



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

## **RESEARCH APPENDIX -** **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 04/16/2008 (Per: RPN/RLR)



 Appendix A ... Part 02 of 16

 The 2007 drafting file for LRB-2341/1

has been transferred to the drafting file for

**2007 LRB-0517**

**(AB 400 ... Wisconsin Act 200)**

 The attached 2007 draft was incorporated into the new 2007 draft listed above. For research purposes, this cover sheet and the attached drafting file were added, as an appendix, to the new 2007 drafting file. This section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

(B)

SECTION 1. Chapter 322 of the statutes is created to read:

CHAPTER 322  
CODE OF MILITARY JUSTICE  
SUBCHAPTER I. GENERAL PROVISIONS

322.01 Article 1. Definitions

- ✓ (a) In this Code, unless the context otherwise requires:
  - ✓ (1) "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.
  - ✓ (2) "Cadet," "candidate," or "midshipman" means a person who is enrolled in or attending a state military academy, a regional training institute, or any other formal education program for the purpose of becoming a commissioned officer in the state military forces.
  - ✓ (3) "Classified information" means as follows:
    - ✓ (A) Any information or material that has been determined by an official of the United States or any state subject to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national or state security.
    - ✓ (B) Any restricted data, as defined in section 11(y) of the Atomic Energy Act of 1954, 42 U.S.C. § 2014(y).
  - ✓ (4) "Code" means this Chapter.
  - ✓ (5) "Commanding officer" includes only commissioned officers of the state military forces and shall include officers in charge only when administering nonjudicial punishment under article 15 of this code. The term 'commander' has the same meaning as 'commanding officer' unless the context otherwise requires.
  - ✓ (6) "Convening authority" includes, in addition to the person who convened the court, a commissioned officer commanding for the time being or a successor in command to the convening authority.
  - ✓ (7) "Day" means calendar day and is not synonymous with the term "unit training assembly." Any punishment authorized by this code which is measured in terms of days shall, when served in a status other than annual field training, be construed to mean succeeding duty days.
  - ✓ (8) "Duty status other than state active duty" means any other type of duty including Unit Training Assemblies/drills but excludes duty not in federal service and not full-time duty in the active service of the state; under an order issued by authority of law and includes travel to and from duty.
  - ✓ (9) "Enemy" includes organized forces of the enemy in time of war, any hostile body that U.S. or state forces may be opposing, such as a rebellious mob or band of renegades, and includes civilians as well as members of military organizations. Enemy is not restricted to the enemy government or its armed forces.
  - ✓ (10) "Enlisted member" means a person in an enlisted grade.
  - ✓ (11) "Forfeiture" means a permanent loss of entitlement to pay or allowances and any forfeiture under this code shall be exempt from Article X, Section 2 of the Wisconsin

Constitution.

✓(12) "Judge advocate" means a commissioned officer of the organized state military forces who is a member in good standing of the bar of the highest court of a State, and is any of the following:

✓(A) Certified or designated as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy, or the Marine Corps or designated as a law specialist as an officer of the Coast Guard, or a reserve component of one of these.

✓(B) Certified as a non-federally recognized judge advocate, under regulations promulgated subject to this provision, by the senior judge advocate of the commander of the force in the state military forces of which the accused is a member, as competent to perform military justice duties required by this Code. If there is no judge advocate available, then certification may be made by the senior judge advocate of the commander of another force in the state military forces, as the convening authority directs.

✓(13) "Military court" means a court-martial or a court of inquiry under article 135.

✓(14) "Military judge" means an official of a general or special court-martial detailed in accordance with article 26 of this code.

✓(15) "Military offenses" means those offenses prescribed under articles 77 (Principals), 78 (Accessory after the fact), 80 (Attempts), 81 (Conspiracy), 82 (Solicitation), 83 (Fraudulent enlistment, appointment, or separation), 84 (Unlawful enlistment, appointment, or separation), 85 (Desertion), 86 (Absence without leave), 87 (Missing movement), 88 (Contempt toward officials), 89 (Disrespect towards superior commissioned officer), 90 (Assaulting or willfully disobeying superior commissioned officer), 91 (Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer), 92 (Failure to obey order or regulation), 93 (Cruelty and maltreatment), 94 (Mutiny or sedition), 95 (Resistance, flight, breach of arrest, and escape), 96 (Releasing prisoner without proper authority), 97 (Unlawful detention), 98 (Noncompliance with procedural rules), 99 (Misbehavior before the enemy), 100 (Subordinate compelling surrender), 101 (Improper use of countersign), 102 (Forcing a safeguard), 103 (Captured or abandoned property), 104 (Aiding the enemy), 105 (Misconduct as prisoner), 107 (False official statements), 108 (Military property — Loss, damage, destruction, or wrongful disposition), 109 (Property other than military property — Waste, spoilage, or destruction), 110 (Improper hazarding of vessel), 111 (Drunken or reckless operation of a vehicle, aircraft, or vessel), 112 (Drunk on duty), 112a. (Wrongful use, possession, etc., of controlled substances), 113 (Misbehavior of sentinel), 114 (Dueling), 115 (Malingering), 116 (Riot or breach of peace), 117 (Provoking speeches or gestures), 120 (Rape and carnal knowledge), 121 (Larceny and wrongful appropriation), 122 (Robbery), 123 (Forgery), 124 (Maiming), 126 (Arson), 127 (Extortion), 128 (Assault), 129 (Burglary), 130 (Housebreaking), 131 (Perjury), 132 (Frauds against the government), 133 (Conduct unbecoming an officer and a gentleman), and 134 (General article) of this code.

✓(16) "National security" means the national defense and foreign relations of the United States.

✓(17) "Non-military offenses" mean offenses which are in the state's civilian penal statute and are not offenses in this Code.

- ✓(18) "Officer" means a commissioned or warrant officer.
- ✓(19) "Officer in charge" means a member of the naval militia, the Navy, the Marine Corps, or the Coast Guard as designated by appropriate authority.
- ✓(20) "Record," when used in connection with the proceedings of a court-martial, means any of the following:
  - ✓(A) An official written transcript, written summary, or other writing relating to the proceedings.
  - ✓(B) An official audiotape, videotape, digital image or file, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.
- ✓(21) "State active duty" means full-time duty in the state military forces under an order of the Governor or otherwise issued by authority of law, and paid by state funds, and includes travel to and from duty.
- ✓(22) "Senior force judge advocate" means the senior judge advocate of the commander of the same force of the state military forces as the accused and who is that commander's chief legal advisor.
- ✓(23) "State military forces" means the National Guard of the State, as defined in Chapter 321 and Title 32 U.S.C. §§ 502, 503, 904, the state defense force, the organized Naval Militia of the State, and any other military force organized under the Constitution and laws of the State, not to include the unorganized militia, state guard, or home guard, when not in a status subjecting them to exclusive jurisdiction under chapter 47 of title 10, United States Code. The unorganized militia, state defense force, state national guard, home guard or any other name of any state force that does not meet this definition nevertheless shall be part of the "state military forces" under this Code.
- ✓(24) "Superior commissioned officer" means a commissioned officer superior in rank or command.
- ✓(25) "Senior force commander" means the commander of the same force of the state military forces as the accused.
- ✓(26) "Unit training assembly" means an assembly for drill and instruction which may consist of a single ordered formation of a company, battery, squadron, or detachment, or, when authorized by the commander, a series of ordered formations of those organizations.

*Annotation to Article 1*

The definitions were updated and condensed. Some deletions were made because terms were better defined in state statutes or regulations or in active duty military regulations. The continued validity of certain definitions in the rapidly changing world of military doctrine and the evolving state of military culture and environment was a primary reason for the deletion of terms once commonly used.

(1, 5, 9, 13, 16, 17, & 24) The terms "accuser," "commanding officer," "enlisted member," "military judge," "officer," "officer in charge," and "superior commissioned officer" were adopted as defined by the UCMJ with clarifying language added. Specifically, the term "commanding officer" includes only commissioned officers of the state military forces, thus ensuring that officers exclusively in a title 10 status and without state authority cannot

convene a state court. (2) "Cadet," "candidate," and "midshipman." These terms include the concept of distinguished designation of officer candidates pursuant to 10 U.S.C. § 12209. Article 1(a)(6) and (7) of the UCMJ were combined to ensure the "cadet" term also included any state candidates in state commissioning processes or attending state academies of like nature. "Midshipman" was included since "Naval Militia" was included in the term "state military forces." Additionally, the drafters discussed whether the term midshipman should be an option for state inclusion. It is recommended that such term be included. See the comments contained in the annotation on the Naval Militia for a more complete discussion. The inclusion of the term does not affect any other part of the Model Code, but failure to include it could affect the Model Code in the future should a state activate a naval militia. It also allows for those situations wherein a midshipman assigned to another state military force is attached to a unit within the state.

(3) "Classified information." The definition was broadened by insertion of the phrase "or any state" to allow for the classification of information not only by persons in the state military forces while not in federal service but also by any state official. An example would include the State Emergency Management Agency (SEMA) and other state agencies that may classify certain information as a matter of course.

(10) "Judge advocate." The drafters combined subsections 11, 12, and 13 of article 1 of the UCMJ into the term "judge advocate." Even though the Coast Guard duty position of 'law specialist' does not require TJAG certification and does not specifically correspond by function to the national guard, the term was included to cover the situations where, by request of an accused, or by virtue of expanding homeland security and defense missions in the states, Coast Guard law specialists perform military justice duties under this Code. Exclusion of this term, on balance, is outweighed by the potential for its use. Any 'judge advocate' can, regardless of legal duty title or position, or being designated a 'staff' judge advocate, perform the military justice duties required by this Code. Thus the preface 'staff' to 'judge advocate' was eliminated as a criterion. The term 'Law Officer' pre-dates the 1968 Military Justice Act, which predominantly replaced that term with 'military judge.' 'Certification' of a judge advocate by a service TJAG is primarily an active component term. 'Designation' of a judge advocate by a service TJAG is primarily a reserve component term. Since only active duty judge advocates can be 'certified,' the distinction between 'certification' and 'designation' has no effect on competency to perform military justice duties under this Code, the normal though not necessarily exclusive performance of which under this Code will be in non-federal duty status. The first qualifying criteria to be a judge advocate thus includes those judge advocates in the active component, activated reserves or activated national guard who have been 'certified,' as well as those members of the national guard or reserves who have been 'designated' as a judge advocate (i.e. federally recognized) by a service TJAG. Because a commissioned officer member in good standing of the bar of the highest court of a State may not be certified or designated as a judge advocate by a service TJAG, but may be needed or requested to perform military justice duties under this Code, a second qualifying alternative is provided to determine competency to perform those duties. An example of such a non-federally recognized 'judge advocate' would be a civilian prosecutor newly commissioned with no prior military judge advocate experience, but who has been practicing for 10 years. An example of a person who would not be eligible to perform military justice duties under this Code would be an enlisted member of the state military forces who was an attorney and a civilian prosecutor practicing for 10 years, because being a commissioned officer is a pre-requisite to being a 'judge advocate.' Certification is best left first to the accused's force's senior judge advocate assigned to the force commander and who supervises the administration of military justice in that force, and if none, then to another force's similarly assigned, senior judge advocate as determined by the convening authority. This is because there is more likely at least one force judge advocate in each state rather than a 'state judge advocate,' and military justice is administered by a force in a state rather than by state for all forces in that state, similar to the separate active duty service TJAGs. If a state includes such entities as the 'state defense force,' 'state guard,' 'home guard' or similar entities in its definition of 'state military forces,' an attorney - officer of such organization may qualify as a 'judge advocate' and under the second alternative, may qualify to be 'certified' as competent to perform military justice duties under this Code.

(14) 'Military Offenses.' The drafters listed as 'Reserved' those articles not used in this Code but derived from the UCMJ. Use of 'Reserved' permits this Code to maintain the article numbering system corresponding to the UCMJ for those articles derived from the UCMJ and used in this Code. Thus, articles not listed in the definition of 'military offenses' are 'Reserved' in this Code. Comparison with those articles marked 'Reserved' and the UCMJ reflects the specific intent of the drafters to avoid re-writing a state's civilian penal statute. Offenses under such statutes are among the 'non-military' offenses referred to in Article 2.

