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In Reply Refer To:
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CDC
4 Aug 15

CDC POLICY MEMO 2.5

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

Subj: MARINE CORPS DEFENSE SERVICES ORGANIZATION POLICY ON THE HANDLING OF REAL EVIDENCE

Ref: (a) JAGINST 5803.1D of 01 May 2012 (Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General)
(b) American Bar Association Standards for Criminal Justice: Defense Function §4-4.6 at 190 (3d Ed. 1993)
(c) CDC Policy Memo 2.3 (series) (Guidance on Walk-Ins and IRO Hearings)

1. Purpose. To establish a uniform practice for all DSO attorneys concerning the acceptance, possession, and inspection of real evidence, including knowledge concerning its location.

2. Discussion.

a. No DSO attorney should ever be forced to half-step in the zealous defense of a Marine or Sailor out of fear of a hostile response by the very same persons who arrest, interrogate, investigate and seek to convict our clients. Yet experience dictates that the zealous defense of servicemembers sometimes leads to contact with real evidence—and the chilling effect concomitant to the range of possible Governmental responses thereto is all too real.

b. If we are doing our jobs right, contact with real evidence is virtually inevitable. Courts have essentially said as much, pointing out that client confidentiality may not allow a defense attorney the luxury of *avoiding* contact with real evidence:

[T]he legal responsibility imposed upon lawyers who learn of the existence of tangible evidence of a completed crime in the course of an attorney-client

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relationship is complex and far from settled. Moreover, a lawyer can be faced with a host of conflicting important obligations to balance, including the duty to preserve client confidences, investigate the case, and maintain an allegiance to the system of justice as an officer of the court.

Wemark v. State, 602 N.W.2d 810, 816 (Iowa 1999).

c. A sound attorney-client relationship is based on trust. Its absence makes defending our clients nearly impossible, particularly in view of the increasing complexity of criminal representation. Drawing further from the lessons in Wemark, this is particularly true for three principle reasons:

(1) First, the law is so complex and so pervasive in today's society that a Marine needs the assistance of an attorney to resolve legal disputes with the Government.

(2) Second, in order to effectively do their job, lawyers need full knowledge of all of the facts and evidence in their client's case. Frequently the best source of that information is the client.

(3) Third, our clients will likely be reluctant to reveal all of the facts to their attorney without some assurance that, once disclosed, the attorney will not reveal those confidences.

d. For these reasons confidentiality is the basis of the trust we seek from our clients. Furthermore, confidentiality is invoked through any communicative act between the attorney and his or her client. Except under very limited circumstances, an attorney may not disclose confidential information.

e. When a client notifies his or her attorney of the existence of real evidence, or where a client attempts to provide or deliver that evidence to an attorney (personally or through a third party) it will generally be accompanied by some form of confidential communication. In fact, the mere act attempting to deliver a piece of real evidence may, in and of itself, be a communicative act.

f. So while the item itself may need to be disclosed, the confidentiality of the communicative act accompanying the evidence may prevent counsel from revealing the contents of the

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communication, including the source of their knowledge of the location or possession of the item.

g. At the same time, our rules of practice generally prohibit interfering with access to evidence by all parties. Certainly our Code so requires. See ART. 46, UCMJ, 10 U.S.C. §846. An attorney may not suppress, obstruct, alter, conceal or destroy relevant items of real evidence which the law otherwise requires be produced, nor may an attorney counsel another to do so. Neither can an attorney conceal or fail to disclose information and/or evidence in his or her possession which the law requires he or she reveal.¹ In either case the attorney may jeopardize his or her license with an attendant allegation of obstruction of justice. Furthermore, our practice generally recognizes the military community's legitimate interest in safety, national security, and preventing the knowing destruction of evidence of a crime, even when it is in a Defense Counsel's possession. This remains true even though the interests of the client rarely align with those of the military community at large.

