



UNITED STATES MARINE CORPS
CHIEF DEFENSE COUNSEL OF THE MARINE CORPS
MARINE CORPS DEFENSE SERVICES ORGANIZATION
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ARLINGTON, VA 22204-2482

In Reply Refer To:
5813
DSO
19 Apr 21

CDC POLICY MEMORANDUM 3.4A

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

Subj: CONFLICT OF INTEREST BETWEEN DETAILED COUNSEL AND CLIENT

Ref: (a) Sixth Amendment to the U.S. Constitution
(b) Discussion of R.C.M. 502(d)(6)
(c) JAGINST 5803.1E
(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
(3) Finding of Good Cause to Sever Attorney Client Relationship
(4) Finding of No Good Cause to Sever Despite Proposed Conflict of Interest

1. Purpose. To update standard procedures within the Marine Corps Defense Services Organization (DSO) in order to advise clients of a DSO attorney's potential conflict of interest. The policy has been re-named to better reflect its content. To establish standard procedures to memorialize the client's preference of counsel in order to assist the severance authority under Rule for Court-Martial (R.C.M.) 505(d)(2)(B) and reference (d), and the military judge under R.C.M. 901(d)(3), if necessary, in determining whether to sever the attorney-client relationship where a potential or actual conflict of interest exists between a DSO detailed defense counsel and the client.

2. Discussion

a. Pursuant to references (a) through (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 potential or actual conflict of interest, appreciate any and all material risks related to continued representation by conflicted counsel, and understand all reasonably 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

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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. Engaged DSO leadership is critical in this regard. No case should be detailed without first executing a conflict check, and Senior Defense Counsel and Regional Defense Counsel are tasked with remaining engaged in order to address conflicts should they arise.

3. Policy. When a DSO attorney discovers he or she has an actual or potential conflict of interest with a client, the counsel shall immediately consult with supervisory counsel. Where the detailing authority is different than the supervisory attorney, consult both the supervisory attorney and detailing authority. A conflict of interest may arise either pre- or post-formation of the attorney client relationship.

a. Pre-Formation Conflicts. When a conflict of interest is discovered and there is no pre-existing or established attorney-client relationship with the individual Servicemember, counsel shall not meet with the potential client. If counsel has met with the client, counsel will take no action on behalf of the client and will not send a letter of representation. Detailed counsel shall notify supervisory counsel and/or the detailing authority, who will revoke the detailing and detail the case to conflict-free counsel under reference (d).

b. Post-Formation Conflicts. If the conflict of interest is revealed after the establishment of an attorney-client relationship and the severance authority agrees that good cause to sever the attorney-client relationship exists, counsel other than conflicted counsel shall be assigned to execute enclosure (1). Tailor italicized portions to ensure a complete explanation of the conflict to the client. If the conflict is personal to the detailed defense counsel, any member of the DSO may be assigned to execute the conflict-free advice form. If the entire region or DSO is conflicted, the CDC will arrange conflict-free counseling. Enclosure (1) is intended 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; and
- (4) Obtain an informed decision whether the client wants to waive the conflict or sever the attorney client relationship and be detailed new counsel.

(a) Client requests new counsel. If, after being advised of the conflict, documented in enclosure (1), the client desires severance and detailing of new counsel, the severance authority shall sever the attorney-client relationship in writing using enclosure (3). New counsel shall be detailed under R.C.M. 505(d)(2)(B)(iii) and reference (d) using enclosure (2). Provide copies of enclosure (2) to the trial counsel, military judge, and Staff Judge Advocate in order to ensure the change of counsel is properly memorialized on the record. *See, e.g., United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011).

Subj: CONFLICT OF INTEREST BETWEEN DETAILED COUNSEL AND CLIENT

(b) Client desires to waive the conflict of interest. If the client desires continued representation by conflicted counsel, ensure insure informed consent is documented in enclosure (1) to memorialize this important decision. Notwithstanding the requested waiver, the severance authority may determine that the conflict nevertheless requires severance of the attorney-client relationship and will do so in writing using enclosure (2) and detail a new counsel under R.C.M. 505(d)(2)(B) and reference (d). A determination to sever the attorney-client relationship will be documented in enclosure (3). All appropriate enclosures will be completed, but only enclosure (2) will be provided to adverse parties or the military judge notifying a change of counsel; the basis of any conflict will not be disclosed. Release only that a conflict existed and the severance authority determined there was good cause to sever the attorney client relationship. Seek supervisory counsel assistance before disclosing details of any conflict.

4. If a conflict has been proposed but the severance authority finds no good cause to sever, enclosure (4) will be completed to memorialize the determination. It will not be provided to adverse parties or the military judge. The client must be advised, however, that he or she may raise the issue through counsel to the military judge. If the military judge disqualifies the detailed counsel, the detailing authority will promptly detail a new counsel under reference (d).

5. Conclusion. CDC Policy Memo 3.4 is hereby cancelled. This CDC Policy Memo is effective immediately.


V. C. DANYLUK

Distribution List:
SJA to CMC
Legal Chief of the Marine Corps
All Marine Corps SJAs
LSSS OICs
LSST OICs
All members of the DSO

UNITED STATES MARINE CORPS
[RDC LETTERHEAD]
MARINE CORPS DEFENSE SERVICES ORGANIZATION
[RDC LETTERHEAD]

CONFLICT-FREE COUNSEL ADVICE FORM

By initialing next to each number, I am indicating that the paragraph has been explained to me by [Disinterested Counsel]. I acknowledge that I should ask questions by [Disinterested Counsel] and shall not initial any paragraph until I fully understand it.