(18) "Record." The term was updated to include digital images and files.

(21) "State active duty." This term is the statutory, regulatory, and fiscally correct terminology in the National Guard.

(23) "State military forces." Discussions involved the uncommon usage of this term in recent decades. In today's current military environment, the term "National Guard" generally means the Army National Guard and the Air National Guard. More detailed definitions of those components are found in titles 10 and 32, United States Code. A review of state constitutions and state statutes reveals that usage of the term "militia" is prevalent, and by statute, often divided into the "organized militia" and the "unorganized militia." See 10 U.S.C. § 311. Arizona is the only state that uses the term "National Guard" in its Constitution. See AZ Const. art. 16, § 3. North Carolina uses the term "military force." See NC Const. art. XII. West Virginia uses the term "military service." WI Const. art. IV, § 29 See WV Const. art. III, § 12. All other state constitutions uses the term "Militia." See AK Const. art. I, § 1.19; AL Const. art I, § 8, art XV, § 271; AR Const. art. 11; CA Const. art. 5; CO Const. art. II, § 8; CT Const. art. I, § 8; DE Const. art. I, § 8; FL Const. art. X, § 2; GA Const. art. I, § VI, ¶ II(2); HI Const. art. I, § 10; ID Const. art. XIV § 2; IL Const. art. XII; IN Const. art. 12; IA Const. art. VI, 1; KS Const. art. 8, § 2; KY Const. pt. 2, § 221; LA Const. art. I, § 15; ME Const. art. 7, § 4; MD Const. art. IX; MA Const. art. 18; MI Const. art. III, § 4; MN Const. art. XIII, § 9; MO Const. art. III, § 46; MS Const. art. IX, § 215; MT Const. art. VI, § 13; NE Const. art. XIII, § 1; NV Const. art. 12, § 1; NH Const. art. 16; NJ Const. art. V, § 3(1); NM Const. art. 2, § 14; NY Const. art. XII, § 1; ND Const. art. XI, § 17; OH Const. art. 9, § 1; OK Const. art. VI, § VI-6; OR Const. art. X, § 1; PA Const. art. 1, § 10; RI Const. art. 1, § 7; SC Const. art. XIII, § 1; SD Const. art. XV, § 3; TN Const. art. VIII; TX Const. art. I, § 10; UT Const. art. XV, § 2; VT Const. ch. II, § 59; VA Const. art. I, § 13; WA Const. art. X, § 2; WI Const. art. IV, § 29; WY Const. art. XVII, § 2.

The drafters discussed the adoption of the term "National Guard" in lieu of "state military forces." Both terms contain diametrically opposing terms — "National" and "State." Most members of the state national guard consider themselves members of the "National Guard." The term "state military forces" may connote fringe militia groups in the mind of the public, but most state codes currently use this term. It is intended that the members of the state National Guard, not in federal service, be subject to this code. The inclusion of other state forces other than the states' National Guard and their subjection to this Code is left to individual state determination. The term "Naval Militia" was included since it currently exists in a few states and in the current environment, defense of waterways and water sources may result in stand up of such a component in other jurisdictions. Inclusion of "Naval Militia" would make this code applicable to all additional Naval Militia units stood up in the future. In the current environment, defense of waterways and water sources may take on greater significance. The source of the term "state military forces" could not be located, statutorily or historically, but for the 1961 Uniform Commission Military Justice Act. Public Law No. 33 was an act entitled "An act to promote the efficiency of the militia and for other purposes" enacted on January 21, 1903. See 32 Stat. 778. Popularly known as the Dick Act of 1903 or the Dick Acts (Militia), it proved to be the first of several steps towards "federalization" of part of the militia as it made state militias and national guards the reserve component of the federal army. It named the "organized militia" the "National Guard," a name already adopted by most states. It was originally used in 1824 when certain New York units took the title of "National Guard" to honor Lafayette on a visit to the United States because he had once commanded the National Guard of Paris in 1789. Colonel Emmons Clark, *History of the Seventh Regiment of New York* (1890). In 1908, the Militia Dick Acts was amended. See 35 Stat. 399, Ch. 204. The drafters' purpose is the standardization of one term to represent the state military forces and elimination of potential confusion in the public arena and other military components.

#### *References and Notes:*

Captain Dennis A. York, *State Codes of Military Justice* (1958), (unpublished thesis, Judge Advocate General's School U.S. Army).

David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. Rev. 606 (1996).

Patrick Todd Mullins, Note, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 Geo. Wash. L. Rev. 328 (1988).

Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 Okla. City U. L. Rev. 191 (1996).

Chuck Dougherty, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. Marshall L. Rev. 959 (1995).

Lt. Col. Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service"*, 1994 Army Law. 35 (1994).

William S. Fields & William T. Hardy, *The Militia and the Constitution: A Legal History*, 136 Mil. L. Rev. 1 (1992).

Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919 (1988).

Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213 (1997).

John E. Theuman, Annotation, *Review by Federal Civil Courts of Court-Martial Convictions – Modern Status*, 95 A.L.R. Fed. 472 (2002)

32 U.S.C. § 101 (2003).

32 U.S.C. §§ 326 - 327 (2003).

10 U.S.C. §§ 802 - 803 (2003).

The drafters attempted to use gender neutral terms throughout the Code. However, such application was particularly strained within the punitive articles; therefore, subsection (b) was inserted to accommodate those situations.

322.02 **Article 2.** Persons subject to this code; jurisdiction

(a) Except as provided in article 3, this code applies only to members of the state military forces at all times.

(b) Subject matter jurisdiction is established if a nexus exists between an offense under this code and the state military force. Courts-martial have primary jurisdiction of military offenses as defined in article 1. A proper civilian court has primary jurisdiction of a non-military offense when an act or omission violates both this code and local criminal law, foreign or domestic. In this case, a court-martial may be initiated only after the civilian authority has declined to prosecute or dismissed the charge, provided jeopardy has not attached. Jurisdiction over attempted crimes, conspiracy crimes, solicitation, and accessory crimes must be determined by the underlying offense.

**Annotation to Article 2**

Comprehensive, inclusive language was utilized. Members of the state military forces as defined above fall under the Code at all times, 24 hours a day, 7 days a week, regardless of duty status as a result of their membership in the state military forces. Some states' military justice codes only apply while the member is in a duty status. *See, e.g.* RSMo § 40.234 (2003). The drafters' reasoning is that a member of the state military forces is under obligation of oath, and therefore, under the jurisdiction of the state during a period of service regardless of whether they are in a duty status. *See Solorio v. United States*, 483 U.S. 435 (1987). Subject matter jurisdiction is established by nexus and can occur in the following four situations: (1) The military offenses in this code apply when members of the state military forces are in a duty status; (2) Non-military offenses may apply to state military forces in a duty status if a nexus exists between the non-military offense and the state military forces; (3) The military offenses in this code apply when members of the state military forces are in a non-duty status if a nexus exists between the military offense and the state military forces and; (4) Non-military offenses may apply to state military forces in a non-duty status if a nexus exists between the non-military offense and the state military forces. Those non-military offenses with the established nexus may be prosecuted under Articles 133 (for officers) and 134 (for all members). Moreover, non-military offenses may apply to state military forces in a non-duty status if a nexus exists between the civilian offense and the state military forces.

322.03 ✓ **Article 3.** Jurisdiction to try certain personnel

(a) Each person discharged from the state military forces who is later charged with having fraudulently obtained a discharge is, subject to article 43 of this code, subject to trial by court-martial on that charge and is, after apprehension, subject to this code while in custody under the direction of the state military forces for that trial. Upon conviction of that charge that person is subject to trial by court-martial for all offenses under this code committed before the fraudulent discharge.

✓(b) No person who has deserted from the state military forces may be relieved from amenability to the jurisdiction of this code by virtue of a separation from any later period of service.

*Annotation to Article 3*

This article was adopted from the UCMJ, section 803, Art. 3(b) and (c) with clarifying language.

322.05 ✓ **Article 5.** Territorial applicability of the code

✓(a) This code has applicability in all places, provided that either the person subject to the code is in a duty status or, if not in a duty status, that there is a nexus between the act or omission constituting the offense and the efficient functioning of the state military forces; however, this grant of military jurisdiction shall neither preclude nor limit civilian jurisdiction over an offense.

✓(b) Courts-martial and courts of inquiry, as defined in article 135 of the Wisconsin Manual for Courts-Martial, may be convened and held in units of the state military forces while those units are serving outside the State with the same jurisdiction and powers as to persons subject to this code as if the proceedings were held inside the State, and offenses committed outside the State may be tried and punished either inside or outside the State.

*Annotation to Article 5*

Discussion arose on the extent of the applicability of the Code within other states. The drafters recommend that application of this Code be as far-reaching as possible. Here, military jurisdiction is based on the person and the offense, not the location. Each state is authorized to prosecute the offenses of the members of its state military forces wherever committed within the United States, thus maximizing the code's portability. In absence of agreement or regulation, each state shall prosecute its own members wherever in the United States the offenses were committed.

322.06 ✓ **Article 6.** Judge Advocates

✓(a) The senior force judge advocates in each of the state's military forces or that judge advocate's delegates shall make frequent inspections in the field in supervision of the administration of military justice in that force.

✓(b) Convening authorities shall at all times communicate directly with their judge advocates in matters relating to the administration of military justice. The judge advocate of any command is entitled to communicate directly with the judge advocate of a superior or subordinate command,

or with the State Judge Advocate.

(c) No person who has acted as member, military judge, trial counsel, defense counsel, or investigating officer, or who has been a witness, in any case may later act as a judge advocate to any reviewing authority upon the same case.

*Annotation to Article 6*

This article was modified to reflect the fact that although a staff judge advocate's position is different among the services, this Code does not differentiate. The functions of the position described can be performed by any qualified judge advocate in any branch within the state; the title is not determinative of the function. The senior force Judge Advocate must be a member in good standing of the bar of the state's highest court (unlike a judge advocate pursuant to article 1(a)(10), who is not required to be licensed in the state wherein membership is held in the state military forces) and must be a member of the state military forces. Waiver of the state bar requirement for the senior force Judge Advocate was considered by the drafters but rejected, because state licensing will lend credibility to those positions and may well be required for facilitating and processing state prosecution of offenses

**SUBCHAPTER II. APPREHENSION AND RESTRAINT**

322.07 ✓ **Article 7. Apprehension**

- ✓ (a) Apprehension is the taking of a person into custody.
- ✓ (b) Any person authorized by this code or by the Uniform Code of Military Justice, or by regulations issued under either, to apprehend persons subject to this code, any marshal of a court-martial appointed subject to the provisions of this code, and any peace officer or civil officer having authority to apprehend offenders under the laws of the United States or of a State, may do so upon probable cause that an offense has been committed and that the person apprehended committed it.
- ✓ (c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this code and to apprehend persons subject to this code.
- ✓ (d) If an offender is apprehended outside the State, the offender's return to the State must be in accordance with normal extradition procedures or by reciprocal agreement.
- ✓ (e) No person authorized by this article to apprehend persons subject to this code or the place where an offender is confined, restrained, held, or otherwise housed may require payment of any fee or charge for so receiving, apprehending, confining, restraining, holding, or otherwise housing a person except as otherwise provided by law.

*Annotation to Article 7*

This article was adopted from the UCMJ, section 807, Art. 7, with clarifying language. Because the civilian criminal justice system uses the term "probable cause," the drafters changed the term "reasonable belief" to "probable cause" to reflect the current standard usage and maintain consistency within the Code.

372.08 ✓ **Article 9. Imposition of restraint**

- ✓(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
- ✓(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of the commanding officer's command or subject to the commanding officer's authority into arrest or confinement.
- ✓(c) A commissioned officer, a warrant officer, or a civilian subject to this code or to trial there under may be ordered into arrest or confinement only by a commanding officer to whose authority the person is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order persons into arrest or confinement may not be delegated.
- ✓(d) No person may be ordered into arrest or confinement except for probable cause.
- ✓(e) This article does not limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

*Annotation to Article 9*

This article was adopted from Section 809, Art. 9 UCMJ with no substantive changes.

322.10 ✓ **Article 10. Restraint of persons charged with offenses**

✓ Any person subject to this code charged with an offense under this code may be ordered into arrest or confinement, as circumstances may require. When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform the person of the specific wrong of which the person is accused and diligent steps shall be taken to try the person or to dismiss the charges and release the person.

*Annotation to Article 10*

This article was adopted from Section 810, Art. 10, UCMJ with clarifying language. Specifically, the term "shall" was changed to "may" Because there is no mandate for an order of arrest or confinement of those charged with offenses. This also affords flexibility to not arrest or confine those charged with offenses normally tried by a summary court. The reference to summary court-martial was eliminated because the guidance need not be statutory. The term "immediate" was changed to "diligent" in order to eliminate any interpretation that the term "immediate steps" serve as a modifier to the trial or dismissal and release provisions of the article. This ensures the language was consistent and in accord with the speedy trial rules and other guidance in this Code. It was considered that some interpretations might conclude that "immediate" means "immediate" in the sense of exigency at any cost and not within the term of days prescribed by speedy trial or Article 43 of this Code.

322.11 ✓ **Article 11. Place of Confinement; Reports and receiving of prisoners**

✓(a) If a person subject to this code is confined before, during, or after trial, he or she shall be in a civilian or military confinement.

- ✓(b) No person authorized to receive prisoners subject to subsection (a) may refuse to receive or keep any prisoner committed to the person's charge by a commissioned officer of the state military forces, when the committing officer furnishes a statement, signed by the officer, of the offense charged against the prisoner, unless otherwise authorized by law.
- ✓(c) Every person authorized to receive prisoners subject to subsection (a) to whose charge a prisoner is committed shall, within 24 hours after that commitment or as soon as the person is released from guard, report to the commanding officer of the prisoner the name of the prisoner, the offense charged against the prisoner, and the name of the person who ordered or authorized the commitment.

*Annotation to Article 11*

This article is taken from section 811, Art. 11, UCMJ. This article defines confinement locations to reflect current terminology and include any federal or state confinement facility. Discussion of the place of confinement eliminated the term "guard house" because such use historically relates to the place or the length of detention. The revised definition eliminates the need to include a long list of names of confinement facilities. The language "unless authorized by law" was added to subsection (b) to ensure that supremacy clause issues do not arise. The Model Code recognizes that a federal military confinement facility may not be able to confine a member because of law and this phrase allows for refusal based on law. See also article 58.

322.12 ✓ **Article 12. Confinement with enemy prisoners prohibited**

- ✓ No member of the state military forces may be placed in confinement in immediate physical association with enemy prisoners or other foreign nationals not members of the armed forces.

*Annotation to Article 12*

This article was adopted from section 812, Art. 12, UCMJ. The state should review its constitution and statutes to determine who is an "enemy" of the state. With the probable National Guard role in Homeland Defense in mind, an "enemy" of the state may include a person within the borders of the United States who intends to inflict damage or harm to the United States or its citizens. The drafters recommend that the state be cognizant of the real possibility that any enemy of the United States will also be an enemy of the individual state. See Articles 99, 100, 104, and 105. For clarity, language was added in the remaining subsections dealing with reports of prisoners. The term "foreign national" was adopted and included to recognize those situations where legal or illegal aliens or immigrants may be confined within the same facility as a member. Although a prisoner may not be a formally designated enemy combatant, such a prisoner may be a terrorist and considered an enemy. Members of state military forces are due protection and segregation from any of these persons. Hence, the member cannot be placed in immediate physical association with either an enemy or foreign national. Compliance with the term "immediate association" should not involve punitive measures such as solitary confinement. Common sense should be used in these situations to support the interest of protection of the state military forces member.

322.13 ✓ **Article 13. Punishment prohibited before trial**

- ✓ No person, while being held for trial or awaiting a verdict, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against the person, nor shall the arrest or confinement imposed upon the person be any more rigorous than the circumstances

required to insure the person's presence, but the person may be subjected to minor punishment during that period for infractions of discipline.