h. The DSO will carefully balance these competing interests. First, we will remain true to our creed, and keep foremost in our minds our duty to our clients—a duty which, on very rare occasions, may require that we accept, possess, inspect or even possibly forensically test real evidence. Not only might there be circumstances where a DSO attorney is unable to avoid contact with such evidence, but there may also be the unusual circumstance where he or she is ethically bound to accept it in zealous defense of his or her client. But second, these duties must be performed in the context of a system based on confrontation—which states that defense counsel may not suppress, obstruct, alter, hinder or conceal evidence in counsel's possession from the prosecution, and which recognizes the military community's legitimate interest in safety, national security, and preventing the knowing destruction of evidence of a crime.

i. For purposes of this Policy Memo real evidence is defined as being some item which has a role in the prosecution or defense of a preferred charge under the Uniform Code of Military Justice. It is original evidence brought before a tribunal, hearing, court or panel, or which either party seeks to produce before a tribunal, hearing, court or panel, addressed

¹ The difficulty lies in determining when the law requires disclosure. If any question with regard to disclosure/nondisclosure of evidence exists, immediately seeking the advice of your supervisory attorney is required.

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directly to the senses of the tribunal, hearing, court or panel, and not requiring the testimony of witnesses other than as may be required to lay a foundation for its admission. It is not a demonstrative aide. See, e.g., Smith v. Ohio Oil Co., 134 N.E.2d 526, 530 (Ill. 1956). This definition is intended, for example, to include both the knife used in a homicide and the wound caused by the knife. It is specifically intended to be read broadly to include any original documentary, physical, or electronic evidence either party seeks to produce concerning a preferred offense charged under the Uniform Code of Military Justice. As such it includes not only the knife and the knife wound, but would also include a cell phone and the text messages on that cell phone.

j. In this regard real evidence may be viewed in two contexts, that which is exculpatory, genuinely enhancing the client's defense, and that which is incriminating or inculpatory. As it may be difficult initially to distinguish between these two types of evidence, and as evidence originally thought to be entirely innocuous may become incriminating as the scope of the investigation widens, consultation with your supervisory attorney, and familiarity with both reference (a) and the rules promulgated by your State licensing agency are critical. In all cases counsel will thoroughly document the case file.

3. Policy.

a. *Acceptance of Evidence Generally Discouraged.* It is rarely necessary to accept real evidence from a client. No physical item should be accepted without a conscientious consideration of its necessity to provide an effective and zealous defense in the absence of some other means to preserve it. By definition, obviously inculpatory items should not be accepted. But before accepting any evidence from anyone, a DSO attorney should first ask: "Is this evidence so necessary to my defense and so clearly exculpatory that I would be comfortable asking CID or NCIS to come to my office to take possession of the item?" If the answer to this question is not "yes" then counsel should probably refrain from accepting the item.

b. Acceptance of stolen property or contraband will require the defense attorney turn the item(s) over to the United States. See 1(4) (a) below.

c. While there is no mandatory disclosure rule in the DSO, neither is there any requirement that you as defense counsel

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accept possession of any physical item from your client or from any third parties.

(1) In all cases where a DSO attorney comes in contact with real evidence he or she shall immediately seek advice from his or her supervisory attorney before taking any action.

(2) A DSO attorney shall not under any circumstances personally destroy or alter evidence.

(3) A DSO attorney shall not under any circumstances advise any party to destroy or alter any piece of evidence.

d. *Knowledge of Evidence Generally Privileged.* There is no mandatory disclosure rule in the DSO. If you learn of evidence but do not accept it into your possession, this information is privileged with three narrow exceptions:

(1) First, where disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

(2) Second, where disclosure is necessary to prevent the client from committing a criminal act that a DSO attorney reasonably believes is likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(3) Third, where disclosure is required pursuant to law or court order.²

² See Navy Rules of Professional Conduct, Rule 3.4 (a) (1). But note the prohibition is to "unlawfully obstruct access to evidence" of potential evidentiary value. Counsel is ethically bound not to conceal or knowingly fail to disclose evidence which he is *required by law* to reveal. Model Rules of Prof'l Conduct R. 3.3(a)(2), 3.4(a). In *United States v. Rhea*, 29 M.J. 991 (A.F.C.M.R. 1990) a case of first impression in the military, the court addressed the ethics of accepting real evidence from a client which is subsequently sought by the government. During a pretrial investigation, accused's counsel became concerned that an annotated calendar in their possession belonging to the alleged victim contained evidence of defendant's crime. The annotated calendar in the possession of the defense was specifically sought in a search authorization of the accused's quarters but had been given to the counsel by their client. On the advice of their respective state bars, the counsel requested an ex parte hearing before the trial judge, who ordered the material be turned over to the government. The evidentiary nature of the calendar only became apparent after the Art 32 hearing and the Government search authorization was granted.

