DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060

REPLY TO
ATTENTION OF:

JALS-TD

9 November 2012

MEMORANDUM FOR All Trial Defense Counsel

SUBJECT: TDS Policy Memorandum 2012-01: Detailing of Defense Counsel and Formation of Attorney-Client Relationships Within the Trial Defense Service (TDS)

1. The memorandum reissues the guidance contained in the policy letter dated 12 March 2012, subject as above, with the addition of a new paragraph 10. Paragraph 10 gives detailing authorities the authority to expand the scope of representation of a client beyond the limits discussed in paragraphs 2-9 in extraordinary cases. This revised policy is incorporated by reference into Army Regulation (AR) 27-10 through paragraph 6-1, AR 27-10.

2. Effective immediately, all detailing authorities in TDS will detail counsel in writing using DCAP Form 6. This form will be used when the detailing authority details himself or herself to a case. Also effective immediately, all defense counsel detailed to represent Soldiers at courts-martial will advise their clients of the limits of the scope of the representation *before* entering into an attorney-client relationship using DCAP Form 7a. In addition, effective immediately, all defense counsel serving in the CENTCOM Area of Responsibility (AOR), all defense counsel who are within six months of deploying to the CENTCOM AOR, all defense counsel in TDS who are within six months of leaving TDS, and all reserve component defense counsel performing duties at active duty TDS field offices will advise their clients not facing court-martial charges of the limits of the scope of the representation *before* entering into an attorney-client relationship using DCAP Form 7b-7g. All defense counsel are expected to advise their clients of the scope of their representation. Counsel falling into the categories described above will document this advice using the DCAP Forms. Supervising attorneys will ensure that this policy is being followed.

3. Counsel chosen to represent Soldiers facing court-martial charges must be chosen with care. Detailed counsel must have sufficient time remaining in TDS to complete the representation. The initial presumption is that the detailed counsel will represent the client until the client is assigned an appellate defense counsel, unless released by the client. When the client is assigned an appellate defense counsel, the detailed counsel's detailing and attorney-client relationship end. If the client is completely acquitted at trial, the attorney-client relationship and detailing end when the client receives a copy of his or her record of trial. If the client's case will not be reviewed under Article 66, UCMJ, the attorney-client relationship and detailing generally end when the convening authority takes initial action. However, detailing authorities can extend the detailing and attorney-client relationship if necessary to assist clients with Article 69(b), UCMJ appeals. In some cases, the charges will be disposed of before initial action. In these cases, the

detailed defense counsel's detailing and attorney-client relationship will end when the charges are dismissed. If the charges are re-preferred, the same counsel can be re-detailed to the case or a new attorney can be detailed to the case. If a new attorney is detailed, the client can submit a request for individual military counsel (IMC) to have the previous attorney represent him. If a detailed defense counsel leaves TDS before the completion of the case, the detailed counsel's detailing ends, except as provided in paragraph 10. The client must understand this prior to detailing and forming the attorney-client relationship. If the client does not wish to release the counsel, the client may submit a request for IMC. Counsel will explain the scope of his or her representation using DCAP Form 7a before entering into an attorney-client relationship.

4. Counsel advising Soldiers seeking a general military justice consultation or suspect rights advisement may enter into an attorney-client relationship with the Soldier after explaining the scope of his or her representation to the Soldier. All active duty defense counsel in the CENTCOM AOR, within six months of deploying to the CENTCOM AOR, or within six months of leaving TDS, and all reserve component defense counsel performing duties at active duty TDS field offices, will memorialize this advice using DCAP Form 7b. In this situation, the attorney-client relationship will end when the consultation is over. If charges are later preferred against the Soldier based on the subject matter of the consultation, the original attorney should be detailed to represent the Soldier, assuming the detailed counsel has sufficient time remaining in TDS to complete the representation. If a Soldier returns seeking more advice or because she or he is facing nonjudicial punishment or administrative separation for the subject matter of the original consultation, the original attorney should advise the Soldier whenever possible.