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, my representation by that lawyer will be severed unless I consent to the conflicted representation
4. ____ I understand that the following facts have created an actual or potential conflict of interest for [Counsel]:
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, there is a potential conflict given the facts and circumstances.
6. ____ I understand that, due to this conflict of interest, 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 [Counsel] not begin new duties that would create the conflict of interest until he has fully completed his representation in my case.
7. ____ I understand that some conflicts require more than one person to waive the conflict and that, even if I desire to continue to be represented by [Counsel], it is possible that the attorney-client relationship may still be ended by the severance authority.
8. ____ I understand that if I disagree with the determination to sever or not to sever the attorney-client relationship with [Counsel], I am able to raise the issue with the military judge/President of the Board.
9. After discussing this matter with [Disinterested Counsel], I have made the conscious and informed decision that I:
 - a. ____ do not waive my right to conflict-free counsel and I request that a new conflict-free counsel be detailed to represent me instead of [Counsel].
 - b. ____ [If applicable] do not waive my right to conflict-free counsel and demand that [Counsel] not begin new duties that would create the conflict of interest explained in paragraph 4 above until he has completed his representation in my case.
 - c. ____ do waive my right to conflict-free counsel and voluntarily consent to [Counsel]'s continued representation in my case despite the conflict of interest.
10. ____ I have had sufficient time to make this decision.

Signature of Accused

Date

Signature of Major Disinterested



UNITED STATES MARINE CORPS
[RDC LETTERHEAD]
MARINE CORPS DEFENSE SERVICES ORGANIZATION
[RDC LETTERHEAD]

IN REPLY REFER TO:
5817
Office/Serial
DD Mmm YY

From: *SEVERANCE AND DETAILING AUTHORITY*
To: Distribution List

Subj: NOTICE OF CHANGE OF COUNSEL IN THE CASE OF *UNITED STATES V. NAME AND RANK OF CLIENT EDIPI/MOS USMC*

Ref: (a) R.C.M. 505(d)(2)(B)(ii), M.C.M. (2019 edition)
(b) JAGINST 5800.7G (JAGMAN)
(c) JAGINST 5803.1E
(d) MCO P5800.16
(e) CDC Policy Memo 3.1 (series) (Detailing and IMC Rules)

1. Pursuant to the references, [New Counsel] is detailed to represent [Client X], and the attorney-client relationship between [Previous Counsel] and [Client X] is hereby severed.
2. [Previous Counsel] and [New Counsel] are directed to conduct a face-to-face case file turnover as soon as possible.

R. D. COUNSEL

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



UNITED STATES MARINE CORPS
[RDC LETTERHEAD]
MARINE CORPS DEFENSE SERVICES ORGANIZATION
[RDC LETTERHEAD]

IN REPLY REFER TO
5817
Office/Serial
DD Mmm YY

From: *SEVERANCE AND DETAILING AUTHORITY*
To: Distribution List

Subj: FINDING OF GOOD CAUSE TO SEVER THE ATTORNEY-CLIENT RELATIONSHIP IN
THE CASE OF *UNITED STATES v. RANK NAME OF CLIENT EDIPI/MOS USMC*

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

Encl: (1) Conflict-Free Counsel Advice Form

1. In reference (a), I was delegated the authority to sever counsel. *See* reference (b), para. 2006.1. This removal authority is derived from Rule for Court-Martial (R.C.M.) 505(d)(2)(B)(iii), which provides “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 considering the proposed conflict and the references, I do find good cause, under R.C.M. 505(d)(2)(B)(iii), to sever the attorney-client relationship between [Previous Counsel] and [Client X], despite being an apparent conflict of interest.
3. [Set forth the conflict and explain in detail why there is good cause to sever the attorney-client relationship. Add additional enclosures, if necessary.]

R. D. COUNSEL

Copy to:
Detailed Counsel
Any co-counsel
Accused
CDC
File

Enclosure (3)



UNITED STATES MARINE CORPS
[RDC LETTERHEAD]
MARINE CORPS DEFENSE SERVICES ORGANIZATION
[RDC LETTERHEAD]

IN REPLY REFER TO
5817
Office/Serial
DD Mmm YY

From: *SEVERANCE AND 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 P5800.16
(c) JAGINST 5803.1E

Encl: (1) Conflict-Free Counsel Advice Form

1. In reference (a), I was delegated the authority to sever counsel. This removal authority is derived from Rule for Court-Martial (R.C.M.) 505(d)(2)(B)(iii) which provides “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 considering the proposed conflict 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 [Counsel] and [Client X].
3. [Set forth the proposed conflict and explain in detail why, despite the proposed conflict of interest, there is no good cause to sever the attorney-client relationship. Add additional enclosures, if necessary.]
4. The military judge will make the final determination regarding whether is good cause to sever the attorney-client relationship on the record at a subsequent session of court. The client has been advised to bring the matter to the military judge, through counsel, for final resolution.

R. D. COUNSEL

Copy to:
Detailed Counsel
Any co-counsel
Accused
CDC
File

Enclosure (4)