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IN REPLY REFER TO
5800
CDC
6 Nov 20

CDC POLICY MEMORANDUM 3.1D

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

Subj: DETAILING AND INDIVIDUAL MILITARY COUNSEL AUTHORITY FOR MARINE
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Ref: (a) JAGINST 5800.7F w/CH2 dtd Aug 2019 (JAGMAN)
(b) NDAA 2020, Pub. L. 116-92
(c) MCO 5800.16, Vol. 3 of 20 Feb 18
(d) JAGINST 5803.1E (Rules of Professional Conduct)
(e) CDC Policy Memo 3.3 (series) (release of counsel without conflict of interest)
(f) CDC Policy Memo 3.4 (series) (release of counsel due to conflict of interest)
(g) MCO 5354.1E
(h) Rule For Courts-Martial 503(c), 505, 506

Encl: (1) Detailing Letter for Limited Scope Representation Template
(2) Limited Scope Representation Agreement Template
(3) Completion and Voluntary Release of Limited Scope Representation Template

1. Purpose. Changes to reference (a), the passing of reference (b), the trial judiciary's changing of judicial circuits, recent court rulings, and the need to clarify delegation of authority necessitate reconsideration of the policies on detailing and Individual Military Counsel (IMC).

2. Discussion. Reference (c) identifies the Chief Defense Counsel of the Marine Corps (CDC) as the Officer-in-Charge of the Defense Services Organization (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. Reference (b) has introduced judicial oversight prior to referral of court-martial charges specifically related to IMC which references (a) and (c) do not contemplate.

3. Policy. Under reference (d), formation of attorney-client relationships (ACR) by defense counsel with clients is permissible only when the attorney is authorized to do so by competent authority. The competent authority in the DSO is the CDC, and that authority is delegated, in limited circumstances herein, to RDCs and SDCs. 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 references (c)-(f). Unless the attorney-client relationship is properly severed, or a defense attorney is otherwise properly relieved, a defense counsel shall continue to represent a client through the completion of applicable post-trial or post-board matters.

a. Detailing Authority. Detailing authority includes the authority to detail defense counsel in the below circumstances as determined necessary:

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(1) Detail counsel to a court-martial case, an administrative separation board, a board of inquiry, or other due process proceeding in which the detailing of counsel is specifically authorized by departmental or service regulations;

(2) Detail counsel for limited scope representation¹ to any pre-referral proceeding under Article 30(a), UCMJ;

(3) Detail counsel for limited scope representation to any servicemember in receipt of an investigative subpoena, including pre-preferral;

(4) Detail counsel to servicemembers pending investigation under Chapter 2 of reference (a) or reference (g), by an Inspector General, or by any law enforcement agency, when the detailing authority reasonably believes that such an investigation may result in court-martial, nonjudicial punishment, or adverse administrative action;

(5) Detail counsel for limited scope representation to any servicemember at post-preferral. In this context, limited scope representation detailing may only be used to surge resources for a short duration to support a specified task. Additionally, it may only be used if the client consents to the limited purpose and acknowledges in writing that the additional counsel will only be detailed for the specified purpose and duration. Thereafter, the client will execute the voluntary release documentation, ending the ACR.

(6) Detail counsel to servicemembers for the limited purpose of representation at an Initial Review Officer (IRO) Hearings conducted pursuant to R.C.M. 305, unless the servicemember has previously been detailed a defense counsel;

(7) Detailing upon request of the Navy Judge Advocate General for limited scope representation under the Military Extraterritorial Jurisdiction Act (MEJA).

(8) Detail counsel to servicemembers in any other situation which, in the judgement of the CDC, meets the spirit and intent of reference (c), meets other applicable laws and regulations, and best serves the interests of justice; and

(9) Remove counsel under the provisions of R.C.M. 505 and Rule 1.16 of reference (d).

b. Detailing Authority Within the DSO.² Detailing authorities may detail defense counsel from the DSO to cases in accordance with paragraph a above; using the procedures set forth in reference (c); and consistent with the limits hereafter and the considerations specified in paragraph c below. The following billet-specific delegations pertain:

(1) CDC. The CDC has complete detailing authority and may detail any defense counsel(s) assigned to the DSO to any case authorized by reference (c) and any non-DSO auxiliary defense counsel made available for a particular case.

(a) The CDC may self-detail with the consent of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC).

