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IN REPLY REFER TO
5817
CDC
14 Mar 13

CDC Policy Memo 2-13

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

Subj: WALK-IN DEFENSE COUNSELING AND REPRESENTATION AT INITIAL REVIEW OFFICER HEARINGS

Ref: (a) MCBul 5400 of 31 Aug 12
(b) MCBul 5800 of 11 Mar 13
(c) MCO P5800.16F (LEGADMINMAN)
(d) CDC Policy Memo 1-13 (Detailing and IMC Rules for the DSO)
(e) Article 31, UCMJ
(f) JAGINST 5803.1D (Rules of Professional Conduct)
(g) CDC Policy Memo 5-12 (Identifying and Responding to At-Risk Clients)
(h) R.C.M. 305
(i) CDC Policy Memo 2-12 (Advising Clients of Conflicts of Interest)
(j) CDC Policy Memo 3-13 (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 “walk-in” defense counseling to Marines and Sailors and representation at initial review officer (IRO) hearings by defense counsel assigned to the Marine Corps Defense Services Organization (DSO) in light of the Commandant-directed legal reorganization approved in reference (a) and implemented by reference (b). Further, this policy memo reinforces previous guidance that defense counsel within the DSO will not establish an attorney-client relationship unless authorized to do so by an appropriate authority.

2. Discussion.

a. Reference (c) tasks the Chief Defense Counsel of the Marine Corps (CDC) with establishing standard operating procedures for the delivery of defense counsel services throughout the Marine Corps. The policies below, which establish standard operating procedures for the delivery of walk-in defense counseling and representation at initial review officer hearings, apply only to services provided by the DSO and supersede the guidance provided by CDC Policy Memo 7-11, cancelled by reference (d).

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b. The DSO's walk-in defense counseling plays a critical role in the preservation of good order and discipline within the Marine Corps. Walk-in defense counseling includes providing 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, notifications of initiation of administrative separation processing, or other similar administrative procedures. Walk-in defense counseling also includes providing privileged and confidential legal advice to Marines and Sailors who have been advised of their Article 31(b) rights under reference (e) and have elected to exercise their right to consult with counsel.

3. Policy.

a. General Rules. Defense counsel will not form an attorney-client relationship, as established by Rule 1.2 of reference (f), with any individual unless detailed, assigned, or otherwise authorized to do so by their detailing or IMC determination authority. While the communications between defense counsel and the individual receiving the walk-in counseling may be privileged and confidential, providing walk-in counseling does not, in and of itself, establish an attorney-client relationship under Rule 1.2 of reference (f) or constitute an assignment or detailing of that defense counsel as that individual's defense counsel or personal representative for the purposes of the applicable administrative procedure. A defense counsel may discuss the factual background surrounding the issue; review related paperwork; contact the command to seek clarification about the administrative procedure; discuss the costs and benefits of accepting or refusing nonjudicial punishment or summary court-martial, agreeing to a "fast track" disposition, waiving an administrative separation board, or making a statement; provide technical explanations regarding basic principles of military law; and discuss courses of action related to the exercise of a due process or regulatory right without forming an attorney-client relationship. Defense counsel shall ensure the individual receiving the legal advice understands that these privileged communications and authorized actions do not establish an attorney-client relationship, unless the defense counsel has been detailed by proper authority to serve as defense counsel or personal representative for the accused.

b. Walk-in Rules.

(1) Only defense counsel may provide walk-in counseling; student judge advocates and legal services specialists may not provide legal advice.

(2) Senior Defense Counsel (SDC) will establish and publish regular walk-in defense counseling hours that provide opportunities to receive counseling at least two days per week. These walk-in counseling hours are normally reserved for Marines and Sailors in pay grades E-5 and below. Staff Noncommissioned Officers (SNCOs) and Officers should be seen by appointment, normally arranged with the SDC.

(3) 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 affected by the legal reorganization.

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(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 support plan for the provision of walk-in counseling to Marines and Sailors assigned to the deployed command that is responsive to the needs of the deployed commander.

