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CDC POLICY MEMO 3.7

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

Subj: DEFENSE COUNSEL OBLIGATIONS DURING APPELLATE REVIEW

Ref: (a) JAGINST 5803.1E of 20 Jan 2015 (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 (4th Ed. 2015)
(c) American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 10-456 of 14 July 2010.
(d) American Bar Association, Model Rules of Professional Conduct (2019)
(e) California Formal Opinion 1992-127
(f) California, Rules of Professional Conduct (2018)
(g) CDC Policy Memo 3.6 (Termination of ACR)
(h) CDC Policy Memo 1.3B (Records Management)

1. Purpose. To establish a uniform practice for all Defense Services Organization (DSO) attorneys concerning trial defense counsel involvement with appellate review.

2. Discussion.

a. Pursuant to Articles 66 and 67, Uniform Code of Military Justice (UCMJ), Marines and Sailors convicted at special or general courts-martial who receive certain minimum sentences are entitled to automatic appellate review by the Navy-Marine Corps Court of Criminal Appeals (NMCCA). The NMCCA also has jurisdiction to review convictions and sentences from Marines and Sailors convicted at summary courts-martial who appeal their case and the court grants review. Lastly, the NMCCA has jurisdiction to review cases referred to it from the Judge Advocate General.

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b. When convicted Marines and Sailors (appellants) appeal their cases, they are assigned appellate defense counsel who represent them on appeal. In accordance with reference (g), trial defense counsel's representation is terminated.

c. Trial defense counsel still maintain obligations to their former clients. Attorney-client privileged information remains privileged. There remains a duty of loyalty and confidentiality. Reference (d), R. 1.9; Reference (c), Standard 4-1.3.

d. It is not uncommon for a former client's appellate defense counsel to contact trial defense counsel to discuss the case. Because trial defense counsel lived through the case rather than just reviewed the transcript and evidence in the record, trial defense counsel may be in the best position to identify potentially appealable issues. The collaboration may benefit the appellant by ensuring that appealable issues are identified in a timely manner, thus expediting the appellate process.

e. In many instances, however, appellate defense counsel may be investigating or making a claim of ineffective assistance of counsel (IAC) against trial defense counsel. Often, appellate defense counsel do not inform trial defense counsel of their intent to raise IAC on appeal.

f. If there is an allegation of IAC, trial defense counsel may be contacted by appellate defense counsel, appellate government counsel, or the appellate court seeking information that may be confidential or privileged. Trial defense counsel must be particularly cautious regarding such contacts because of the possibility of disclosing confidential information in violation of the ethics rules. The natural desire to defend oneself in such circumstances may itself result in disciplinary trouble for the counsel if privileged or confidential information is improperly disclosed.

3. Background on Ineffective Assistance of Counsel (IAC).

a. Understandably, trial defense counsel may be concerned if a former client is pursuing a claim of IAC. However, the burden on the appellant is "very high." *United States v. Saintaupe*, 61 M.J. 175, 179 (C.A.A.F. 2005) (citations omitted). On appeal, the appellant must overcome a presumption that trial defense counsel was competent. *United States v. Cronin*, 466 U.S.

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648, 658 (1984). To receive relief on appeal for IAC, the Court of Appeals for the Armed Forces adopted a three-part test requiring the client to overcome the presumption of competence (factors 1 and 2) and show prejudice (factor 3):

- (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
- (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and
- (3) If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Polk, 32 M.J. 150, 153 (C.A.A.F. 1991).

b. If the IAC allegation can be resolved by addressing only the third prong of prejudice, the court does not need to address whether the representation was ineffective. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)). Therefore, most IAC allegations will be resolved under the third prong without the court requiring the trial defense counsel to respond.

c. If, however, the appellate court "reviews the allegation of ineffectiveness and the government response, examines the record, and determines that the allegation and the record contain evidence which, if unrebutted, would overcome the presumption of competence," the court will order a response from trial defense counsel. *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995).

d. In the past, trial defense counsel have potentially violated their ethical obligations to their former clients by disclosing confidential information to appellate government counsel without a court order after their former client has made an allegation of IAC. Although some states and courts may condone this, the American Bar Association has found that trial defense counsel making such disclosures to appellate government without informed consent of the former client or court order raises serious ethical concerns and likely constitutes a violation of trial defense counsel's ethical obligations. Reference (a), R 1.6; Reference (c), R. 1.6. Additionally, no authority requires trial defense counsel to cooperate with appellate government counsel after an allegation of IAC without a court order requiring such cooperation.

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4. Policy.

a. Generally. All trial defense counsel are required to comply with both reference (a) and their applicable state bar ethics rules. Given differences between state bar rules, this policy seeks to comply with the most restrictive state bar requirements to ensure that adherence to this policy will comply with all state bar requirements. To that end, some requirements in this policy may be optional under some state bar rules but may be a requirement under others. Therefore, these obligations supersede any state bar rule that would either authorize or permit lesser obligations on trial defense counsel.

b. Duties to Former Clients. Trial defense counsel have a duty of confidentiality to their clients that continues after the representation ends. Reference (b), Standard 4-1.3. Trial defense counsel may not reveal "information relating to the representation" of a former client except as allowed by the rules. Reference (b), R. 1.9(b). Trial defense counsel also may not use information relating to the representation to the disadvantage of the former client. Reference (b), R. 1.9(b). Confidential information is defined broadly and applies "not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Reference (a), R. 1.6, cmt.; Reference (d), R. 1.6, cmt. Trial defense counsel may not disclose confidential information without the former client's informed consent or as authorized or required by the ethics rules, a lawful order, regulation, or statute. Reference (a), R. 1.6 cmt.

c. Cooperation with Appellate Judicial Proceedings. DSO policy is to reasonably cooperate with appellate defense counsel and not reveal confidential information to appellate government counsel or a court unless ordered by a court or with the former client's informed consent. If trial defense counsel are unsure of their obligations, they should consult with supervisory counsel.

(1) Appellate Government Counsel.

(a) Trial defense counsel shall not provide any confidential information to appellate government counsel unless ordered by a court. If contacted by appellate government counsel about their representation of a current or former client, trial defense counsel must not disclose any information relating to the representation, whatever its source, without a court order.

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Reference (a), R. 1.6(a); Reference (d), R. 1.6, cmt. This rule applies even if appellate defense counsel is pursuing an IAC claim against the trial defense counsel. Reference (c).

(b) If contacted by appellate government counsel, trial defense counsel shall inform supervisory counsel. Supervisory counsel will then discuss the attempted contact with the Chief Defense Counsel of the Marine Corps to determine what action, if any, to take.

(2) Appellate Courts. Trial defense counsel shall comply with any lawful order of the trial court or appellate court. See *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000) (quoting *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995)) (discussing the process for when an appellate court will order a trial defense counsel to respond).

(a) Compliance with a court order¹ may include submitting an affidavit to the court, testifying at an evidentiary hearing (*DuBay* Hearing), or both.

(b) Where a court orders trial defense counsel to disclose confidential information, trial defense counsel should ensure that the former client or appellate defense counsel is aware of the order prior to disclosing confidential information because the client may decide not to continue pursuing the claim to prevent the disclosure of confidential information. If necessary, trial defense counsel should request a delay before complying with the court's order to ensure that client has an opportunity to discuss the ordered disclosure with appellate defense counsel so the client can make an informed decision.

(3) Appellate Defense Counsel. Trial defense counsel shall reasonably cooperate with the former client and appellate defense counsel. This includes providing the client's case file to appellate defense counsel and complying with reasonable requests for information from appellate defense counsel. The requirements to reasonably cooperate with appellate defense

¹ If an IAC issue is raised *sua sponte* by the appellate court and not the former client, trial defense counsel's duty of confidentiality still applies. Trial defense counsel shall inform supervisory counsel prior to acting on the appellate court order. Supervisory counsel shall discuss the issue with the Chief Defense Counsel of the Marine Corps to determine what action, if any, to take.

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counsel apply even if appellate defense counsel is pursuing an IAC claim against trial defense counsel.²

(a) Client's Case File. The "client's case file" should be construed broadly. It includes "correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation." Reference (f), R. 1.16(e); Reference (e). Included within the definition of a client's case file is attorney work product, including "the attorney's impressions, conclusions, opinions, legal research, and legal theories" prepared for the client's case. Reference (e). In effect, virtually everything created by the defense counsel or maintained by the defense counsel in relation to a client's case is part of the case file. Trial defense counsel are required to maintain the case file in accordance with reference (h). Upon request, trial defense counsel must turn over the case file to the former client or appellate defense counsel. Reference (h). Personally Identifiable Information (PII) shall not be turned over to the client.

(b) Requests for Information from Appellate Defense Counsel. Trial defense counsel shall reasonably cooperate with the former client or appellate defense counsel. Counsel must candidly discuss matters relating to the representation with appellate defense counsel. Reference (e). Reasonable cooperation applies regardless of whether appellate defense counsel is pursuing an IAC claim and whether the disclosure of information would disclose a failure on the part of trial defense counsel to provide effective assistance of counsel. Reference (e).

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



V. C. DANYLUK

² See *United States v. Dorman*, 58 M.J. 295, 297 (C.A.A.F. 2003) ("trial defense counsel must provide appellate defense counsel with reasonable access to the case file.").