¹ Limited scope representations (LSR) are discussed at enclosure (1) including standardized LSR detailing letters for various purposes; documents for review and execution by the client; and ACR severance letter.

² For ease of reference, all detailing is referenced as detailing to a case, as opposed to case, board, proceeding, servicemember, etc.

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(b) The CDC is the sole detailing authority for RDCs and members of the Defense Counsel Assistance Program (DCAP).

(c) The CDC is the detailing authority for all reserve members of the DSO including all reservists assigned in direct support to regional DSO branches.

(d) The CDC is the sole detailing authority for any client, including reserve clients, in the officer grade of O-6 and above; the warrant officer grade of CWO4 and above; and the enlisted grade of E-8 and above.

(e) The CDC is the sole detailing authority for all courts-martial alleging violations of Article 118(1) or (4).³

(g) The CDC may remove counsel under the provisions of R.C.M. 505 and Rule 1.16 of reference (b).

(h) The CDC will appoint a substitute CDC for detailing purposes when the CDC is on leave or otherwise unavailable to execute detailing responsibilities for three or more business days.

(2) RDCs. Except as set forth below, RDCs are delegated complete detailing authority for active duty defense counsel assigned to their LSSS and subordinate LSSTs, as well as auxiliary defense counsel made available by competent authority for a specified case, to cases in their LSSA.

(a) RDCs may not detail any case listed in paragraph b.(1)(a)-(f) of this Memorandum.

(b) RDCs may detail any of his/her counsel to any case a subordinate SDC has the authority to detail.

(c) RDCs may remove counsel under the provisions of R.C.M. 505 and Rule 1.16 of reference (b).

(d) RDCs will appoint a substitute RDC for detailing purposes when the RDC is on leave or otherwise unavailable to execute detailing responsibilities for three or more business days.

(3) SDCs. Except as set forth below, SDCs are delegated the same detailing authority delegated to RDCs appropriately limited to defense counsel within their LSST(s) and cases supported by their LSST(s) (or element thereof). The RDC-West and RDC-Pacific may delegate their authority to detail their respective defense counsel located at Marine Corps Air Stations Yuma and Iwakuni to the SDC Miramar and SDC Okinawa, respectively.

(a) SDCs may not self-detail without RDC approval.

(b) SDCs may not detail counsel under the following circumstances:

1. Any case listed in paragraph b.(1)(a)-(f) of this Memorandum.

2. Cases involving an officer above the grade of O-3, a Chief Warrant Officer above the grade of CWO-2, or an enlisted above the grade of E-7.

³ In the case of administrative boards involving an offense of Article 118 (1) or (4), the CDC does not reserve detailing authority.

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3. Courts-martial alleging violations of Article 118 (including attempts).

4. National security cases as defined by section 0126 of reference (c).

(c) SDCs may not remove counsel under the provisions of R.C.M. 505 and Rule 1.16 of reference (b).

(d) Prior to detailing counsel to complex cases, the SDC will consult with the RDC to ensure the right counsel is detailed to the right case. While the term “complex case” is a term of art, the following non-exclusive list of factors shall be considered when deciding what is and what is not a complex case: the number and severity of charges, the maximum possible sentence, the number of potential witnesses, the need for expert assistance or testimony, the technological, medical, and forensic aspects of the allegations and evidence, whether the case involves a child, anticipated media attention, and the relative training and experience of counsel assigned to that SDC.

(e) In cases where the number of co-accused exceeds the capacity of the SDC’s branch office(s) and/or where there are conflicts which interfere with the ability to detail, the SDC shall forward the additional case files to the RDC for detailing.

(f) When an SDC is on leave or otherwise unavailable to execute detailing responsibilities for three or more business days, RDCs will appoint an Acting SDC for detailing purposes.

(4) SDC for Reserve Matters. SDC for Reserve Matters (SDC-RM) is the detailing authority within the LSSS-NCR for cases brought by Marine Corps Forces Reserve (MarForRes) and their subordinate units. SDC-RM works with the RDC-NCR and the SDC LSST-NCR in coordinating the detailing of the reserve cases to DSO counsel within the LSSS-NCR. As a result of this overlapping detailing authority, the RDC LSSS-NCR may, at his discretion, restrict detailing by SDC-RM. Otherwise, SDC-RM has the same authority as other SDCs.

(a) In addition, SDC-RM may be delegated additional detailing authority for enlisted administrative boards in writing by the CDC as set forth herein.

