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IN REPLY REFER TO
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CDC
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CDC POLICY MEMO 1.6

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

Subj: INDEPENDENCE OF THE DEFENSE SERVICES ORGANIZATION

Ref: (a) MCO 5800.16, Volume 3
(b) United States Constitution
(c) UCMJ, Article 27 (10 U.S.C. §827)
(d) *Gideon v. Wainwright*, 372 U.S. 335 (1963)
(e) *Strickland v. Washington*, 466 U.S. 668 (1984)
(f) *U.S. v. Gooch*, 69 M.J. 353 (C.A.A.F. 2010).
(g) JAGINST 5800.75 CH 1
(h) JAGINST 5803.1E
(i) ABA Criminal Justice Standards for the Defense Function (4th Ed.)
(j) MCO 5800.11A (15 November 1985)
(k) DoD Dictionary of Military and Associated Terms

1. Purpose. To establish business rules for the Marine Corps Defense Services Organization (DSO) to ensure it operates as a functionally independent organization, and appears to the public as such, as required by reference (a).

2. Discussion

a. Every Marine has sworn to support and defend the Constitution of the United States of America. And every Marine knows the maxim “mission accomplishment first, Marines always.” The DSO is fortunate to have a mission so clearly tied to these fundamentals; we take care of Marines and defend the Constitution in doing so.

b. The DSO’s mission is born of the Constitution and Uniform Code of Military Justice’s (UCMJ) requirement that every Marine receive *effective* defense counsel. References (b)-(i). To be effective, defense counsel must zealously represent and advocate for their clients without fear of repercussion or reprisal, with unfettered loyalty, and professional independence. References (d)-(i).

c. Historically, this basic requirement was not always met. Prior to the publication of reference (j), defense counsel did not even have an independent fitness report chain. The Commandant of the Marine Corps (CMC), however, took steps to rectify these past failures and ensure we meet our Constitutional, Title 10, regulatory, and ethical obligations. His 20 February 2018 Legal Support and Administration Manual, reference (a), recognizes the DSO must be a functionally independent organization and explains several elements of that independence.

d. A crucial element of that independence, CMC identifies the Chief Defense Counsel of the Marine Corps (CDC) as the Officer-in-Charge of the DSO (OIC, DSO) and tasks the CDC with establishing

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standing operating procedures and standards of practice for the delivery of defense services throughout the Marine Corps. CMC has entrusted the CDC with effective “operational control” of the DSO and its members. *Cf.* reference (k).¹ This authorizes the CDC to perform functions of leadership over defense personnel including: organizing and employing them, assigning them with tasks, designating their objectives, and giving them the authoritative direction necessary to accomplish the DSO mission. It also grants the CDC authoritative direction over all aspects of DSO operations and training necessary to accomplish the DSO mission. Because defense counsel must exhibit unfettered loyalty and professional independence in representing their clients, however, it does not extend to case-specific decisions made by individual defense counsel in their representation of Marines.

e. But while reference (a) acknowledges the DSO must be functionally independent and takes certain steps in that direction, it also keeps the DSO within the administrative chain of the Legal Services Support Section (LSSS). This structure forces a reliance on the LSSS and installation commanders for manpower management as well as funding for training, resources, and facilities—which degrades the DSO’s functional independence. This degradation of Constitutionally and legally required independence is exacerbated by government actors², including convening authorities and those who control over the day-to-day activities of DSO personnel. Their authorities include the approval of leave, special liberty, and temporary additional duty (TAD); the administration of physical fitness tests (PFT) and combat fitness tests (CFT); the administration of rifle and pistol ranges; and the administration of training, annual or otherwise. These government actors also control enlisted proficiency and conduct marks as well as awards for DSO personnel, giving them authority to unilaterally lower recommendations by DSO leadership.³

f. Clearly then, DSO personnel remain in important ways directly subordinate to government actors, including supervisory prosecutors and convening authorities, who have interests *directly* adverse to us and our clients despite references (a)-(i)’s functional independence requirement. These court-martial opponents maintain the power to order DSO personnel to engage in certain activities at specific times and locations without regard for DSO operations. This may include, and has in the past included, participating in formations; participating in physical training; participating in and/or attending changes of command or other ceremonies; fulfilling various collateral duties; conducting urinalyses; standing duty; completing annual training, including PFTs, CFTs, and qualifying on the pistol and rifle ranges; and attending professional military education (PME) outside of that required for promotions. This places DSO personnel in the untenable position of taking orders that interfere with their representational responsibilities from the very people they must oppose while representing clients.