5. Counsel advising Soldiers facing discipline under nonjudicial procedures may enter into an attorney-client relationship with the Soldier after explaining the scope of his or her representation to the Soldier. All active duty defense counsel in the CENTCOM AOR, within six months of deploying to the CENTCOM AOR, or within six months of leaving TDS, and all reserve component defense counsel performing duties at active duty TDS field offices, will memorialize this advice using DCAP Form 7c. When representing a Soldier facing nonjudicial punishment, the attorney-client relationship will end when nonjudicial procedures are terminated without punishment, punishment is imposed and the Soldier elects not to appeal, when appellate review is complete, or when the counsel leaves TDS. If punishment is imposed but suspended, the attorney-client relationship will continue until the end of the suspension period or until the counsel leaves TDS.

6. Counsel advising Soldiers facing administrative separation may enter into an attorney-client relationship with the Soldier after explaining the scope of his or her representation to the Soldier. All active duty defense counsel in the CENTCOM AOR, within six months of deploying to the

CENTCOM AOR, or within six months of leaving TDS, and all reserve component defense counsel performing duties at active duty TDS field offices, will memorialize this advice using DCAP Form 7d. When representing a Soldier facing administrative separation, the attorney-client relationship will end when the separation action is terminated without separation, the separation action is complete, or the counsel leaves TDS.

7. Defense counsel may be detailed for the limited purpose of representing a Soldier being placed in pretrial confinement. In this situation, the attorney-client relationship ends when a detailing authority details a new defense counsel to represent the accused at trial. Counsel advising Soldiers for the limited purpose of the pretrial confinement hearing may enter into an attorney-client relationship with the Soldier after explaining the scope of his or her representation to the Soldier. All active duty defense counsel in the CENTCOM AOR, within six months of deploying to the CENTCOM AOR, or within six months of leaving TDS, and all reserve component defense counsel performing duties at active duty TDS field offices, will memorialize this advice using DCAP Form 7e.

8. Detailed defense counsel may seek advice from another TDS attorney. If a detailed defense counsel does so outside the presence of the client, the non-detailed attorney can assist the detailed counsel without forming an attorney-client relationship and the conversation is protected by client confidentiality. If a detailed counsel seeks advice from another TDS attorney and the client is present, the non-detailed attorney might form an attorney-client relationship as a result of his assistance. The non-detailed attorney may form a limited attorney-client relationship under these circumstances after advising the client of the limits of his representation. All active duty defense counsel in the CENTCOM AOR, within six months of deploying to the CENTCOM AOR, or within six months of leaving TDS, and all reserve component defense counsel performing duties at active duty TDS field offices, will memorialize this advice using DCAP Form 7f. The non-detailed attorney is not automatically detailed to the case because of the representation and will inform the Soldier that the non-detailed attorney will not represent the Soldier at trial.

9. Counsel advising Soldiers seeking advice on matters not already covered by another notice of representation may enter into an attorney-client relationship with the Soldier after explaining the scope of his or her representation to the Soldier. All active duty defense counsel in the CENTCOM AOR, within six months of deploying to the CENTCOM AOR, or within six months of leaving TDS, and all reserve component defense counsel performing duties at active duty TDS field offices, will memorialize this advice using DCAP Form 7g. In these cases, the attorney-client relationship will end when the action is complete, the consultation is complete, or when the counsel leaves TDS.

10. Detailing authorities can grant exceptions to this policy and extend the scope of the attorney-client relationships described in this document if it is in the client's best interest to do so. For example, if a trial defense attorney counseling a Soldier during suspect rights counseling deems it advantageous to the client's interests to inform investigators or prosecutors that the defense counsel represents the client in an effort to reduce the likelihood that the client will be reapproached for interrogation, the defense counsel should contact the detailing authority. (See DCAP Sends 6-2, Advising the Client to Remain Silent for an example of how this may arise.) If the detailing authority agrees that expanded representation would serve the client's interests, the detailing authority may expand the scope of representation. Before doing so, however, the detailing authority will consider whether it is wise for the requesting defense counsel to continue to represent the client given the amount of time the requesting defense counsel has remaining in TDS and the likely duration of the representation. If the requesting attorney does not have sufficient time in TDS to see the representation to completion, the detailing authority may assign a different defense counsel who does. This defense counsel may form an attorney-client relationship sufficient to protect the client's interests. Counsel will use DCAP Form 7g, appropriately tailored, to explain the scope of the attorney-client relationship to the client.

11. The phrase "when the counsel leaves TDS" includes reassignment to a position outside of TDS, the demobilization of a defense counsel, and the release of counsel from active duty. This phrase does not include periods of transition leave. Regional Defense Counsel may approve the continuation of the detailing and the attorney-client relationship when the detailed defense counsel is reassigned to a position outside of TDS but remains on active duty, if the client's court-martial has been adjourned and all that remains is post-trial processing.

Pete M. Cullen

PETER M. CULLEN
COL, JA
Chief, Trial Defense Service

8 Encls
1. DCAP Form 6
2. DCAP Form 7a
3. DCAP Form 7b
4. DCAP Form 7c
5. DCAP Form 7d
6. DCAP Form 7e
7. DCAP Form 7f
8. DCAP Form 7g

DETAIL AND RELEASE OF MILITARY DEFENSE COUNSEL

I. Detailing Order:

Under the provisions of Army Regulation 27-10, paragraph 6-9, and the U.S. Army Trial Defense Service SOP, paragraph 3-7, the following Trial Defense Counsel is detailed for the client and proceeding indicated:

Client:
Unit:
Known conflicts / companion cases:
Attorney:
Effective Date:

Detailed counsel is qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice.

_____ Date:

___, JA
(Regional)(Senior) Defense Counsel

II. Release of Defense Counsel:

I, _____, the accused in a court-martial now pending, hereby release (CPT)(MAJ) _____ from representation as my detailed Trial Defense Counsel. I understand that as a soldier, I have the right to be represented by detailed military defense counsel, and that (CPT)(MAJ) _____ has been detailed as my military defense counsel. However, with full knowledge of my right to retain the services of my detailed military defense counsel, I freely make the following decisions:

_____ I release (CPT)(MAJ) _____ as my detailed military defense counsel for the purposes of trial and post-trial matters.

_____ I release (CPT)(MAJ) _____ as my detailed military defense counsel for the purposes of post-trial matters only.

_____ Date:

___, USA
Accused

Scope of Representation (Court-Martial Clients)

1. I am (Rank) (Name). I am an attorney, and I have been detailed to represent you. I have been certified to represent Soldiers at special and general courts-martial. This form explains the scope of our attorney-client relationship and client confidentiality after the end of the relationship.

2. I expect I will represent you during all phases of the court-martial process, including pre-trial proceedings, trial, and post-trial processing. Our attorney-client relationship will terminate when the convening authority takes initial action if your case will not be reviewed by our appellate courts, or when you are assigned appellate defense counsel if your case will be reviewed by our appellate courts.

3. Additionally, certain things could happen before initial action that will terminate our attorney-client relationship before the convening authority takes initial action. Some of them are:

a. Charges are disposed of before initial action;

b. I am reassigned outside TDS, demobilize or otherwise leave active duty before the completion of the case;

c. You release me from representing you;

d. A conflict of interest develops; or

e. You make a request for individual military counsel and it is approved.

4. If you are completely acquitted of all charges and specifications, our attorney-client relationship will end when you receive your copy of the record of trial.

5. After our attorney-client relationship is terminated, I will continue to have a duty to keep confidential the information I have learned during my representation of you.

NAME
RANK, JA
Defense Counsel

I understand and agree with the scope of representation described in this form.

NAME
RANK, USA
Accused

Scope of Representation (Suspect Right Clients)

1. I am (Rank) (Name). I am an attorney, and I will answer your questions and give you advice as necessary. We will form an attorney-client relationship, so everything you tell me will remain confidential. However, in some extraordinary circumstances, I may be able or required to disclose confidential communications.

2. Our attorney-client relationship will be terminated when this consultation ends. If some adverse action arises or if you have additional questions later, you should return to the Trial Defense Service and an attorney will help you. However, it may be a different attorney.

3. After our attorney-client relationship is terminated, I will continue to have a duty to keep confidential the information I have learned during the representation.

NAME
RANK, JA
Defense Counsel

I understand and agree with the scope of representation described in this form.

NAME
RANK, USA
Accused

Scope of Representation (Nonjudicial Punishment Clients)

1. I am (Rank) (Name), and I am an attorney. I am happy to answer your legal questions and give you advice as necessary. Our communications are protected by the attorney-client relationship, so everything you tell me will remain confidential. However, in some extraordinary circumstances, I may be able or required to disclose confidential communications.

2. Our attorney-client relationship will be terminated at the end of the nonjudicial punishment process or when I leave the Trial Defense Service (TDS), whichever happens first. If I leave TDS before the end of the nonjudicial punishment process, you will be assigned another attorney, if necessary. If the government takes UCMJ or adverse administrative action against you in the future for this or any other misconduct you may be accused of, I may, or may not, be the attorney assigned to represent you.

3. After our attorney-client relationship is terminated, I will continue to keep confidential the information I have learned during the representation.

NAME
RANK, JA
Defense Counsel

I understand and agree with the scope of representation described in this form.

NAME
RANK, USA
Accused

Scope of Representation (Administrative Separation Clients)

1. I am (Rank) (Name). I am an attorney. I will answer your questions and give you advice regarding your proposed administrative separation. We will form an attorney-client relationship, and our communications are protected by the attorney-client relationship. Everything you tell me will remain confidential, however, in some extraordinary circumstances, I may be able or required to disclose confidential communications.

2. Our attorney-client relationship will be terminated when the separation process is complete, to include any appeals, or when I leave the Trial Defense Service (TDS), whichever happens first. If I leave TDS prior to the completion of the separation action process, another attorney will be assigned to represent you, if necessary.

3. After our attorney-client relationship is terminated, I will continue to have a duty to keep confidential the information I have learned during the representation.

NAME
RANK, JA
Defense Counsel

I understand and agree with the scope of representation described in this form.

NAME
RANK, USA
Accused

Scope of Representation (Pretrial Confinement Clients)

1. I am (Rank) (Name). I am an attorney, and I have been detailed to represent you at your pretrial confinement hearing. Our communications are protected by the attorney-client relationship. Everything you tell me will remain confidential, however, in some extraordinary circumstances, I may be able or be required to disclose confidential communications.

2. I have been detailed to represent you only at your pretrial confinement hearing. If your case proceeds to trial, I will not represent you. A different attorney will be detailed to represent you later. Our attorney-client relationship will be terminated when the detailing authority details a new defense counsel to your case.

3. After our attorney-client relationship is terminated, I will continue to have a duty to keep confidential the information I have learned during the representation.

NAME
RANK, JA
Defense Counsel

I understand and agree with the scope of representation described in this form.

NAME
RANK, USA
Accused

Scope of Representation (Non-Detailed Counsel Giving Advice)

1. I am (Rank) (Name). I am an attorney, and I will answer your questions and give you advice as necessary. We will form an attorney-client relationship, and everything you tell me will remain confidential. However, in some extraordinary circumstances, I may be able or required to disclose confidential communications.

2. I am not detailed to represent you at trial; you should not expect me to represent you after we finish our conversation today. Our attorney-client relationship will be terminated when we finish our conversation today.

3. After our attorney-client relationship is terminated, I will continue to have a duty to keep confidential the information I have learned during this limited representation.

NAME
RANK, JA
Defense Counsel

I understand and agree with the scope of representation described in this form.

NAME
RANK, USA
Accused

Scope of Representation (General)

1. I am (Rank) (Name). I am an attorney, and I will answer your questions and give you advice as necessary. We will form an attorney-client relationship, and everything you tell me will remain confidential. However, in some extraordinary circumstances, I may be able or be required to disclose confidential communications.

2. Our attorney-client relationship will be terminated when (we finish our conversation today) (the action you are facing is completed) (when I am reassigned outside of TDS).

3. After our attorney-client relationship is terminated, I will continue to have a duty to keep confidential the information I have learned during the representation.

NAME
RANK, JA
Defense Counsel

I understand and agree with the scope of representation described in this form.

NAME
RANK, USA
Accused