(i) If the SDC-RM believes that detailing a counsel in another RDC’s LSSA is warranted, the SDC for Reserve Matters may seek concurrence from the cognizant RDC and then approval from the convening authority’s SJA (or delegate) in accordance with reference (c). Upon receipt of both, the SDC-RM may detail counsel identified and made available by the cognizant RDC.

(ii) The SDC-RM may detail reserve members of the DSO when the following conditions are met:

1. The reserve member being detailed agrees to make him/herself available.

2. The reserve member’s Reporting Senior agrees to make the reservist available.

3. The CDC-Reserve concurs that the detailing is in the best interest of the DSO and the reservist after consideration of all drilling, training, and other requirements.

4. The cost to the convening authority in detailing the case to the reservist does not exceed the cost of detailing an active duty defense counsel from LSSS-NCR, or, if it does, the convening authority’s SJA concurs in the detailing.

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c. Detailing Considerations

(1) Detailing authorities shall take the following into consideration when detailing a defense counsel to a particular case:

(a) Standard detailing criteria, including those specifically listed in reference (c).

(b) The rights of the accused, including the right to zealous, effective representation by a fully qualified counsel.

(c) The complexity of the case in light of the experience level and case load of the available counsel, work load, military duties and responsibilities, and any other factors which may impact counsel's ethical obligations to represent each individual accused zealously and effectively. Per reference (c), detailing authorities will only assign a counsel to a case when that counsel is properly qualified to handle that particular case.

(d) Any potential conflicts, actual or apparent.

(e) Timeliness.

(f) The location of the accused in relation to the location of counsel.

(g) End of service and/or rotation dates of counsel.

(h) The needs of the local commands.

(i) For reserve enlisted administrative board clients, and consistent with paragraph 3.b.(4) above, the location of the client, the location of the counsel, the expected location of the proceeding, and the location of other LSSSs or LSSTs.

(2) Our policy is to always have Marines defending Marines; detailing authorities may request that defense counsel be detailed by a local Navy Defense Service Office in exceptional circumstances, and after notification to the CDC.

(3) Detailing authorities may detail Marine counsel to non-Marine cases supported by their LSSS but should first notify the relevant sister service.⁴

(4) Supervisory defense counsel will not be detailed to represent a client when there is a conflict of interest with a client of a subordinate defense counsel regardless of whether the supervisory counsel is a reporting senior or reviewing officer for fitness reporting purposes. Only the CDC may grant an exception to this general rule.

(5) An accused in a non-capital case is not entitled to be represented by more than one military counsel. Two counsel detailed to all contested courts-martial is a longstanding best practice. As explained in reference (c), the detailing of a second defense counsel to contested and complex cases is encouraged. Detailing authorities may, at their discretion, detail a second counsel to any case, as long as such detailing is within the scope of that detailing authority's authority.

⁴ For example, chaplains and corpsmen assigned to Marine units are entitled to Marine DSO services. The local Navy DSO should be notified so that they may consider detailing in support of the Sailor.

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(6) In exceptional cases, it may be appropriate to assign three or more counsel to a case. The following will be carefully considered prior to detailing three or more counsel to a case:

- (a) Complexity of the case;
- (b) Experience of currently detailed counsel;
- (c) Case load and other responsibilities of currently detailed counsel;
- (d) Availability of intended additional counsel;
- (e) Case load and other responsibilities of intended additional counsel;
- (f) Anticipated end of DSO tour for intended additional counsel;
- (g) Whether limited scope representation of additional counsel would be more appropriate;
- (h) Whether the accused desires to execute his right to an IMC; and
- (i) The SJA or convening authority's concurrence if funding out of area travel will be necessary for the counsel to attend court sessions and meet with the client.

(7) Detailing authorities shall give preference to detailing local counsel to local cases. Defense counsel are normally detailed to represent personnel assigned to an organization that is supported by that defense counsel's LSST. Under certain circumstances, such as when an organization has no local defense counsel, in conflict cases, or when unique requirements of a case arise, defense counsel may be detailed by the responsible RDC or by the CDC to represent an accused assigned to an organization that is not normally supported by that defense counsel's branch office but within the RDC or CDC's AOR.

(8) Each defense counsel has an established rotation date. Detailing authorities shall take this established rotation date into consideration and *shall not* detail a defense counsel to a case which they reasonably anticipate will extend beyond this established rotation date without the consent of the LSSS or LSST OIC.⁵ If the RDC and the LSSS or LSST OIC cannot agree on such a detailing decision, the matter will be forwarded to the CDC for resolution. If the CDC cannot resolve the issue, the CDC will forward it to the SJA to CMC for final adjudication.

