseling services, representation of Marines under these circumstances provides the DSO with an opportunity to cover a "gap" in the legal process where a Marine is pending preferred charges, is under restraint by military authorities, requires confidential legal advice, yet has not been detailed his or her own attorney.

3. <u>Policy</u>.

a. *Nature of the Relationship*. Unless otherwise authorized by competent authority, DSO attorneys shall not form an attorney-client relationship as defined by Rule 1.2 of reference (e) with any servicemember receiving walk—in services or in the course of IRO representation. While servicemebers seeking these services are not detailed counsel and there is no attorney—

client relationship, they nonetheless may be generically referred to as "clients."

b. *Communications Remain Privileged*. While communications between a DSO attorney and the individual receiving the walk—in counseling or IRO representation remain privileged and confidential, providing these services does not, in and of itself, establish an attorney-client relationship as defined by Rule 1.2 of reference (e).

c. *Assignment of Duty is not Detailing*. Merely being assigned counseling or IRO duty by a supervisory attorney does not constitute detailing of a DSO attorney to an individual case or as a personal representative for a Marine or Sailor seeking pretrial confinement representation or advice on applicable administrative or disciplinary proceedings.

d. *General Responsibilities of Counsel*. As with everything we do, a DSO attorney advising a servicemember on a walk—in basis or at an IRO hearing owes that servicemember a duty of honesty, integrity, candor and zealousness. This includes confidential and privileged communications and advice. In doing so, DSO attorneys shall ensure all parties understand that merely receiving legal advice under these circumstances does not establish an attorney—client relationship unless and until that attorney is detailed by proper competent authority. In this light, a DSO attorney advising a client on a walk—in basis, or representing a client at an IRO hearing, may perform the following non-exclusive list of general tasks:

(1) Discuss the factual background surrounding the issue with the Marine or Sailor.

(2) Review any and all related paperwork, documents or physical items.

(3) Contact command representatives to seek clarification about any pending administrative procedure or processes.

(4) Discuss the costs and benefits concomitant to accepting or refusing nonjudicial punishment, summary court-martial, agreeing to a "fast track" disposition, waiving an administrative separation board, or making a statement to military or law enforcement authorities.

(5) Provide technical explanations regarding basic principles of military law.

(6) Discuss and provide general advice on potential courses of action related to the exercise of a due process or regulatory rights without forming an attorney-client relationship.

e. *Walk-in Specific Rules*.

(1) Only defense counsel certified and sworn under Articles 27(b) and 42(a) of the Uniform Code of Military Justice may provide walk-in counseling. Student Judge Advocates and legal services specialists may not provide legal advice.

(2) Senior Defense Counsel (SDC) will maintain regular and consistent walk-in defense counseling hours which allow Marines and Sailors the maximum opportunity to speak with counsel, at a minimum two days per week. While typically reserved for Marines in pay grades E-5 and below and Sailors in pay grades E-6 and below, SDCs are authorized to make exceptions for more senior walk—in clients as required. Staff Noncommissioned Officers (SNCOs) and Officers will typically be seen by appointment, normally arranged by the SDC.

(3) Some installations are larger than others. Others are remote and do not have resident defense counsel. As such, in addition to walk-in counseling hours at the DSO branch office, SDCs are strongly encouraged to schedule walk-in counseling hours on a regular basis at locations convenient to large command populations and aboard installations where there is no resident defense counsel. Telephonic consultations may be appropriate in some cases.

(4) When forces deploy forward without a defense counsel, the DSO is still responsible for providing walk-in counseling. The responsible RDC will coordinate with the Staff Judge Advocate of the deployed command and establish a support plan for the provision of walk—in counseling to Marines and Sailors assigned to the deployed command in a manner which is responsive to the needs of the deployed commander.

(5) DSO attorneys must have certain minimum documents and information at their disposal before providing counseling, whether done in-person or remotely. These documents include but are not limited to:

(a) The charge sheet.

(b) Administrative separation notification or similar documentation.

(c) Any pages 11 and 12 of the member's Service Record Book.

(d) A summary of the evidence that will be used at the hearing, if applicable.

(6) If a Marine or Sailor comes in for walk-in counseling and does not have these materials, a member of the DSO may contact the command in order to obtain those documents. If the command refuses to provide the required documentation, the SDC should contact the respective Staff Judge Advocate for resolution. Counseling may be denied when no resolution is possible.

(7) DSO Legal Services Specialists will conduct conflict checks on all personnel prior to the initiation of walk-in counseling.