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e. *Return to Original Source.* Attorneys of the DSO are cautioned and encouraged to decline acceptance of incriminating evidence and return it to its original source. This does not interfere with an attorney's obligation to inspect an item for potentially exculpatory evidence. If a DSO attorney has taken temporary possession of an item as described in paragraph 2(j) above, that attorney is cautioned and encouraged not to retain possession of any incriminating evidence, but should instead return it promptly to its original source as soon as possible.

(1) Where a DSO attorney unavoidably receives or takes possession of inculpatory and/or incriminating evidence, he or she is under no obligation to automatically deliver that evidence to those prosecuting his or her client.

(2) Where possible such evidence may instead be returned to its original source. Reference (b) pertains. Where the original source is a third party (e.g. the client's spouse or significant other) clearly explain that:

(a) You are not that third party's attorney, and you do not represent them.

(b) You are not advising them to destroy, alter or otherwise conceal the evidence and can give them no advice about what to do with the evidence.

(c) You do not want the evidence in your possession.

(d) Document your case file accordingly.

f. *Where Return Is Not Possible.* When it is not possible to return the evidence to its original source DSO attorneys should consider alternate methods of return or disclosure, including anonymous disclosure through your Regional Defense Counsel (RDC).³ As always, document your case file accordingly. Any means of disclosure must specifically contemplate and protect:

(1) The client's identity.

(2) The client's words to you concerning the item.

(3) Any other confidential information.

³ Before any disclosure it is **highly** recommended that you consult with your state bar on the state-specific implications of any proposed method of disclosure.

(4) The client's privilege against self-incrimination.

g. *Caution Urged.* But be cautioned—while this policy letter does not establish a rule of automatic delivery, neither does it divest you of responsibility for your actions. In addition to consulting with your supervisory attorney and reviewing reference (a), DSO attorneys who find themselves faced with taking possession of real evidence are encouraged to consult the rules promulgated by their State licensing agency before making any decisions. Document these consultations in your case file.

h. *Imminent Threat.* Items which poses a threat of reasonably certain death or substantial bodily harm or present a reasonably certain risk of significant impairment to national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system are generally defined as an "imminent threat." If real evidence presents an imminent threat immediately contact your supervisory attorney who will contact appropriate authorities for anonymous disclosure.

i. *Implications of acceptance.* Any decision to accept real evidence from a client or third party implies two things:

(1) First, acceptance implies that you have engaged in a thoughtful analysis leading to the conclusion that accepting possession may assist in the effective representation of the client, and that the client's defense genuinely requires this evidence. In arriving at that decision you should consider alternative methods of preserving the evidentiary value of the item in lieu of possession. Frequently a photograph and a percipient witness able to lay an appropriate foundation for introduction of the photograph will satisfy the evidentiary considerations without requiring acceptance of the item in question.

(2) Second, acceptance implies a willingness and capacity to establish and maintain a chain of custody for that real evidence. In those unusual circumstances where a DSO attorney is ethically bound to accept, or simply cannot avoid taking possession of, real evidence, create and maintain a chain of custody.