(5) The charge sheet, administrative separation notification or similar documents; pages 11 and 12 of the Service Record Book; and a summary of the evidence that will be used at the hearing, if applicable, must be provided before a defense counsel will be made available to provide walk-in counseling – whether done in-person or remotely. 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 to resolve this issue. Without adequate resolution, the SDC may refuse to provide the requested counseling.

(6) Prior to conducting walk-in counseling, a conflict of interest check will be conducted and the defense chief will normally show the CDC-approved video which is designed to answer many routine procedural questions regarding nonjudicial punishment, summary courts-martial, and administrative separation boards.

(7) While in-person counseling is preferred, it is not always possible because of the location of the Marine or Sailor needing counseling or due to certain operational requirements. In such situations, the SDC may authorize that the counseling be conducted remotely over the telephone or via Defense Connect Online. The command is still required to provide the defense branch office with copies of the charge sheet, administrative separation notification, or similar documentation regarding the allegations; pages 11 and 12 of the Service Record Book; and a summary of the evidence that will be used at the hearing.

(8) During the counseling session, defense counsel will use enclosure (1) to guide the discussion concerning the legal issues and, as mandated by reference (h), will provide each Marine or Sailor counseled the Tools for Coping with Stress Memorandum.

(9) DSO members will not sign forms or otherwise act as a witness attesting that the Marine or Sailor needing counseling has sought legal advice.

(10) At times, it may be necessary to provide walk-in counseling to Marines or Sailors with adverse interests, e.g. large drug or hazing rings being resolved at NJP. In such situations, which must be approved by the SDC, the defense counsel providing the counseling will not have privileged or confidential communications with the Marines or Sailors seeking the counseling. That defense counsel may not later be detailed to represent any of the Marines or Sailors being counseled at any hearing 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.

(11) 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

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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.

(12) Defense offices will keep a record of all Marines and Sailors who are provided walk-in counseling in a format such as enclosure (2) that allows for entry into the DSO's Case Information System and provides a record of compliance with reference (g) by the individual attorney.

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 at initial review officer (IRO) hearings conducted under reference (h). The defense counsel need not be assigned to the LSST that normally supports the command the accused is assigned and may instead come the LSST closest to the confinement facility. A defense counsel's representation at an IRO hearing is a limited attorney-client relationship related solely to that IRO hearing. 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 does form 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. Unless the defense counsel has been detailed to represent the accused beyond the IRO hearing, the defense counsel shall ensure the accused understands that scope of their limited attorney-client relationship. Absent a knowing waiver obtained utilizing the procedures established in reference (i), defense counsel shall not represent Marines or Sailors at IRO hearings with adverse interests, e.g., co-accused, or witness or victim involved in one of that defense counsel's detailed cases. To allow for a timely resolution of issues related to conflicts, commands are strongly encouraged to notify the SDC of known conflicts prior to the scheduling IRO hearing. When Marines or Sailors with adverse interests require defense counsel representation at IRO hearings, the responsible SDC will coordinate locating independent defense counsel for each accused. Although in-person representation is preferred, the SDC may authorize defense counsel representation at an IRO hearing be done by telephone or through Defense Connect Online in exceptional circumstances. See subparagraph (f) of reference (i) and its analysis for additional guidance.

4. Education. Enclosure (3) is provided to assist counsel in explaining the different processes that result from an allegation of misconduct and may be helpful in certain circumstances. Use of enclosure (3) is not mandatory during walk-in counseling; however, all newly-assigned members of the DSO are required to review this flowchart with their Senior Defense Counsel within the timeframes set forth in reference (j).

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



J. G. BAKER

Distribution List:

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Joint Defenders Committee

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-preferred 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.
- 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.