(8) Before speaking with an attorney a client may be required to watch any CDC—approved video designed to answer many routine procedural questions regarding nonjudicial punishment, summary courts-martial, and administrative separation boards.

(9) While personal, face—to—face counseling is preferable, operational commitments and remote locations may mean that this is not always possible. In such situations, the SDC may authorize remote telephonic or video teleconference counseling using locally available equipment, including telephones and web cam enabled computers using Defense Connect Online. The documentation and other requirements described above pertain, even under these circumstances, and counseling may be denied accordingly.

(10) Use enclosure (1) as a discussion guide. Provide each Marine or Sailor counseled the Tools for Coping with Stress Memorandum found at enclosure (f).

(11) DSO members will not sign forms or otherwise act as a witnesses attesting that the Marine or Sailor needing counseling has sought legal advice. SDCs may authorize the use of stamps by DSO Legal Services Specialists to validate that the individual did, indeed, receive the requested counseling.

(12) There may be occasions where servicemembers present for walk-in counseling with adverse interests (e.g. co-accused). Typically each servicemember will have the opportunity to speak with a different DSO attorney. Where more than one DSO attorney provides walk-in counseling to servicemembers with adverse interests, those DSO attorneys are prohibited from later representing one of those servicemembers other than the party to whom he or she provided the walk-in counseling.

(13) Resource constraints may periodically require one DSO attorney to provide joint walk—in counseling to Marines and/or Sailors with adverse interests (e.g. co-accused). Joint walk—in counseling may only be done with the specific approval of the DSO Branch Office SDC. A DSO attorney providing joint walk—in counseling will not have privileged or confidential communications with the individuals being counseled. Furthermore, a DSO attorney who performs a joint counseling session is prohibited from later be detailed to represent any of the Marines or Sailors jointly counseled at any hearings or in any disciplinary proceedings arising out of the facts related to the joint walk—in counseling. The Marines or Sailors receiving the joint walk—in counseling must be notified of these limitations on their communications with the defense counsel.

(14) Unless the defense counsel has been authorized to form an attorney-client relationship with the accused, a defense counsel will not advise the Marine or Sailor being counseled to accept or refuse nonjudicial punishment/summary court-martial, to request an administrative board, or whether or not to make a statement to investigators. To allow the Marine or Sailor to make an independent decision, the defense counsel should, based on the information provided, present the risks and benefits of either accepting or refusing nonjudicial punishment/summary court-martial, requesting and administrative board, or making a statement to investigators.

(15) Each DSO Branch Office will maintain a record of all servicemembers who appear for walk—in counseling in a manner which allows for entry the DSO’s Case Information System (CIS), and which provides a record of compliance with reference (f). See enclosure (2).

f. *Initial Review Officer Hearing Specific Rules*.

(1) SDCs shall ensure a defense counsel is assigned to represent Marines and Sailors at initial review officer (IRO)

hearings conducted under reference (d). Where an accused previously detailed defense counsel is later placed in pretrial confinement that attorney shall normally represent his or her client at the IRO hearing.

(2) Because of a reduced number of available military confinement facilities, Marines are occasionally confined in civilian facilities or transferred to a confinement facility located aboard an installation distant from the location of the alleged crime and/or convening authority. Under these circumstances DSO attorneys from the closest LSST or LSSS shall normally provide IRO hearing support.

(3) Unless serving as detailed defense counsel, a DSO attorney's representation of a Marine or Sailor at an IRO hearing is a limited attorney-client relationship related solely to that IRO hearing. DSO attorneys advising an accused concerning pretrial confinement should limit this advice to the legal issues and factual background surrounding pretrial confinement. Advising an accused of his or her rights concerning pretrial confinement or speaking on behalf of an accused at an IRO hearing does not, in and of itself, result in detailing of a DSO attorney to that servicemember.

(4) DSO attorneys serving as IRO hearing advocates shall ensure that each individual accused they represent in that capacity understands the limited nature of their representation, that they are not detailed as counsel to their case, and that they are not their personal attorney or representative.

(5) Absent a voluntary and knowing waiver obtained in writing in accordance with procedures established in reference (g), defense counsel shall not represent Marines or Sailors at IRO hearings with adverse interests. To allow for timely resolution of conflicts early notification by command representatives is strongly encouraged, preferably prior to scheduling the IRO hearing. The SDC of the Branch Office providing the IRO service is responsible for ensuring each Marine and/or Sailor receives conflict free IRO hearing counsel.