(9) Reassignment of defense counsel poses unique challenges due to counsel's ethical obligations to each individual client that remain regardless of the counsel's future assignment. Paragraph 010802 of reference (c) accounts for this by prohibiting a defense counsel, without consent and approval, to serve concurrently, including during periods of transition, as trial counsel, victims' legal counsel, special assistant United States attorney, deputy SJA or SJA to a convening authority of any case in which the counsel is still performing defense counsel duties, or LSST OIC where the counsel is assigned, or to any other billet that carries the mantle of command presence. To allow for the scheduled reassignment of counsel, detailing authorities will not detail counsel to a case that will create a conflict between a client and the defense counsel's new billet that would last through rotation.

⁵ This prohibition does not apply to limited scope representation detailing for matters that may be reasonably resolved prior to an established rotation date.

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(10) Reservists assigned to the DSO generally occupy non-litigation billets. To the extent provided for *supra*, reservists may be detailed to cases, particularly to enlisted administrative boards. In all detailing of reservists, the detailing authority and the counsel must be mindful of potential actual or apparent conflicts between civilian employment and the representation of a DSO client. The detailing authority must consider this potential for conflict and, when necessary, document conflict-free counseling of the client.

d. Detailing Procedures

(1) Detailing shall occur as soon as practicable. Without written permission from the CDC, in no case shall detailing occur later than:

(a) Personnel in Confinement. The earlier of five days after being served notice of preferred charges or ten days after being notified in writing by corrections personnel, command representatives, LSSS or LSST personnel, or any other official representative of the United States, that an accused has been placed in pretrial confinement or arrest under R.C.M. 305. Written notification for purposes of this policy memorandum includes electronic mail, facsimile, or any other electronic means of distribution. SDCs shall ensure their branch office regularly receives brig and confinement reports and shall review them regularly to identify newly-confined personnel.

(b) Personnel Not in Confinement. Five days after being served notice of preferred charges or the appointment of an Article 32, UCMJ, preliminary hearing officer.

(c) Personnel Being Processed for Separation. Five days after being served an administrative separation or board of inquiry package.

(d) Other. As otherwise required by law or regulation.

(2) The detailing authority shall memorialize detailing in writing using the approved detailing letter in the Forms section on the DSO SharePoint as soon as practicable.

(a) Counsel will maintain the detailing letter in their case file subject to inspection.

(b) Detailing authorities will maintain the detailing letter in the branch office, subject to inspection.

(c) Per CDC Policy Memo 4.2 (series), defense attorney advisors provide case-specific consultation services and advice to members of the DSO litigating or preparing to litigate sexual assault and similarly complex and victim-based cases. To encourage and facilitate the early involvement of the attorney advisor in these complex cases, detailing authorities shall include a requirement that the detailed defense counsel consult with an attorney advisor within ten days of receipt of discovery for any court-martial case that alleges a child victim, an adult victim of domestic abuse or sexual assault, or a deceased victim or charges with attempts of the same.

(3) Detailed counsel, , shall cause to be provided to the relevant prosecution or administrative law section or SJA a Notice of Representation from the Forms section on the DSO SharePoint within five days of being detailed. If an ACR cannot be formed within the required five days, detailed counsel will notify in writing the relevant government counsel of the detailing in lieu of a Notice of Representation.

(4) Detailed counsel shall cause to the case to be input into the Case Information System (CIS) on the DSO's SharePoint, appropriately identifying the detailed counsel.

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e. Inability to Form an Attorney-Client Relationship. Occasionally, despite good faith efforts, counsel is unable to locate their client and form an attorney-client relationship. This most commonly occurs: (1) when counsel is detailed as substitute counsel for post-trial matters; (2) when the accused has been discharged; or (3) in reserve administrative separation boards

(1) If unable to locate the client, detailed counsel shall notify the detailing authority not later than 30 days from detailing of the inability to form an attorney-client relationship with the client and articulate the steps taken to locate the client.