g. Consequently, the DSO’s level of independence remains inadequate, presenting several unacceptable risks to military justice, including but not limited to:

¹ Under JP1-0 and MCDPI-0, tactical control would only allow the type of control for a specific task from higher: “local direction or control of movements or maneuvers necessary to accomplish missions or tasks assigned.” The CDC’s control has to include—at a minimum—the type of control associated with “assigning them with tasks [and] designating objectives.” This extra authority is only in the definition of operational control. Operational control does not include the authority to discipline Marines, which is retained at the command from where the Marines originally came.

² The term “government actors” is a term of art and includes all military members and civilians outside of the DSO who could reasonably be an opposing entity to defense counsel in the adversarial process of military justice. This includes, but is not limited to: prosecutors, LSSS OICs, LSSS Assistant OICs, Legal Services Support Teams (LSST) OICs, LSSS Chiefs, LSST Chiefs, Legal Administrative Officers, other officer and enlisted leadership at LSSS/LSST, Battalion/Squadron leadership, Installation leadership, and all convening authorities.

³ Proficiency/conduct marks of DSO Marines have been lowered by government actors numerous times in the past. Most recently, in February 2019, a Marine judge advocate, “dual hatted” as a prosecutor and acting staff judge advocate, unilaterally lowered an enlisted DSO Marine’s marks from what his defense chain-of-command and direct supervisor submitted.

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(1) The relationship between counsel and client is adversely affected by the perception we are actually government actors who are subservient to the convening authority because that convening authority is also our commanding officer. The attorney-client relationship is the foundation of the right to counsel. Anything that interferes with it (such as inadequate independence) threatens not only the rights of Marines but also the efficiency and fairness of the system. Detailed defense counsel may be fired by clients for this perception, Individual Military Counsel may be requested from non-local commands at the cost of significant TAD expenditures and loss of that Marine Officer from regular duties, or allegations and findings of Ineffective Assistance of Counsel may overturn convictions.

(2) The lack of true functional independence also threatens the very trial of cases on the merits. When LSST OICs with administrative control over defense counsel are also supervisory prosecutors or installation commanders with the same power over counsel are convening authorities, there can be the appearance and actual occurrence of Unlawful Command Influence (UCI), leading to the dismissal of cases with prejudice. Even something as small as a commanders' interference with a defense counsel's time management decisions (unintentional or otherwise) could raise the specter of UCI.

(3) Finally, in a time where military justice is under constant criticism in the public sphere, we risk further loss of public trust in our system if commanders and OICs maintain an ability to affect cases by virtue of their administrative control over defense personnel. For instance, where defense counsel are assigned billets outside the DSO by the very OICs and commanders who may have disagreed with that counsel's zealous representation of a client, there is certainly a threat to the public perception of military justice. The chilling effect of this possibility alone is a threat to military justice.

h. True functional independence achieved by removal of the DSO from the current installation model is the ideal solution to this lingering problem. The trial judiciary's independence represents a ready model. The trial judiciary's command and control structure reflects the necessity that judges remain completely separate from any government entity with a hand in the prosecution of service members. Unfortunately, the Marine Corps has not yet achieved the same for DSO, despite reference (a)'s recognition of the need to do so.

i. Until that is achieved, the CDC's current authorities will be fully exercised to move the DSO closer to true functional independence as required by the CMC, regulation, law, and the Constitution. This policy is not a "get-out-of-anything free card" for defense counsel or clerks; it is a necessary clarification of the meaning of functional independence and is based only on the references. Functionally independent defense counsel are necessary to the effective, efficient, fair, and final administration of military justice and this policy is meant to achieve only those ends. Every member of the DSO remains a proud Marine committed to accomplishing the mission and is deserving of the same trust, confidence, and respect as those executing more traditional missions.