(6) While personal, face—to—face IRO representation is preferable, operational commitments and remote locations may mean that this is not always possible. In such situations, the SDC of the DSO Branch Office providing the IRO service may authorize remote telephonic or video teleconference representation using locally available equipment, including telephones and web cam enabled computers using Defense Connect

Online. Other requirements described above remain, even under these circumstances.

4. Education. Enclosure (3) is provided to assist counsel in explaining the different processes which may result from an allegation of misconduct. It may be helpful under certain circumstances. Use of enclosure (3) is not mandatory, however, all newly-assigned members of the DSO are required to review this flowchart with their Senior Defense Counsel in accordance with the requirements of reference (h).

5. Conclusion. CDC Policy Memo 2-13 is cancelled. This CDC Policy Memo is effective immediately.

STEPHEN C. NEWMAN

Distribution List:
SJA to CMC
Legal Chief of the Marine Corps
All Marine Corps SJAs
LSSS OICs
LSST OICs
All members of the DSO

INFORMATION FOR WALK-IN DEFENSE COUNSELING

CONFIDENTIALITY & LIMITS OF COUNSELING

- Your communications with the attorney during today's counseling will be confidential and privileged; he/she may not disclose what you discuss without your permission. However, no attorney-client relationship will be formed. This means that the attorney can answer questions about the process, your rights, and potential impacts of decisions but can't tell you whether you should assert or waive any particular right (e.g., make a statement/remain silent, accept/refuse NJP, accept/refuse summary court-martial, request/waive an administrative discharge board, accept/deny a pre-preferral agreement, etc.). The attorney you see today is not "your lawyer."

ARTICLE 31(b) RIGHTS, SEARCHES, & POLYGRAPHS

- If you are suspected of an offense, you have the absolute right to remain silent and to consult with an attorney. These two rights are different. The Article 31(b) rights advisement does not have to be in writing and you don't have to sign anything to waive them. They can be read to you verbally and you can waive your rights verbally.
- If you desire to exercise your right to remain silent or to consult with an attorney, you must explicitly state your desire to do so. For example, if the DNCO, 1stSgt, or PMO suspect you of misconduct and ask you "What happened here?" It is perfectly okay for you to respond with, "I respectfully wish to remain silent and I would like to see a lawyer." Even after you see an attorney, you still have the right to remain silent and not make a statement. Whether you make a statement is up to you, but you should speak with an attorney to discuss the pros/cons of making a statement before you do so.
- If you choose to make a statement, whether written or oral, it can be used against you. This includes conversations with law enforcement, chain of command, friends, family, Facebook, and email. Any statement you make must be truthful. If any part of it is false, you may be subject to further prosecution for making a false official statement.
- You don't have to consent to searches or seizures of your property. For example, if the DNCO, 1stSgt, or PMO asks you, "Is it okay if we search your room / look at your iPhone/ take your computer/ etc." or "Do you mind giving us a urine sample" it is okay to refuse and to require them to get authorization from your CO (similar to a warrant).
- During an interview, law enforcement officers are permitted to be untruthful with you and to embellish the facts in order to get you to incriminate yourself. This means that they can say your accomplice confessed when he didn't, that they have your DNA when they don't, that they have you on camera when they don't, and many other things.
- Law enforcement officers may offer you an opportunity to take an "exculpatory polygraph" to prove you're telling the truth. The majority of the time, the results indicate deception or are inconclusive; the results rarely indicate truthfulness. Just like remaining silent and refusing consent, you have an absolute right to refuse a polygraph. You should speak to an attorney to discuss the pros/cons of polygraphs before you submit to a polygraph.

NONJUDICIAL PUNISHMENT (NJP)

- You have the following rights:
  a) Right to be present at the NJP proceeding;
  b) Right to remain silent;
  c) Right to a spokesperson. (Will not be a military attorney. May speak for you, but may not question witnesses unless your CO allows it.);
  d) Right to examine all documents or physical evidence being used to prove the allegation(s);
  e) Right to present evidence in DEFENSE (proof you didn't do it), EXTENUATION (circumstances involved), & MITIGATION (why CO should give less punishment);
  f) Right to have witnesses present if they are reasonably available;
  g) Right to have proceedings open to the public; and
  h) Right to refuse NJP up until punishment is imposed (Up until CO says "I impose the following punishment…"). If you refuse NJP, the CO can do the following: 1) no further action; 2) administrative action (page 11, reduced pros/cons, adverse fitrep, processing for administrative separation, etc.); or 3) court-martial.
- Maximum punishment

CO is O-3 and below Maximum Punishment

Restriction:	14 days
EPD:	14 days
Forfeitures:	7 day's pay
Reduction:	1 pay grade (if CO has promotion authority)
CCU:	7 days (Pvt-LCpl)(not currently being used)

CO is O-4 and above Maximum Punishment

Restriction:	60 days (45 if w/ EPD)
EPD:	45 days
Forfeitures:	1/2 of 1 month's pay for 2 months
Reduction:	1 pay grade (if CO has promotion authority)
CCU:	30 days (Pvt-LCpl)(not currently being used)

- While NJP can have a significant impact on your career, it is not a criminal conviction like a special or general court-martial.
- National Crime Information Center (NCIC) reporting requirements: All non-military offenses are likely to be reported to NCIC by law enforcement, regardless of disposition.

