

## **Chapter 9**

### **DEFENSE COUNSEL**

#### **9-1. DETAIL OF DEFENSE COUNSEL**

Every accused shall have a qualified military defense counsel detailed to the accused at government expense during every stage of the proceedings. Should the military judge approve the request of an accused to represent himself, detailed defense counsel may act as standby counsel at the direction of the military judge. Should the accused retain civilian counsel, a military defense counsel shall remain detailed to the accused.

##### *a. Chief Defense Counsel.*

1. The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the Secretary of Defense or his designee. The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the DoD.

2. The Chief Defense Counsel shall supervise all defense activities and the efforts of detailed defense counsel and other office personnel and resources pursuant to the M.C.A. and the M.M.C., ensure proper supervision and management of all personnel and resources assigned to the Military Commissions Defense Organization (MCDO), and facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A. As the supervisory attorney for the MCDO, the Chief Defense Counsel must be provided access to all classified information and other information as addressed in protective orders issued under RTMC 17-4, R.M.C. 701, or Mil. Comm. R. Evid. 505 and 506, or disclosed to or otherwise obtained by defense teams, and may attend any hearings closed under Mil. Comm. R. Evid. 505(d), 505(h), and 506(i) that a MCDO defense team is authorized to attend. In cases where a conflict of interest between or among accused precludes the Chief Defense Counsel from supervising the efforts of a detailed defense counsel, such supervisory authority may be exercised by another individual who is designated by the Chief Defense Counsel.

3. The Chief Defense Counsel shall ensure that all personnel assigned to the MCDO review and attest that they understand, and will comply with, the M.C.A., the M.M.C., this Regulation, all Supplementary Regulations and Instructions issued in accordance therewith, and the orders of the commission. Furthermore, the Chief Defense Counsel shall regulate the conduct of detailed defense counsel as deemed necessary, consistent with the aforementioned legal authorities as well as subordinate instructions and regulations. The Chief Defense Counsel also shall ensure that military counsel who remain detailed when an accused is represented by civilian counsel are familiar with the provisions and restrictions contained in MC Form 9-2, Affidavit and Agreement By Civilian Defense Counsel, and are prepared to assist civilian defense counsel in complying with that agreement.

4. The Chief Defense Counsel shall detail a judge advocate of any United States armed force, who is assigned to or performing duty with the MCDO, to perform the duties of

the detailed defense counsel as set forth in R.M.C. 502(d)(7). The Chief Defense Counsel shall also detail other personnel or, as approved by the Convening Authority, employ civilian personnel and any other personnel to provide administrative and other support services. The Chief Defense Counsel may not detail himself to perform the duties of detailed defense counsel.

5. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate or qualified civilian attorney performing duty with the MCDO, as assistant detailed defense counsel to assist in performing the duties of the detailed defense counsel.

6. *Learned Counsel.* In any case in which trial counsel makes a recommendation to the Convening Authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, the accused has the right to be represented by at least one additional counsel who is learned in applicable law relating to capital cases. *See* R.M.C. 506(b). If a charge transmitted by trial counsel to the convening authority is a charge for which the death penalty is authorized, the Convening Authority may not refer the charge as a capital offense unless the provisions regarding learned counsel in Rule 506(b) have been met. *See* R.M.C. 601(d)(2).

A. The Chief Defense Counsel shall notify the Convening Authority in writing as to whether it is practicable to detail a military or civilian attorney assigned to, or employed by, the MCDO as learned counsel in a particular case. This notice shall be made by the Chief Defense Counsel within 14 business days of receiving notice that charges be referred to a capital military commission

B. If it is practicable to detail a military or civilian attorney assigned to, or employed by, the MCDO as learned counsel, the Chief Defense Counsel shall detail such counsel within 30 business days of receiving notice that charges may be referred to a capital military commission. Once learned counsel has been detailed, the Chief Defense Counsel shall inform the Convening Authority accordingly.

C. If it is not practicable to detail an attorney assigned to, or employed by, the MCDO, the Chief Defense Counsel shall select a member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, who has the appropriate qualifications as outside learned counsel and forward a request for approval of funding for this counsel to the Convening Authority. This request for the approval of funding for outside learned counsel shall be made within 45 business days of receiving notice that charges may be referred to a capital military commission. This request shall include all the completed and executed applications, forms, and other materials as required by the government in order to qualify the selected outside learned counsel pursuant to R.M.C. 502(d)(3) and Chapter 9-5 of this Regulation, including:

i. A memorandum from the Chief Defense Counsel indicating that the outside counsel has been properly admitted as a member of the pool of civilian defense counsel (if applicable) under Chapter 9-5c. of this Regulation, or is eligible for the same, and that the outside counsel has executed and submitted the Affidavit and Agreement (Figure 9.2) and the Non-disclosure Agreement (Figure 9.3) required for civilian defense counsel; and

ii. Proof that the outside civilian counsel possesses a current security clearance at the level required for the case to which he is to be assigned, or a statement by the Chief Defense Counsel that the outside civilian counsel has executed and submitted an application for Security Clearance, SF-86, and other necessary documents. If after selected learned counsel has complied with all the requirements set forth by the government, and the government determines the selected outside learned counsel is not eligible for access to information classified at the level necessary for the trial of the case to which such counsel is to be assigned, the Chief Defense Counsel shall, within 45 business days of receiving notice of such ineligibility of the selected outside learned counsel, select another member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, as outside learned counsel, and shall comply with the rules set forth in this Regulation pertaining to selection of same.

D. The Convening Authority shall approve the Chief Defense Counsel's reasonable request for the appointment of qualified outside learned counsel.

E. If the Chief Defense Counsel is unable to forward this request for the approval of funding for outside learned counsel within 45 business days of receiving notice that charges may be referred to a capital military commission, the Chief Defense Counsel shall make a written request for additional time, and shall state the reasons for making the request. The Convening Authority shall grant the Chief Defense Counsel's reasonable request for additional time, and may recommend up to three outside learned counsel to the Chief Defense Counsel for consideration. The Chief Defense Counsel may consider these candidates as well as any others he or she may have identified.

F. The Convening Authority is authorized to identify and appoint outside learned counsel (regardless of whether they are yet members of the civilian defense pool), to include military counsel, if the Chief Defense Counsel fails, within 45 business days of receiving notice that charges may be referred to a capital military commission, to submit a written request for additional time, if the Chief Defense Counsel's request for additional time is unreasonable, or if the Chief Defense Counsel fails to identify and appoint outside learned counsel within the period of time granted by the Convening Authority in response to the Chief Defense Counsel's request for additional time.

G. Outside learned counsel shall be retained and compensated in a manner consistent with the procedures employed by federal courts under 18 U.S.C. §§ 3005 and 3006A. The applicable hourly rate for the appointment of qualified outside learned counsel shall be the maximum hourly rate for federal capital prosecutions, as provided by the Administrative Office of the United States Courts. Consistent with practice in federal courts, the military judge shall review payment for reasonable requests for attorney's fees and expenses submitted by outside learned counsel, keeping in mind the complexity of capital cases and validate the request for the Convening Authority to make the reasonable payment of those funds. For representation relating to an appeal in the U.S. Court of Military Commission Review, the Chief Judge of that Court shall review and validate the payment of all reasonable fee and expense requests. Fee and expense requests shall be submitted to the military judge in a manner consistent with 18 U.S.C. § 3006A(d)(5) and

each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and the fees and expenses incurred in the performance of representation services. If outside learned counsel request payment prior to detailing of a military judge, payment for reasonable requests for attorney's fees and expenses shall be approved by the Convening Authority.

H. Outside learned counsel shall have access to MCDO Defense paralegals, interpreters, analysts, investigators, supplies, and other resources. Outside learned counsel shall not be entitled to reimbursement for expenses associated with the hiring of interpreters, analysts, or investigators.

I. When appointed outside learned counsel is approved for travel by the Chief Defense Counsel, the Office of the Convening Authority shall issue invitational travel orders.

J. Consistent with 18 U.S.C. § 3006A(d)(4), information regarding validated requests for payment of services to outside learned counsel shall be made available to the public. The military commission shall redact any detailed information on the payment voucher provided by defense counsel to justify the expense to the military commission and make public only the amounts approved for payment to the outside learned counsel. Upon completion of the trial, the military commission shall, consistent with 18 U.S.C. § 3006A(d)(4)(C), make available an unredacted copy of the expense voucher.

K. It is the responsibility of the Chief Defense Counsel to ensure that outside learned counsel are adhering to the provisions of the M.C.A., M.M.C and this Regulation.

7. The Chief Defense Counsel may structure the MCDO to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to defense counsel.

8. The Chief Defense Counsel shall take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including, where applicable, classified information) to fulfill this responsibility.

9. The Chief Defense Counsel shall take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all defense counsel (detailed and civilian), including review of information provided pursuant to subsection (8), and take appropriate measures to ensure that defense counsel remain unencumbered by conflicts of interest. See also Chapter 10.

10. The Chief Defense Counsel shall ensure that when an accused proceeds *pro se* a detailed defense counsel is assigned to the case. Detailed defense counsel may act as standby counsel at the direction of the military judge

11. The Chief Defense Counsel shall administer all requests for individual military defense counsel requested in accordance with Chapter 9-2 of this chapter. The Chief Defense Counsel shall determine the availability of such counsel in accordance with 10 U.S.C. § 949a(b)(2)(C)(i), R.M.C. 506(c), and this Regulation.

12. The Chief Defense Counsel shall administer the civilian defense counsel pool, screening all requests for qualification and making qualification determinations and recommendations in accordance with Chapter 9-5(b), and ensuring appropriate notification to an accused of civilian attorneys available to represent an accused before a military commission.

13. The Chief Defense Counsel shall administer the selection of learned counsel, screening all requests for qualification and determining which military and civilian counsel assigned to, or employed by, the MCDO and members of the civilian defense pool are qualified to serve as learned counsel pursuant to the standards set out in Chapters 9-1(b)(1)(C) and 9-5. The Convening Authority shall determine the compensation of learned counsel selected from the civilian defense pool in a manner consistent with that employed by federal courts under 18 U.S.C. § 3005 and § 3006A.

14. The Chief Defense Counsel shall ensure that all detailed defense counsel and civilian defense counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15. The Chief Defense Counsel shall ensure that all personnel under the supervision of the MCDO possess the appropriate security clearances.

16. The Chief Defense Counsel may appoint one or more deputies to assist him in his duties as Chief Defense Counsel.

17. The Chief Defense Counsel shall establish, within the MCDO, a section dedicated to providing appellate representation for the accused on appeal, to include appellate representation by counsel learned in the law applicable to capital cases for cases in which the appellant has been sentenced to death, and shall establish procedures for the appointment of appellate counsel to represent an accused before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court. Appellate defense counsel shall meet the requirements for counsel appearing before military commissions.

b. *Detailed defense counsel.*

1. *Qualifications of detailed defense counsel.*

A. Ordinarily, only persons certified under 10 U.S.C. § 827(b) (Article 27(b) of the U.C.M.J.) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel in a military commission. However, a civilian who is a member of the bar

of a Federal court or the highest court of a State or the District of Columbia and is otherwise qualified by means of training and has attained the requisite security clearance pursuant to regulation issued under DoD DIRECTIVE 5200.R-2 may also serve as defense counsel. Both detailed defense counsel and civilian defense counsel must be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation, and have signed the appropriate non-disclosure agreement(s) (Form 4414, SF 312, and/or DD Form 1847, *see* Figure 9.3), and an agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission pertaining to conduct during the course of the proceedings.

B. The Chief Defense Counsel may detail, in addition to military defense counsel, a DoD civilian attorney performing duties with the MCDO, as an assistant defense counsel.

C. A counsel learned in the applicable law relating to capital cases is an attorney (i) who is a military or civilian counsel assigned to, or employed by, the MCDO, or a civilian counsel qualified for membership in the civilian defense pool pursuant to Chapter 9-5; and (ii) whose background, knowledge and/or experience would enable him or her to properly represent an accused in a capital case, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation. A counsel who meets the requirements of 18 U.S.C. § 3005 qualifies as learned counsel under this section.

D. Each prospective detailed defense counsel shall identify to the Chief Defense Counsel each jurisdiction wherein the prospective detailed defense counsel is licensed to practice law. Consistent with R.M.C. 109(b)(3)(D), the Chief Defense Counsel will review the licensing bar association rules of each prospective detailed defense counsel, and verify that such bar association rules cannot reasonably be foreseen as an impediment to that counsel's adherence to the rules of professional responsibility expressly applicable to trials by military commission under Chapter 10. Only after this review is a candidate eligible for service in the MCDO.

E. Detailed defense counsel must be determined to be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation; and have signed a Non-Disclosure Agreement (Form 4414) and an agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission for conduct during the course of the proceedings.

## *2. Duties of detailed defense counsel.*

A. Express duties of the detailed defense counsel are articulated in 10 U.S.C. §949c(b), and R.M.C. 502(d)(7) Discussion. The detailed defense counsel shall defend the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused.

B. Detailed defense counsel shall comply with the procedures accorded the accused pursuant to 10 U.S.C. §§ 948a – 948d, the M.M.C. and this Regulation.

C. Detailed defense counsel shall serve as standby counsel should the military judge approve an accused's request to represent himself *pro se*. Detailed defense counsel shall serve as associate counsel, should the accused retain civilian counsel of his own choosing under Chapter 9-5 of this Regulation.

D. Detailed defense counsel shall have primary responsibility to prevent any conflicts of interest related to the handling of the cases to which he or she is detailed.

E. Detailed defense counsel shall fulfill all responsibilities set forth in the M.C.A., M.M.C., this Regulation, and those assigned by the Chief Defense Counsel.

F. At all times, detailed defense counsel must strictly comply with 10 U.S.C. §§ 949p-1 – 949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505, and Chapter 18 of this Regulation, to ensure that they do not disclose classified and protected information to any person not authorized to receive such information.

G. All requests for the declassification of classified materials intended to be used by the Defense in a military commission shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any non-DoD federal departments or agencies. *See* 10 U.S.C. § 949p-1(c). Requests for further declassification of classified materials, or for reconsideration of a declassification decision, shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any pertinent non-DoD federal department or agency. *See* 10 U.S.C. § 949p-1(c).

## **9-2. REQUEST FOR INDIVIDUAL MILITARY COUNSEL**

An accused may be represented by a military counsel of his own selection, if reasonably available. *See* 10 U.S.C. § 949a(b)(2)(C)(i).

a. An accused must request, either through detailed defense counsel, on the record, or directly to the Chief Defense Counsel, the desire to be represented by a specific military counsel. To be a valid request, the accused must provide the name of a specific military attorney at the time of the request, and acknowledge his understanding of the requirements for requests for individual military counsel (IMC).

b. Once in receipt of a valid request from an accused for IMC counsel, the Chief Defense Counsel shall determine if the requested military attorney is reasonably available.

1. A military attorney is not reasonably available unless assigned to the Office of Military Commissions, MCDO, at the time of the request. If the requested military attorney

is not assigned to that office, the Chief Defense Counsel shall deny the request because the requested military counsel is not reasonably available.

2. If the requested military counsel is assigned to the MCDO at the time of the request, the Chief Defense Counsel shall, in his sole discretion, make an administrative determination whether the requested military counsel is reasonably available.

c. When a request for IMC is denied, the Chief Defense Counsel shall notify the accused directly of his decision in writing. The notification shall be made a part of the record of trial.

d. When a request for IMC is granted, the Chief Defense Counsel shall detail the requested counsel and the accused shall be informed of the decision. An accused's request for IMC shall be considered a request to release the detailed defense counsel from further representation. As such, the approval of a request for IMC shall automatically constitute the removal of the detailed defense counsel from the case effective upon the detailing of the IMC. However, if requested by the accused, with the consent of the IMC, the Chief Defense Counsel, in his sole discretion, may allow the detailed defense counsel to continue to represent the accused.

### **9-3. RATINGS AND SUPERVISION OF DEFENSE COUNSEL**

a. The Chief Defense Counsel shall supervise all defense counsel and other personnel assigned to the MCDO.

b. The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with defense counsel and other personnel under the supervision of the Chief Defense Counsel.

c. Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with the M.C.A. and M.M.C. shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom an individual "reports" as set forth below, shall be deemed to be such individual's supervisor and shall, to the extent possible fulfill performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's military service performance evaluation regulations.

1. Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the DoD.

2. Deputy Chief Defense Counsel: The Principal Deputy Chief Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the DoD. Subordinate Deputy Chief Defense Counsel shall report to the Principal Deputy Chief Defense Counsel, and then to the Chief Defense Counsel.



3. Detailed defense counsel: Detailed defense counsel shall report either to the Deputy Chief Defense Counsel or to the Chief Defense Counsel.

4. Other Personnel: All other defense personnel such as paralegals, interpreters, security personnel, and clerks detailed or employed by the MCDO shall report to the Chief Defense Counsel or his or her designee.

#### **9-4. LOGISTICAL SUPPORT OF DEFENSE COUNSEL**

The Chief Defense Counsel shall inform the Convening Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the MCDO. The Chief Defense Counsel shall provide the Deputy General Counsel (Personnel and Health Policy) of the DoD an information copy of such requests.

#### **9-5. CIVILIAN DEFENSE COUNSEL**

##### *a. Accused's option for civilian counsel.*

1. Pursuant to 10 U.S.C. § 949c(b) and R.M.C. 502(d)(3), the accused may retain the services of a qualified civilian attorney of the accused's own choosing and at no expense to the United States Government.

2. At all times, civilian defense counsel must comply with 10 U.S.C. §§ 949p-1–949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505, and Chapter 18 of this Regulation, to ensure that they do not disclose classified, protected, or privileged information, to any person not authorized to receive such information.

##### *b. Qualifications of civilian defense counsel.*

1. A qualified civilian defense counsel is an attorney who: (i) is a member of the bar of a Federal court or of the bar of the highest court of a State, the District of Columbia, or U.S. possession; (ii) is a United States citizen; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation; and (v) has signed the appropriate non-disclosure agreement(s) (Form 4414, SF 312, and/or DD Form 1847, *see* Figure 9.3) Non-Disclosure Agreement Form 4414, Figure 9.3 and (vi) has signed an Affidavit and Agreement by Civilian Defense Counsel, MC Form 9-2 (Figure 9.2).

2. Representation by civilian defense counsel does not relieve detailed defense counsel of the duties specified in 10 U.S.C. § 949c(b), R.M.C. 502(d)(7) and this Regulation. The detailed defense counsel shall continue to serve as associate counsel under R.M.C. 502(d)(2) unless formally excused pursuant to R.M.C. 505(d)(2).

c. *Qualification pool for civilian defense counsel.* Civilian attorneys may be qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis based upon a specific request by an accused.

1. Applications Procedures

A. An attorney seeking qualification as a member of the pool of available civilian defense counsel shall submit an application, by letter, to:

Office of the General Counsel, Department of Defense  
(Attn: Chief Defense Counsel, Office of the Chief Defense Counsel)  
1600 Defense Pentagon  
Washington, DC 20301-1600

B. Applications will be comprised of the letter requesting qualification for membership, together with the following:

i. Applicants will provide proof of citizenship (*e.g.*, certified true copy of passport, birth certificate, or certificate of naturalization).

ii. Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

iii. An applicant will submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application. Further, applicants shall submit a properly executed Authorization for Release of Information [Form 9-1], authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from

each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

iv. Civilian defense counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority. Civilian defense counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with regulation issued pursuant to DoD Directive 5200.2-R, "Personnel Security Program" and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this Regulation and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the civilian defense counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of civilian defense counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the civilian defense counsel's services are likely to be sought.

v. Civilian defense counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission for conduct during the course of proceedings. This requirement shall be satisfied by the execution of the Affidavit and Agreement by Civilian Defense Counsel [Form 9-2]. Form 9-2 shall be executed and agreed to without change (*i.e.*, no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. Form 9-2 shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application. Applications mailed in a franked U.S. Government envelope will not be considered. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction

### C. Application review.

1. The Chief Defense Counsel or his designee shall review all civilian defense counsel pool applications for compliance with 10 U.S.C. § 949c(b), R.M.C. 502(d)(3) and this Regulation. The Chief Defense Counsel shall consider all applicants for qualifications as members of the pool of available civilian defense counsel without regard to race, religion, color, sex, age, national origin, or non-disqualifying physical or mental disability. The Chief Defense Counsel may reject any civilian defense counsel application that is incomplete or otherwise fails to comply with 10 U.S.C. § 949c(b), R.M.C. 502(d)(3) and this Regulation.

2. Subject to review by the Deputy General Counsel (Personnel and Health Policy), the Chief Defense Counsel shall determine the number of qualified attorneys that

shall constitute the pool of available civilian defense counsel. Subject to review by the Deputy General Counsel (Personnel and Health Policy), the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the civilian defense counsel applicant. The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified civilian defense counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified civilian defense counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

3. The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the pool of available civilian defense counsel on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the civilian counsel's application, or material violation of obligations of the civilian defense counsel, or other good cause, or he or she may refer the matter to the Convening Authority or the Deputy General Counsel (Personnel and Health Policy), who may revoke or suspend the qualification of any member of the civilian defense counsel pool.

#### **9-6. CONSULTANTS**

a. Pursuant to R.M.C. 506(e), an accused before a military commission may have present and seated at the counsel table, for purpose of consultation, persons who are not qualified to serve as counsel under R.M.C. 502. These consultants may or may not be United States citizens.

b. The detailed defense counsel shall provide written notice to the Convening Authority of any request by the accused to have a consultant present at any stage of the proceedings. The notice shall include the name, address and, if known, the phone number and email address of the requested consultant. If the consultant is approved by the Convening Authority or military judge, the Convening Authority will coordinate the travel arrangements necessary to bring the consultant to Guantanamo Bay or other designated location for the proceedings.

c. Any consultant authorized by the Convening Authority or military judge to attend commission proceedings during which classified material or information is presented or discussed, or to review classified material or information must have the requisite security clearance required by regulation issued pursuant to DoD 5200.2-R, "Personnel Security Program," and have signed a non-disclosure agreement, and an agreement to comply with all applicable regulations, including any rules of court for conduct during the course of the proceedings. Existing agreements with other countries pertaining to the recognition of security clearances for the purposes of military commissions apply. Subject to the discretion of the military judge, these consultants may be removed from the courtroom for any in camera presentation or proceeding to which only the parties are permitted to attend. A consultant shall be removed from the courtroom at any other point when material will be

considered that is classified at a level higher than that of the security clearance of the consultant.

d. For any person, including consultants, access to and communication with the accused is, at all times, contingent upon the individual seeking access having obtained the requisite security clearance as determined by the appropriate classification authority.

Access for consultants may be granted during an unclassified commission proceeding at the discretion of the Convening Authority or the military judge. Outside the courtroom, the time, place and procedures for access and communication with the accused is subject to the discretion of the custodian of the accused. For the purposes of this paragraph, commission proceedings are deemed to have begun at the time charges are sworn.

e. Attorneys and legal consultants not qualified to serve as counsel under R.M.C. 502 are not entitled to compensation at government expense.

#### **9-7. STATEMENTS TO THE MEDIA**

Personnel assigned to the MCDO, as well as all members of the civilian defense counsel pool and associated personnel, may communicate with news media representatives regarding cases and other matters related to military commissions. Comments to the media and in other public forums by both civilian and detailed defense counsel are subject to the Rules of Professional Conduct of their licensing jurisdictions and of the Judge Advocates General of their respective military departments, protective orders issued by the Convening Authority, and any rulings or orders from the military judge of a military commission.