



UNITED STATES MARINE CORPS
CHIEF DEFENSE COUNSEL OF THE MARINE CORPS
MARINE CORPS DEFENSE SERVICES ORGANIZATION
755 SOUTH COURTHOUSE ROAD, BUILDING 2, SUITE 1000
ARLINGTON, VA 22204-2482

IN REPLY REFER TO
5813
CDC
20 Jul 17

CDC Policy Memo 3.1A

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

**Subj: DETAILING AND INDIVIDUAL MILITARY COUNSEL
DETERMINATION AUTHORITY FOR COUNSEL ASSIGNED TO THE
MARINE CORPS DEFENSE SERVICES ORGANIZATION**

Ref: (a) MCO P5800.16 (series)
(b) JAGINST 5800.7F (JAGMAN)
(c) JAGINST 5803.1D (Rules of Professional Conduct)

1. Purpose. To establish detailing and individual military counsel (IMC) determination delegation authority within the Marine Corps Defense Services Organization (DSO), and to cancel Chief Defense Counsel (CDC) Policy Memo 1-13.

2. Discussion. Reference (a) identifies the Chief Defense Counsel of the Marine Corps (CDC) as the Officer-in-Charge of the DSO and the detailing and IMC determination authority for defense counsel assigned to the DSO. Additionally, reference (a) authorizes the CDC to delegate these authorities to Regional Defense Counsel (RDC) and Senior Defense Counsel (SDC) subject to certain restrictions that are incorporated below. This policy memo supersedes and cancels all previous CDC Policy Memos related to detailing and IMC approval.

3. Policy. A defense counsel will not establish an attorney-client relationship, as defined by section 0131b(3) of reference (b), with any individual unless detailed, assigned, or otherwise authorized to do so by his or her detailing or IMC determination authority. Once established, the attorney-client relationship may only be severed under the provisions of Rule for Courts-Martial (R.C.M.) 505 and 506 and reference (c). Unless the attorney-client relationship is properly severed, or he or she is otherwise properly relieved, a defense counsel shall continue to represent an accused through the completion of applicable post-trial matters as outlined in reference (a).

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a. Detailing. Detailing authority includes the authority to detail a counsel to a court-martial case, an administrative separation board, or other due process proceeding in which the detailing of counsel is specifically authorized by Departmental or service regulations and, for the CDC and RDCs, authorization to form an attorney-client relationship and to remove a counsel from a case for good cause under the provisions of R.C.M. 505 and Rule 1.16 of reference (b).

b. Detailing Authority within the DSO. Detailing authorities may detail defense counsel from the DSO to cases in accordance with the procedures set forth in reference (a), consistent with the considerations specified in paragraph 2 below. The following billet-specific delegations pertain:

(1) *CDC*: The CDC may detail defense counsel from the DSO, and auxiliary defense counsel made available for a particular case, to cases supported by the DSO. The CDC may also remove counsel who have formed an attorney-client relationship from a case for good cause under the provisions of R.C.M. 505 and Rule 1.16 of reference (b).

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

(b) The CDC is the detailing authority for RDCs.

(c) The CDC is the detailing authority for all reserve members of the DSO.

(d) The CDC is the detailing authority for cases involving an accused in the grade of O-5 and above, or cases alleging violations of Article 118(1) or (4).

(e) The CDC may authorize a defense counsel to form an attorney-client relationship with officers and staff non-commissioned officers (SNCOs) subject to investigation under Chapter 2 of reference (b), or under investigation by an Inspector General, where the CDC reasonably believes that such an investigation may result in nonjudicial punishment (NJP) and/or a board of inquiry or administrative separation.

(f) The CDC will appoint a substitute CDC for detailing purposes when the CDC is on leave or otherwise unavailable to execute detailing responsibilities.

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(2) *RDCs*: *RDCs* may detail defense counsel assigned to their Legal Services Support Section (LSSS) and subordinate Legal Services Support Teams (LSST), as well as Auxiliary Defense Counsel made available by the LSSS or LSST OIC, to cases arising in their Legal Services Support Area (LSSA), and may remove counsel who have formed attorney-client relationships for good cause under the provisions of R.C.M. 505 and Rule 1.16 of reference (b).

(a) *RDCs* may not self-detail.

(b) *RDCs* may not detail cases involving an accused in the grade of O-5 and above, or cases alleging violations of Article 118(1) or (4).

(c) In cases with multiple co-accused an LSSS or LSST SDC may be unable to detail due to conflicts or a lack of available counsel. When such circumstances arise, the *RDC* will normally detail defense counsel and auxiliary defense counsel to these cases. The *RDC* may contact the CDC to request support from an adjacent LSSA.

(d) While the preference is to have Marines defend Marines, *RDCs* may request that Navy defense counsel be detailed by a local Navy Defense Service Office in exceptional circumstances.

(e) *RDCs* will maintain a record of all cases, to which their counsel have been detailed, within their region and other cases involving accused assigned to commands supported by their LSSS utilizing the Case Information System (CIS) on the DSO's SharePoint website.

(f) Except for officers in the grade of O-5 and higher, *RDCs* may authorize defense counsel in their region to form an attorney-client relationship with officers and SNCOs pending NJP when they reasonably believe an NJP may lead to a board of inquiry or an administrative separation.

(g) *RDCs* will appoint a substitute *RDC* and for detailing purposes when the *RDC* is on leave or otherwise unavailable to execute detailing responsibilities.

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(3) *SDCs*: *SDCs* may detail defense counsel assigned to their *LSSS* or *LSST* to cases supported by the *SDC's* *LSST* or an element thereof.

(a) *SDCs* may self-detail.

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

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

2. Cases alleging violations of Article 118 (including attempts).

3. National security cases as defined by section 0126 of reference (a).

(c) Additionally, *SDCs* who write fitness reports on subordinate defense counsel may not detail themselves to represent clients who have a conflict of interest with a client of a subordinate defense counsel for whom the *SDC* is the reporting senior.

(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. The term "complex case" is a term of art. Consider the following non-exclusive list of factors when deciding what is and what is not a complex case: The forum; the number and severity of charges; the severity of any possible sentence; the number of potential witnesses; the possible requirements for expert assistance or testimony; and the relative experience base of counsel assigned to that *SDC*.

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

(f) *SDCs* will maintain a record of all cases, to which their counsel have been detailed, within their area and other cases involving accused assigned to commands supported by their *LSST* utilizing the *DSO's* *CIS*.

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(g) When an SDC is on leave or otherwise unavailable to execute detailing responsibilities, RDCs will appoint a temporary SDC for detailing purposes.

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 (a).

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

(c) The needs of the local command and convening authority.

(d) The complexity of the case in light of the experience level and case load of the available counsel, work load (including military duties), and any other factors which may impact counsel's ethical obligations to zealously and effectively represent each individual accused.

(e) Any potential conflicts, actual or apparent.

(f) Timeliness.

(g) The location of the accused in relation to the location of counsel, with preference given to detailing local counsel.

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

(2) Detailing shall be done in writing using the approved detailing letter in the Forms section on the DSO SharePoint page.

(3) Detailing shall occur as soon as practicable. In no case shall detailing occur later than:

(a) *Personnel in confinement*: Ten days after being notified in writing by corrections personnel, command

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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 memo 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.

(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.

(4) The detailing authority will provide a copy of the detailing memorandum to the responsible Staff Judge Advocate and the cognizant LSSS or LSST prosecution or administrative support section within seven days of detailing. Detailed counsel will provide the trial counsel or recorder the approved Notice of Representation from the Forms section on the DSO SharePoint within seven days of being detailed to a court-martial case, board of inquiry, or administrative separation board.

(5) Supervisory defense counsel will normally not be detailed to represent a client, nor will they normally detail themselves, when there is a conflict of interest with a client of a subordinate defense counsel within their fitness reporting chain. Only the CDC may grant an exception to this general rule. If a supervisory defense counsel is detailed to a case that creates a conflict of interest with a client of a subordinate defense counsel, the supervisory defense counsel may not review or write the fitness report of that subordinate defense counsel. When this occurs the next-level supervisor will replace the supervisory counsel in the subordinate defense counsel's fitness reporting chain.

(6) An accused in a non-capital case is not entitled to be represented by more than one military counsel, and normally only one defense counsel will be detailed to a particular case. As explained in reference (a), the detailing of a second defense counsel to contested and complex cases is encouraged. Detailing

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authorities may, at their discretion, detail a second counsel to such cases.

(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 LSSS or 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, subject to the following:

(a) Paragraph 0145 of reference (b) states that the convening authority is responsible for both the cost of travel, other than local travel as defined by the Joint Federal Travel Regulations, and per diem, for a defense counsel in the course of representing a member of his command.

(b) Prior to detailing a counsel to a case that will incur non-local travel costs, the detailing authority shall obtain approval from the Convening Authority (typically through the Convening Authority's SJA), including authority to expend funds for travel and other expenses associated with representation. If the Convening Authority declines to fund non-local travel and per diem associated with representation, forwarded the matter 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.

(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 may extend beyond this established rotation date without the consent of the LSSS or LSST OIC. If the detailing authority and the LSSS or LSST OIC cannot agree on a 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.

d. Inability to Form an Attorney-Client Relationship. Occasionally, despite good faith efforts, counsel are unable to locate their client and form an attorney-client relationship. This most commonly occurs in two circumstances: when counsel is

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detailed as substitute counsel for post-trial matters and the accused has been discharged; and in reserve administrative separation boards. Should this occur, detailed counsel shall notify the detailing authority of the inability to form an attorney-client relationship with the client and articulate the steps taken to locate the client. If the detailing authority is satisfied that all reasonable efforts have been exhausted to locate the client, the detailing authority shall notify the responsible trial counsel, recorder, Staff Judge Advocate, or other appropriate and official agent of the United States, in writing, using the approved Notice of Inability to Form an Attorney-Client Relationship form found in the Forms Section on the DSO SharePoint, 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.

e. 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 that said counsel is reasonably available.

(2) Section 0131 of reference (b) sets forth standards for determining reasonable availability of the requested IMC.

(3) In accordance with reference (a), the CDC is the determination authority under section 0131b(2) of reference (b) for all IMC requests for defense counsel assigned to the DSO, other than the CDC. The CDC is authorized to delegate that authority to RDCs. Specific IMC approval authority is as follows:

(a) The SJA to CMC retains IMC approval authority on IMC 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 for RDCs, the OIC DCAP, all requests from officers of the grade O-5 and above, and all requests from servicemembers charged under Article 118 (1) and (4) (including attempts). For IMC availability purposes, an RDC's organization encompasses the LSSA of the LSSS assigned, not the battalion or military organization to which the RDC is administratively attached. The

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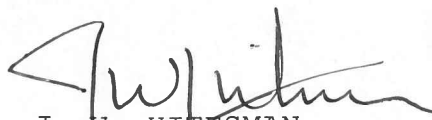
OIC, DCAP's organization is the DSO, not the battalion or military organization to which the OIC DCAP is administratively attached.

(c) Except as limited in paragraph (5) *infra*, RDCs are delegated determination authority on IMC requests for defense counsel and Senior Defense Counsel within their region. For IMC availability purposes, counsel's organization is the LSSS or LSST to which assigned and the location of the units supported therefrom, not the battalion or military organization to which the counsel is administratively assigned.

(4) Considerations for reasonable availability determinations. Unless the case is one for which a sentence of death may be adjudged under R.C.M. 1004, a national security case as defined by section 0126 of reference (b), or the counsel has an existing attorney-client relationship with the accused, the requested counsel must either be located within the same judicial circuit or assigned to an organization within 500 miles where the proceedings are to be held in order to be found reasonably available.

(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 detailing authority approves a request from the accused that the detailed defense counsel act as associate counsel.

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


J. W. HIPESMAN

Distribution List:
SJA to CMC
Legal Chief of the Marine Corps
All Marine Corps SJAs
LSSS OICs
LSST OICs
All members of the DSO
NMCTJ Code 52, OJAG