3. Policy

a. In recognition of the DSO's placement within the LSSS and the inherent conflict this creates, additional guidance is necessary to ensure that the DSO and its personnel appear as, and in actuality are, functionally and operationally independent, as directed by reference (a). As such, the following guidance applies to all DSO personnel:

(1) DSO personnel shall not stand duty, hold collateral billets, or perform other non-DSO functions, if such duties, billets, and/or functions negatively affect or interfere with the primary mission of defending our clients and safeguarding their rights. Reference (a). The relevant Regional Defense Counsel (RDC) shall be the determining authority for availability and appropriateness of their Marines

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participating in these collateral duties/functions. In practice, the Senior Defense Counsel (SDC) will submit their suggested exemptions to their respective RDCs who will make the determinations.⁴ All conflicts or disagreements between RDCs and non-DSO Marines, which cannot be resolved locally, will be forwarded to the CDC for final resolution.

(2) All DSO personnel will make every effort to attend and/or participate in all non-DSO command/LSSS/LSST functions, including but not limited to: formations, funerals, changes of command or other ceremonies, unit physical training, and non-legal PME. However, DSO Marines are excused if attendance and/or participation will negatively affect or interfere with the primary mission of defending our clients and safeguarding their rights. The relevant RDC will be the determining authority for availability of DSO personnel. In practice, SDCs will submit their suggested exemptions to their respective RDCs who will make the determinations.⁵ All conflicts or disagreements between RDCs and non-DSO Marines, which cannot be resolved locally, will be forwarded to the CDC for final resolution;

(3) DSO personnel are required to complete any and all calendar and fiscal year training pursuant only to Marine Corps Orders;

(4) The lowering of any DSO member's award, proficiency and conduct markings, or performance evaluations from what was submitted by the relevant DSO leader, shall be treated as a CDC Critical Information Requirement (CIR) and will be communicated to the CDC pursuant to CDC Policy Memo 1.2B;

(5) The denial of any rights, privileges, or benefits accrued to any DSO member by virtue of their active military service—such as leave requests—shall be treated as a CDC CIR and will be communicated to the CDC pursuant to CDC Policy Memo 1.2B.

b. All members of the DSO will continue to hold themselves to the highest standards expected of a U.S. Marine. The current model, however, is untenable, increases our institutional risk, and is a significant threat to our clients' constitutional rights to counsel and to present a defense. As such, DSO leadership will continue to explore new models of functional independence akin to that of the judiciary to resolve the conflicts, satisfy our constitutional requirements, and guarantee the fairness and finality of military justice.

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

W.N.P.H.
W. N. PIGOTT

⁴ Due to the very nature of certain duties, DSO Marines should always be exempted. Any duty with a law enforcement nexus is one obvious category for such blanket exceptions. For example, Command Duty Officer. Command Duty Officers are responsible for checking-in "restricted" Marines, who often have received defense services from the local DSO office where the counsel standing the duty works. In fact, in the case of our smaller branch offices, there could be as little as a one in three chance that the counsel serving as a Command Duty Officer is either detailed to or formed a limited attorney client relationship with a particular restricted servicemember.

⁵ Regarding paragraphs 3(a)(1) and 3(a)(2), SDCs and RDCs will consider all exemption requests on a case by case basis for merit and practicality. This Policy Memorandum will not be treated as a "free pass" to avoid collateral duties and functions. DSO leadership will use sound judgment to carefully and consider each request prior to making a determination.

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Distribution:

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Legal Chief of the Marine Corps

All Marine Corps SJAs

LSSS OICs

LSST OICs

All members of the DSO