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 report the incident to NCIC, 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

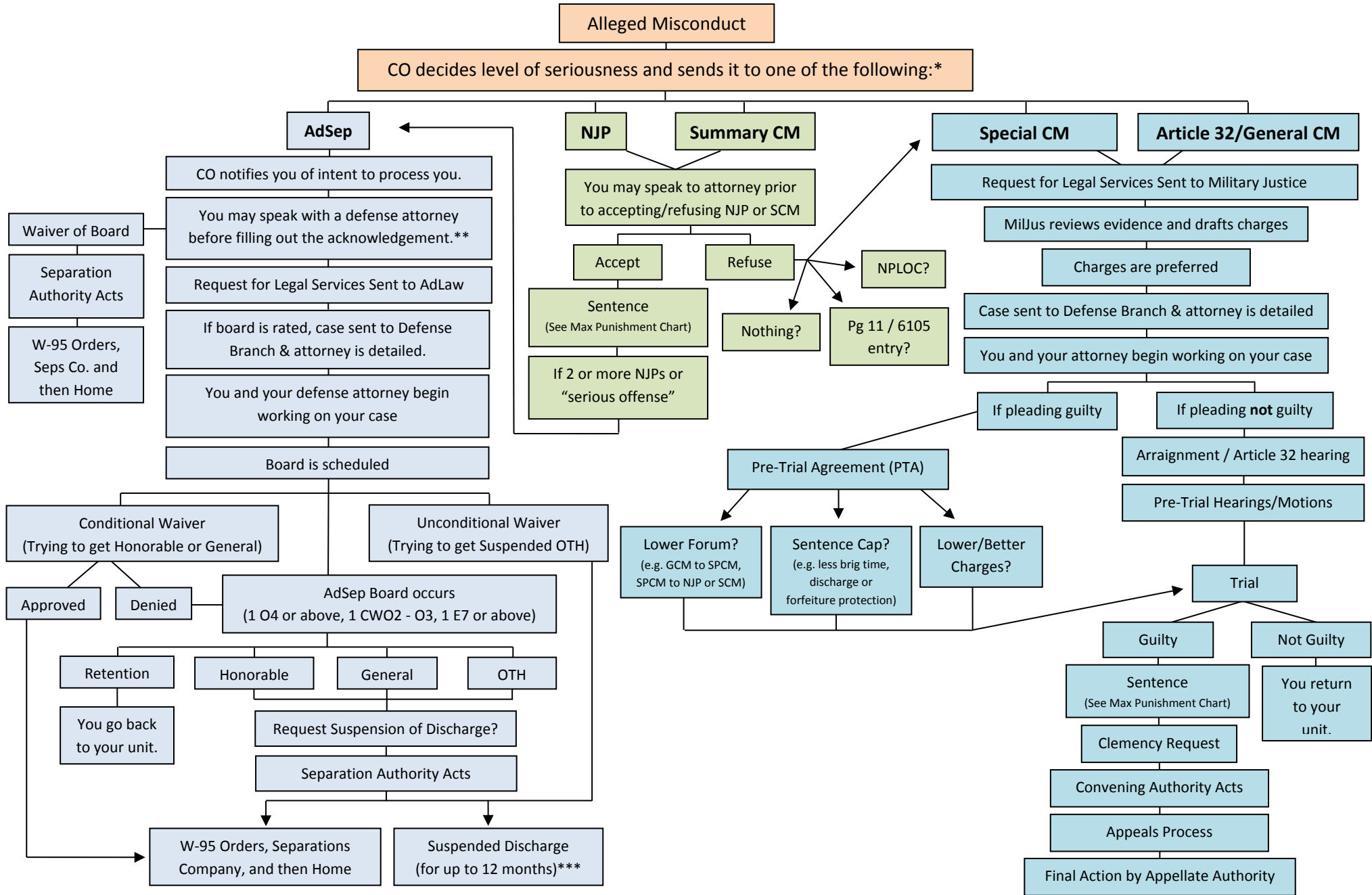
Punishment Type	Summary Court-Martial	Special Court-Martial***	General Court-Martial***
Confinement	30 days (≤ E-4 only)	12 months (E-9 and below)	Life w/o parole or death
Restriction	60 days (E-9 and below)	60 days	60 days
Forfeitures	2/3 pay for one month	2/3 pay for 12 months	Total forfeitures
Reduction	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 acknowledgment.
- 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.

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 not 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.