(3) In the event counsel believes effective representation requires acceptance of an item of real evidence, and where feasible, seek a non-detailed member of the DSO or DSO

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support staff member to facilitate acceptance of the evidence in question.

j. *Duty of Disclosure to the Client.* If you elect to take possession of physical evidence of any nature, even if you believe it to be exculpatory, at a minimum you have a duty to inform your client of:

(1) The possibility that you may be required under the Rules of Professional Responsibility to turn the evidence over to the Government if it later proves to be in any way incriminating. Specifically advise your client that items not immediately incriminating may become incriminating as the investigation evolves. This advice should be given in the presence of another member of the DSO and documented in your case file.⁴

(2) The possibility that acceptance of evidence may put you, the detailed counsel, in the position of having to withdraw as counsel on the case. Tell your client that the Rules of Professional Conduct prohibit counsel from being a witness in a case in which he or she is detailed, and that acceptance of the evidence may well make you a witness. Reference (a). This advice should also be given in the presence of another member of the DSO and documented in your case file.

k. *Pre-preferred and Walk-In Counseling:* A servicemember may become aware that he or she is under investigation before charges are preferred, and a DSO attorney may be assigned to provide that servicemember with advice. Reference (c) explains that, while this does not necessarily equate to being "detailed," such counseling is generally confidential. Should such a servicemember present with real evidence, or should a third party attempt to present real evidence to a DSO attorney on behalf of such a servicemember, the DSO attorney will typically decline acceptance in consideration of the following:

⁴ In *United States v. Rhea*, 29 M.J. 991 (A.F.C.M.R. 1990) defense counsel became aware of potential inculpatory nature of the item through the post Art 32 search authorization and sought a judicial order clarifying their obligation to disclose the evidence already within their possession within the parameters of the Navy Rules of Professional Conduct. The court acknowledged the apparently innocuous nature of the evidence at the time it was accepted by counsel. As the case progressed, however, it became vital corroboration in the testimony of a sexual assault complainant.

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(1) Determine if the item presents, or if acceptance would present, an imminent threat. If so, follow the procedures described in paragraph 3.g. above.

(2) If the evidence does not pose an imminent threat, decline to accept the item. Under no circumstances will any DSO attorney destroy or alter any evidence, nor will any DSO attorney render advice to any party to do so. Consult your supervisory attorney and document your case file or make a contemporaneous memo if no file exists.

(3) Sometimes a non-client servicemember or third party will deliver real evidence without acceptance by a DSO attorney, e.g. deliver it by mail, or simply leave it behind. If it is not possible to return the item to its source, place the evidence in a sealed plastic bag or container, with a completed chain of custody documents. Deliver it to your Regional Defense Counsel (RDC) for anonymous disclosure to appropriate authorities.

1. *How to Deal with Real Evidence Post-Preferral or Where there is an Established Attorney-Client Relationship.* The following is provided as an analytical framework for handling real evidence. Under circumstances where a client or third party presents with real evidence, a DSO attorney must ask:

(1) *Do I have an attorney-client relationship with a party for the offense to which this real evidence is linked?* If the answer that question is "no," follow the procedures described more fully in paragraph 3.j. If the answer to that question is "yes" proceed.

(2) *Can I decline acceptance?* This is generally the best choice, especially if the evidence is incriminating. If the evidence is not genuinely required for the client's defense or its evidentiary value can be preserved through photography or by other means, a DSO attorney should decline to accept the evidence and return it to its original source. Even temporary possession for purposes of photography or other testing should be appropriately documented to protect against allegations of obstruction.

(3) *Can I accept the evidence?* But in those rare circumstances where an item is genuinely required for the client's defense, counsel may be ethically compelled to accept it. So long as the DSO attorney is capable of preserving the integrity of both the evidence and the chain of custody for the

evidence, and after consultation with a supervisory attorney, he or she may do so.

(4) *Once I accept the evidence, what do I do with it?* Real evidence will generally come in two categories, that which is contraband or poses an imminent threat, and all other evidence("other real evidence.")

(a) Contraband/Imminent threat: Contraband evidence, or evidence which presents an imminent threat, may not be accepted. But if you inadvertently take possession of evidence that is contraband or which poses an imminent threat (e.g controlled substances or stolen proceeds), acceptance will legally and ethically compel a DSO attorney to turn the item over to the United States in accordance with Rule 3.4 of reference (a). This presents a dilemma in that if a DSO attorney delivers evidence against his or her client, he or she likely violates the attorney-client privilege and jeopardizes the client's Fifth and Sixth Amendment rights. History shows that attorneys placed in this situation have been found ineffective (which is why acceptance is typically discouraged). Under these circumstances a DSO attorney should consider delivering the evidence to the United States anonymously through his or her RDC. This may help protect the DSO attorney and the client. However a DSO attorney may:

1. Inspect the item as may be required to photograph, preserve, forensically test,⁵ or otherwise document the item.

2. Establish a chain of custody for the item.

3. Turn the item over to the United States anonymously through the DSO attorney's RDC.

4. Document your case file accordingly.

⁵ The Navy rules are silent on forensic testing. The ABA Criminal Justice Standards for the Defense Function have an allowance for forensic testing. Check your state bar rules and consult your RDC/SDC prior to forensically testing any evidence in which you have taken custody. Note that under JAGINST 5803.1E Rule 3.4, a covered attorney shall not: ". . . **unlawfully alter, destroy**, or conceal a document or other material having potential evidentiary value." While it is the DSO's position that forensically testing an item of evidentiary value is not **unlawfully** altering or destroying evidence, it is best practices to preserve the evidence in its original state as much as is possible. See Gregory C. Sisk, *The Legal Ethics of Real Evidence: Of Child Porn on the Choirmaster's Computer and Bloody Knives Under the Stairs*. 89 Wash. U. L. Rev. 819 (2014).

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(b) *Other Real Evidence:* While acceptance of real evidence is discouraged, if your client's defense genuinely requires this evidence; you are capable of establishing and maintaining a chain of custody for the evidence; you are ethically bound to accept the evidence under reference (a) and your State rules; and so long as the evidence is neither contraband nor presents an imminent threat; it may be retained. When presented with a court order, or when otherwise required by law, deliver the evidence to appropriate authorities. Establish a chain of custody for all accepted evidence.

(5) *When a client or third party tells me of the physical location of evidence, but does not deliver it to me, what may I do?* There may be occasions when a DSO attorney learns the location of evidence, but does not take possession. Even if this information relates to evidence of guilt secreted away by the client, when the information comes to a DSO attorney's attention through a communicative act of the client, the information remains covered by the attorney-client privilege. Mere knowledge of the existence of evidence, including its location, does not require disclosure. Assuming that law enforcement personnel are somehow entitled to evidence they otherwise would not discover does not square with the attorney's ethical obligation to zealously represent the accused. Neither can it be squared with the client's Constitutional rights to be protected from self-incrimination and to effective representation.

(6) Under most circumstances a DSO attorney will decline to inspect the location of such evidence, but there may be circumstances where a DSO attorney believes he or she is ethically or legally bound to do so. Should any DSO attorney believe he or she is ethically or legally bound to inspect the evidence location, immediately consult your RDC or the Chief Defense Counsel.

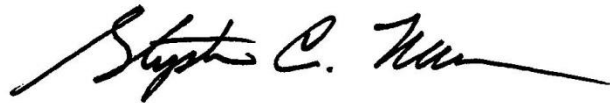
(7) Consistent with the procedure outlined in *United States v. Rhea*, in the event a DSO attorney accepts possession evidence which he/she later learns is inculpatory or is sought by the government the DSO attorney should consult with his/her RDC and seek an *ex parte* ruling on the requirement of disclosure from the military judge or the Chief Judge of the Judicial district if no military judge has yet been assigned.

4. Summary. There is no mandatory disclosure rule in the DSO. Such a rule would run counter to the obligation of client loyalty and enlist the client's own attorney in the Government's

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attempt to convict him. Generally a DSO attorney will be able to avoid taking possession of real evidence. This policy memo, however, contemplates scenarios where such contact is unavoidable—it contemplates the more difficult path where the attorney-client privilege and the right of the accused to effective, zealous representation are paramount. Even non-testimonial evidence, itself without Fifth Amendment protection, is typically privileged when delivered to an attorney by a client. The mere act of producing an item has “communicative aspects” of its own, wholly aside from the nature of the item. Just as importantly, an attorney has an ethical and legal responsibility to investigate on behalf of his or her client. Properly executing this ethical obligation makes some degree of contact with real evidence a virtual certainty. The foregoing is drafted with these challenges in mind.

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

A handwritten signature in black ink, reading "Stephen C. Newman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps