



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

In Reply Refer To:
3000
CDC
7 Nov 14

CDC POLICY MEMORANDUM 3.4

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

Subj: RELEASE OF COUNSEL DUE TO CONFLICT OF INTEREST

Ref: (a) Sixth Amendment to the U.S. Constitution
(b) Discussion of R.C.M. 502(d) (6)
(c) JAGINST 5803.1D
(d) CDC Policy Memo 3.1 (series) (Updated Detailing and IMC Determination)

Encl: (1) Conflict-Free Counsel Advice Form
(2) Notice of Change of Counsel At Request of Client
(3) Notice of Change of Counsel for Good Cause
(4) Notice of Finding of No Good Cause to Sever Despite Conflict of Interest

1. Purpose. To establish standard procedures within the Marine Corps Defense Services Organization (DSO) in order to advise clients of a DSO attorney's potential conflict of interest. Where there is a potential conflict of interest on the part of a DSO attorney, to establish standard procedures to memorialize the client's preference of counsel in order to assist the detailing authority under Rule for Court-Martial (R.C.M.) 505(d) (2) (B) (iii), and the military judge under R.C.M. 901(d) (3), in determining whether good cause exists to sever the attorney-client relationship.

2. Discussion.

a. Pursuant to references (a) - (c), a client has the right to be represented by conflict-free counsel. There are, however, circumstances under which a client may choose to waive the right to conflict-free counsel. In order to make an informed decision about waiving this important right, the client must be adequately informed of the conflict of interest, appreciate any and all material risks related to continued representation by potentially conflicted counsel, and understand all reasonably

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available representation alternatives. In no case should a client's decision regarding this critically important matter go undocumented—put another way, the client's informed consent should always be confirmed in writing.

b. Conflicts may be actual, potential or perceived. Severance as a severe remedy may be required based on the circumstances. As always, the conduct of the DSO when addressing such matters should be animated by the best interest of the individual client. DSO attorneys should be on the alert so as to avoid or prevent conflicts of interest from becoming ripe. Engaged DSO leadership is critical in this regard. Senior Defense Counsel and Regional Defense Counsel are tasked with remaining engaged with their personnel in order to address conflicts as they arise.

3. Policy. When a DSO attorney discovers he or she has an actual or potential conflict of interest with a client, he or she shall immediately consult with his or her supervisory counsel. Where the detailing authority is different than the supervisory attorney, consult both the supervisory attorney and detailing authority. A conflicts of interest typically arises in one of two circumstances—either pre- or post-formation of the attorney client relationship.

a. *Pre-Formation Conflicts*. A DSO attorney may be detailed to a case, yet discover a conflict of interest before meeting with the servicemember. When a conflict of interest is discovered and there is no pre-existing or established attorney-client relationship with the individual servicemember do not meet with the potential client. Notify your supervisory counsel and/or your detailing authority, who will re-detailed the case to conflict-free counsel under reference (d).

b. *Post-Formation Conflicts*. Similarly a DSO attorney may identify a conflict of interest after formation of the attorney-client relationship. If the conflict of interest establishes good cause to sever the attorney-client relationship, use enclosure (1) to:

(1) Inform the client of the nature of the conflict.

(2) Inform the client of the material risks of continued representation by conflicted counsel.

(3) Inform the client of reasonably available alternatives to continued representation by conflicted counsel.

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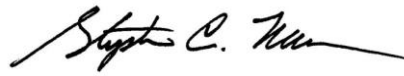
(4) Obtain an informed decision whether or not the client wants a new counsel.

(a) Client requests new counsel. If after being advised of the conflict the client desires to have new counsel, and if the detailing authority agrees, detail new counsel under R.C.M. 505(d)(2)(B)(iii) and reference (d) using enclosure (2). Provide copies of enclosures (1) and (2) to the trial counsel, military judge, and Staff Judge Advocate in order to ensure circumstances for the change are properly memorialized on the record. See, e.g. United States v. Hutchins, 69 M.J. 28 (C.A.A.F. 2011).

(b) Client waives the conflict of interest. If the client desires continued representation by conflicted counsel, the detailed counsel must obtain informed consent from the client, confirmed in writing. Use enclosure (1) to memorialize this important decision. Tailor italicized portions to ensure a complete explanation of the conflict to the client. Many conflicts will be personal to the detailed defense counsel. Where that is the case, advice regarding waiving the right to conflict-free counsel must come from a disinterested attorney. Once completed provide copies of enclosure (1) to the detailing authority and the military judge to permit them opportunity to conduct their own independent assessment relative to the conflict. Notwithstanding the requested waiver, either party may determine that the conflict establishes good cause to sever the attorney-client relationship, and may choose to do so. If the detailing authority finds good cause to sever the attorney-client relationship, the detailing authority will do so using enclosure (3) and will detail a new counsel under R.C.M. 505(d)(2)(B)(iii) and reference (d). Provide a copy of the enclosures (1) and (3) to the military judge, the trial counsel, and the Staff Judge Advocate concerned to ensure circumstances for the change of counsel are memorialized on the record. If the detailing authority does not find good cause to sever the attorney-client relationship, the detailing authority will provide the military judge with a copy of enclosures (1) and (4) to allow the military judge to make a final determination on the record under R.C.M. 901 whether the conflict of interest disqualifies the detailed counsel. See, e.g., United States v. Lee, 70 M.J. 535 (N-M.C.C.A. 2011). If the military judge disqualifies the conflicted counsel, the detailing authority will promptly detail a new counsel under reference (d).

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4. Conclusion. CDC Policy Memo 2-12 is hereby cancelled. This CDC Policy Memo is effective immediately.



STEPHEN C. NEWMAN

Distribution List:

SJA to CMC

Legal Chief of the Marine Corps

All Marine Corps SJAs

LSSS OICs

LSST OICs

All members of the DSO

CONFLICT-FREE COUNSEL ADVICE FORM

1. ____ I understand that I have a constitutional right to be represented by counsel who has an undivided loyalty to me and my case.
2. ____ I understand that a lawyer ordinarily should not represent a client when the representation involves a conflict of interest or the lawyer is representing another client regarding a matter arising out of the same incident or whose interests are adverse to each other.
3. ____ I understand that for a lawyer to represent more than one client concerning a matter arising out of the same incident or if the lawyer has an actual or potential conflict with continued representation, I must consent to that representation
4. ____ I understand that the following facts have created an actual or potential conflict of interest for **Captain Ima X.**: *State with specificity the basis for the conflict of interest.*
5. ____ I understand that even if an actual conflict of interest does not presently exist, one could possibly develop given the facts and circumstances explained to me by **Captain X** and **Major Lee Disinterested.**
6. ____ I understand that due to this conflict of interest that I am entitled to be represented by another lawyer, who does not have a conflict of interest. [*If applicable*] I understand that I could insist that **Captain X** not begin new duties that would create the conflict of interest until he has fully completed his representation in my case.
7. After discussing this matter with **Major Disinterested**, I have made the conscious and informed decision that I:
 - a. ____ do not waive my right to conflict-free counsel and request that a new conflict-free counsel be assigned to represent me instead of **Captain X.**
 - b. ____ [*If applicable*] do not waive my right to conflict-free counsel and demand that **Captain X** not begin new duties that would create the conflict of interest discussed with **Major Disinterested** above until he has fully completed his representation in my case.
 - c. ____ do waive my right to conflict-free counsel and I voluntarily consent to **Captain X's** continued representation in my case despite the conflict of interest that I have discussed with **Major Disinterested.**
8. ____ I have had sufficient time to make this decision.
9. ____ I understand that a copy of this form and its cover letter will be provided to **Captain X**, **list all co-counsel individually**, the detailing authority, and to the military judge.

Signature of Accused Date

Signature of **Major Disinterested**



UNITED STATES MARINE CORPS
[RDC OR SDC LETTERHEAD]
MARINE CORPS DEFENSE SERVICES ORGANIZATION (JAD)
[RDC OR SDC LETTERHEAD]

IN REPLY REFER TO
5817
Office
DD Mmm YY

From: *DETAILING AUTHORITY*
To: Distribution List

Subj: NOTICE OF CHANGE OF COUNSEL AT THE REQUEST OF THE CLIENT IN THE CASE
OF *UNITED STATES V. NAME AND RANK OF CLIENT*

Ref: (a) R.C.M. 505(d)(2)(B)(ii), M.C.M. (2012 edition)
(b) JAGINST 5800.7F (JAGMAN)
(c) JAGINST 5803.1D
(d) MCO P5800.16A
(e) CDC Policy Memo 3.1 (series) (Detailing and IMC Rules)

Encl: (1) Conflict-Free Counsel Advice Form

1. In the enclosure, *Client X* requested a change in counsel due to *Captain Old Counsel's* conflict of interest.
2. Pursuant to the references, *Major New Counsel* is detailed to represent *Client X* and the attorney-client relationship between *Captain Old Counsel* and *Client X* is hereby severed. *Captain Old Counsel* and *Major New Counsel* are directed to conduct a face-to-face case file turnover as soon as possible.

R. D. COUNSEL

Copy to:
Old Detailed Counsel
New Detailed Counsel
Any co-counsel
Client X
RDC
CDC
SJA
TC
Military Judge
File



UNITED STATES MARINE CORPS

[RDC OR SDC LETTERHEAD]
MARINE CORPS DEFENSE SERVICES ORGANIZATION (JAD)
[RDC OR SDC LETTERHEAD]

IN REPLY REFER TO
5817
Office
DD Mmm YY

From: *DETAILING AUTHORITY*
To: Distribution List

Subj: NOTICE OF CHANGE OF COUNSEL FOR GOOD CAUSE IN THE CASE OF *UNITED STATES v. NAME AND RANK OF CLIENT*

Ref: (a) CDC Policy Memo 3.1 (series)(Detailing and IMC Rules)
(b) MCO P5800.16A
(c) JAGINST 5803.1D

Encl: (1) Conflict-Free Counsel Advice Form
(2) *Other enclosures if appropriate*

1. In reference (a), I was delegated the authority to detail counsel. Detailing authority includes “the authority to remove a counsel from a case for good cause.” Para 2006.1 of ref (b). This removal authority is derived from RULE FOR COURTS-MARTIAL 505(d)(2)(B)(iii) which empowers “an authority competent to detail counsel” the ability to remove a counsel from a case for good cause independent of a military judge’s authority to remove a counsel under R.C.M. 506(c). *See United States v. Hutchins*, 69 M.J. 282, 289 (C.A.A.F. 2011).

2. After reviewing the enclosures and the references I find good cause, under R.C.M. 505(d)(2)(B)(iii), to sever the attorney-client relationship between Captain Old Counsel and Client X despite Client X’s request to continue to be represented by Captain Old Counsel.

3. *Set forth the conflict and explain in detail why the conflict, despite the waiver, still creates good cause to sever the attorney-client relationship*

4. Captain New Counsel is detailed to represent Client X. Captain Old Counsel and Captain New Counsel are directed to conduct a face-to-face case file turnover as soon as possible.

R. D. COUNSEL

Copy to:
Old Detailed Counsel
New Detailed Counsel
Any co-counsel
Accused
Military Judge
RDC
CDC

Subj: NOTICE OF CHANGE OF COUNSEL FOR GOOD CAUSE IN THE CASE OF *UNITED STATES v. NAME AND RANK OF CLIENT*

SJA
TC
Military Judge
File



UNITED STATES MARINE CORPS
[RDC OR SDC LETTERHEAD]
MARINE CORPS DEFENSE SERVICES ORGANIZATION (JAD)
[RDC OR SDC LETTERHEAD]

IN REPLY REFER TO
5817
Office
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From: *DETAILING AUTHORITY*
To: Distribution List

Subj: FINDING OF NO GOOD CAUSE TO SEVER THE ATTORNEY-CLIENT RELATIONSHIP
IN THE CASE OF *UNITED STATES v. RANK NAME OF CLIENT*

Ref: (a) CDC Policy Memo 3.1 (series)
(b) MCO P5800.16A
(c) JAGINST 5803.1D

Encl: (1) Conflict-Free Counsel Advice Form
(2) *Other enclosures if appropriate*

1. In reference (a), I was delegated the authority to detail counsel. Detailing authority includes “the authority to remove a counsel from a case for good cause.” Para 2006.1 of ref (b). This removal authority is derived from RULE FOR COURTS-MARTIAL 505(d)(2)(B)(iii) which empowers “an authority competent to detail counsel” the ability to remove a counsel from a case for good cause independent of a military judge’s authority to remove a counsel under R.C.M. 506(c). *See United States v. Hutchins*, 69 M.J. 282, 289 (C.A.A.F. 2011).

2. After reviewing the enclosures and the references I do not find good cause, under R.C.M. 505(d)(2)(B)(iii), to sever the attorney-client relationship between Captain Counsel and Client X, despite there being an apparent conflict of interest.

3. *Set forth the conflict and explain in detail why, despite the conflict of interest, there is no good cause to sever the attorney-client relationship.*

4. The military judge will make the final determination regarding whether or not there is good cause to sever the attorney-client relationship on the record at a subsequent session of court.

R. D. COUNSEL

Copy to:
Detailed Counsel
Any co-counsel
Accused
RDC
CDC
SJA
TC

Subj: FINDING OF NO GOOD CAUSE TO SEVER THE ATTORNEY-CLIENT RELATIONSHIP
IN THE CASE OF *UNITED STATES* v. *RANK NAME OF CLIENT*

Military Judge
File