(2) If the detailing authority is satisfied that all reasonable efforts have been exhausted to locate the client, the detailing authority shall notify all relevant personnel including civilian defense counsel, appellate defense counsel, trial counsel, recorder, SJA, and/or other appropriate and official agent/s of the United States, in writing, using the approved Notice of Inability to Form an Attorney-Client Relationship form that the detailed counsel has been unable to form an attorney-client relationship and that the detailed counsel will not make any personal or written appearance on behalf of the servicemember.

f. Individual Military Counsel (IMC) Requests for Marines Assigned to the DSO

(1) Article 38, UCMJ, provides an accused the right to be represented by military counsel of his or her own selection, provided the counsel requested is reasonably available.

(2) Section 0131 of reference (a) provides the procedural process for requesting an IMC and provides a list of counsel not reasonably available for IMC purposes. Reference (a) otherwise defers to reference (c) for approval of requests for Marine Corps defense counsel as IMC. Neither geography nor judicial circuits limits the authority of an IMC authority to determine whether a counsel is reasonably available except as withheld below.⁶

(3) In accordance with reference (c), the CDC is the determination authority for all IMC requests for defense counsel assigned to the DSO. Specific IMC approval authority is as follows:

(a) The SJA to CMC retains IMC approval authority on requests for the CDC. For IMC availability determination purposes, the CDC's organization is the DSO, not the battalion or organization to which the CDC is administratively attached.

(b) The CDC retains IMC approval authority on IMC requests (1) for RDCs, members of DCAP, reservists assigned to the DSO, and DSO counsel outside of the region assigned to support the convening authority; (2) from officers of the grade O-6 and above, warrant officers of the grade CWO-4 and above, and enlisted of the grade E-8 and above; and (3) from servicemembers charged under Article 118 (1) and (4) (including attempts).⁷

(c) Per section 0112 of reference (c), the CDC is authorized to delegate this authority to RDCs. Except as limited in paragraphs b.(2) and f.(3) *infra*, RDCs are delegated determination authority on IMC

⁶ Criteria such as 500 miles and judicial circuits have been removed from reference (a) for the IMC consideration of Marine Corps counsel.

⁷ For IMC availability purposes, a counsel's organization is the LSSS or LSST to which assigned, not the battalion or military organization to which the counsel is administratively assigned. The RDCs' organizations are all the LSSSs and LSSTs of the relevant LSSAs not the battalions or military organizations to which they are administratively attached. DCAP members' organization is the DSO, not the battalion or military organization to which the OIC DCAP is administratively attached.

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requests for defense counsel and SDCs within their region for cases that are assigned to their LSSS. All other requests should be endorsed and forwarded to the CDC for action.

(4) Considerations for Reasonable Availability Determinations.

(a) The IMC approval authority shall consider the detailing considerations in paragraph c. *infra* when determining the reasonable availability of the requested counsel.

(b) Per section 0131 of reference (c), the IMC approval authority will assess the effect on the counsel's unit should the counsel be made available.

(c) Per section 0131 of reference (c), the IMC approval authority may also consider factors including, but not limited to: (1) the anticipated duties and workload of the requested counsel, including authorized leave; (2) the estimated duration of the requested counsel's absence from the command, including time for travel, preparation, and participation in the proceeding; (3) any unique or special qualifications relevant to the proceeding possessed by the requested counsel; (4) the ability of other counsel to assume the duties of the requested counsel; (5) the nature and complexity of the charges or the legal issues involved in the proceeding; (6) the experience level and any special or unique qualifications of the detailed defense counsel; and (7) the information or comments of the accused and the convening authority.

(5) 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 a detailing authority who had the authority to detail the counsel approves a request from the accused that the detailed defense counsel remain assigned as associate counsel. This could be the RDC or the CDC even if they did not detailA the counsel as long as it would have been within their authority to do so. In considering whether to approve such a request, the determining authority shall consider the detailing considerations in paragraph c. *infra*. Per section 0131 of reference (c), the determining authority may also consider factors including, but not limited to: (1) the seriousness of the charges, (2) the retention of civilian defense counsel, (3) the complexity of the legal and factual issues, (4) the detailing of additional trial counsel, (5) defense counsel training, and (6) the stage of the proceedings.

(6) Routing. IMC requests are routed in accordance with section 0131 of reference (c).

4. Conclusion. CDC Policy Memo 3.1C is hereby cancelled. This CDC Policy Memorandum is effective immediately.



V. C. DANYLUK

Distribution List:

SJA to CMC

Legal Chief of the Marine Corps

All Marine Corps SJAs

LSSS and LSST OICs

All Members of the DSO

NMCTJ Code 52, OJAG