SUMMARY COURT-MARTIAL

- A Summary Court-Martial is conducted by a commissioned officer, but not your CO. The officer is supposed to impartially examine the evidence from both sides, to call witnesses for the Government, to help you obtain evidence, to help you in cross-examining the witnesses, and to help you present your defense. The officer also determines if you're guilty and determines your sentence.
- You have the following rights:
  a) Right to accept or refuse Summary Court-Martial;
  b) Right to be present at the proceeding;
  c) Right to remain silent;
  d) Right to confront and cross-examine all witnesses and examine all evidence against you;
  e) Right to plead not guilty, thus requiring the government to prove your guilt beyond a reasonable doubt;
  f) Right to present evidence in your defense, including the right to have the Summary Court-Martial Officer call witnesses to testify in your behalf;
  g) Right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why you committed the offense; and
  h) Right to be represented by a civilian lawyer provided by you at your own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.
- Rules of Evidence (e.g., hearsay, relevance, etc.) apply at Summary Court-Martial
- You are entitled to a copy of the record of trial as soon as it is authenticated.
- You have seven days after the sentence is announced to submit matters for your CO's consideration. These matters may include anything that may reasonably tend to affect his/her decision whether to approve the finding of guilt or to approve the sentence.
- A Summary Court-Martial finding of guilty is not normally considered a "conviction," but is likely to be report to the NCIC and may be considered a qualifying offense and trigger certain collateral consequences, such as sex offender registration.

COURT-MARTIAL MAXIMUM PUNISHMENTS

Punishment Type	Summary Court-Martial	Special Court-Martial***	General Court-Martial***
Confinement	30 days (≤ E-4 only)	12 months (E-9 and below)	Life w/o parole or death
Restriction	60 days (E-9 and below)	60 days	60 days
Forfeitures	2/3 pay for one month	2/3 pay for 12 months	Total forfeitures
Reduction	If ≤ E-4: E-1 / If ≥ E-5: 1 rank	If ≤ E-9: E-1	If ≤ E-9: E-1
Discharge	N/A	Bad Conduct Discharge	Dishonorable Discharge / Dismissal
Civilian Conviction?	Not normally	Yes – usually as a misdemeanor	Yes – usually as a felony

*** The max punishment depends on which Article(s) of the UCMJ you are found guilty of violating.

INVOLUNTARY ADMINISTRATIVE DISCHARGE

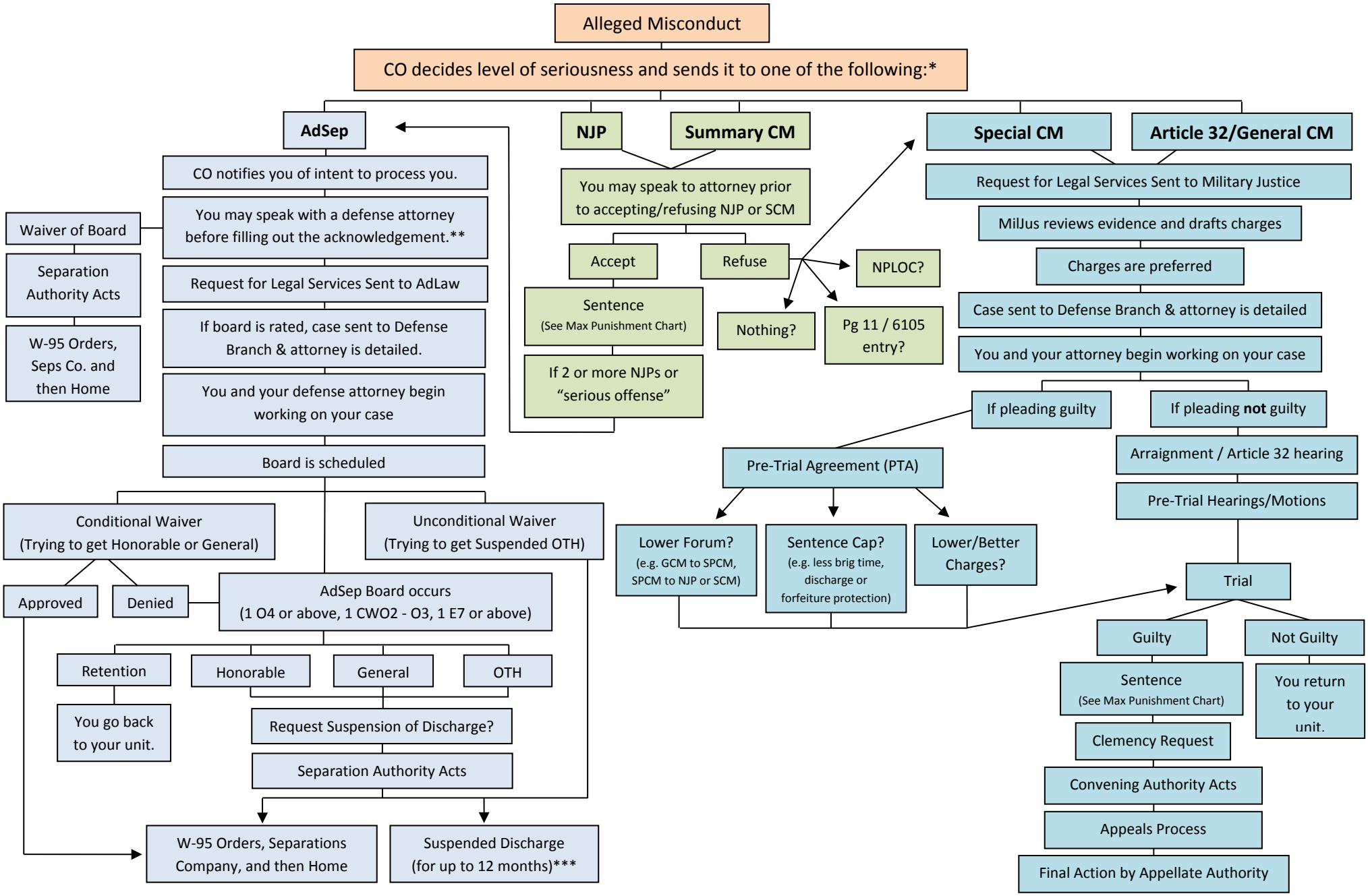
- Your CO can notify you for involuntary administrative separation for many reasons, all of which are contained in Chapter 6 of MCO P1900.16F. The most common reasons for notification include, drug abuse, pattern of misconduct, commission of a serious offense, alcohol rehab failure, and weight control failure.
- You must be provided a written notice and will be provided an acknowledgement of rights form to complete. You have at least two working days to complete and return the acknowledgment. You have a right to consult with an attorney before returning the acknowledgement.
- You are entitled to an administrative discharge board if the least favorable characterization of service possible is Other than Honorable (OTH) or you have more than six years of service. The board consists of at least three members – one member must be at least an O4, one member must be enlisted and at least an E7. If you exercise your right to an administrative discharge board, you will be assigned an attorney to represent you. If you desire to exercise this right, you must select "I do request a hearing before an Administrative Separation Board" on your acknowledgment paperwork.
- You are not entitled to a board if the least favorable characterization of service is General (Under Honorable Conditions) or above, or you have less than six years in service. Even if you are not entitled to a board, you still have the right to submit matters in writing to the Separation Authority (usually your CG). If you desire to exercise this right, you must select "I have included statements in rebuttal to this proposed separation" on your acknowledgment paperwork.

WALK-IN COUNSELING ROSTER

RANK	LAST NAME	FIRST NAME	UNIT	NJP	SEP	31b	APPT	OTHER	ATTORNEY SEEN	STRESS MEMO?	DATE	TIME

Encl (2)

AdSep / NJP / Court-Martial Flowchart For Marine Corps Defense Services



* Each step in the process takes time, which can vary widely in duration. From start to finish, the process takes usually at least 2 months and can take over a year to complete.

** You will <u>not</u> be detailed a defense attorney if you do not rate a board or if you waive it. Only certain bases under the MARCORSEPSMAN/MILPERSMAN rate a board or if you have 6+ years of service. For some bases, the worst possible characterization of service is General Under Honorable Conditions (i.e. BCP failure, convenience of the government, etc).

*** While serving during the period of a suspended discharge, you are not eligible for promotion for the entire duration. Any misconduct during the suspension will almost always result in your discharge.

Encl (3)