*Annotation to Article 13*

This article was adopted from section 813, Art. 13 of the UCMJ with clarifying language.

372.04 ✓ **Article 14.** Delivery of offenders to civil authorities

- ✓ (a) A person subject to this code accused of an offense under this Code or a under the state's civilian penal statute may be delivered to the civil authority for trial or confinement.
- ✓ (b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for the offense shall, upon the request of competent military authority, be returned to the place of original custody for the completion of the person's sentence.

*Annotation to Article 14*

This article was adopted from the UCMJ with clarifying language. Issues surrounding funding arose with regard to apprehension. Numerous situations were identified and discussed as problematic but beyond the scope of this project. States have specific methods of funding confinement, necessitating review in conjunction with this Code. The situation involving states sharing facilities with federal military facilities as well as federal civilian facilities requires additional legal review and coordination with respective entities.

✓ **SUBCHAPTER III. NON-JUDICIAL PUNISHMENT**

322.15 ✓ **Article 15.** Commanding officer's non-judicial punishment

- ✓ (a) Under regulations as prescribed, any commanding officer, and for purposes of this article, officers-in-charge, may impose disciplinary punishments for minor offenses without the intervention of a court-martial subject to this article. The Governor, The Adjutant General, or an officer of a general or flag rank in command may delegate the powers under this article to a principal assistant who is a member of the state military forces.
- ✓ (b) Any commanding officer may impose any of the following upon enlisted members of the officer's command:
  - ✓ (1) Admonition.
  - ✓ (2) Reprimand.
  - ✓ (3) Withholding of privileges for not more than 6 months which need not be consecutive.
  - ✓ (4) Forfeiture of pay of not more than 7 days' pay.
  - ✓ (5) Fine of not more than 7 days' pay.

✓ (6) Reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction.

✓ (7) Extra duties, including fatigue or other duties, for not more than 14 days, which need not be consecutive.

✓ (8) Restriction to certain specified limits, with or without suspension from duty, for not more than 14 days, which need not be consecutive.

✓ (c) Any commanding officer of the grade of major or lieutenant commander, or above may impose any of the following upon enlisted members of the officer's command:

✓ (1) Any punishment authorized in subsections (b)(1), (2), and (3).

✓ (2) Forfeiture of not more than one-half of one month's pay per month for two months.

✓ (3) Fine of not more than one month's pay.

✓ (4) Reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades.

✓ (5) Extra duties, including fatigue or other duties, for not more than 45 days which need not be consecutive.

✓ (6) Restriction to certain specified limits, with or without suspension from duty, for not more than 60 days which need not be consecutive.

✓ (d) The Governor, The Adjutant General, an officer exercising general court-martial convening authority, or an officer of a general or flag rank in command may impose any of the following penalties:

✓ (1) Upon officers of the officer's command, any punishment authorized in subsections (c)(1), (2), (3), and (6) and arrest in quarters for not more than 30 days which need not be consecutive.

✓ (2) Upon enlisted members of the officer's command, any punishment authorized in subsection (c).

✓ (e) Whenever any of the punishments under this article are combined to run consecutively, the total length of the combined punishment cannot exceed the authorized duration of the longest punishment in the combination, and there must be an apportionment of punishments so that no single punishment in the combination exceeds its authorized length under this article.

✓ (f) The service member shall have the right to demand trial by court-martial in lieu of nonjudicial punishment, and shall have the right to consult with a judge advocate.

✓ (g) (1) The officer who imposes the punishment, or the successor in command, may, at any time, suspend, set aside, mitigate, or remit any part or amount of the punishment and restore all rights, privileges, and property affected. The officer also may do any of the following:

✓ (a) Mitigate reduction in grade to forfeiture of pay.

✓ (b) Mitigate arrest in quarters to restriction.

✓(c) Mitigate extra duties to restriction.

The mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating reduction in grade to forfeiture of pay, the amount of the forfeiture shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

✓(h) A person punished under this article who considers the punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority within 15 days after the punishment is either announced or sent to the accused, as the commander may determine. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (g) by the officer who imposed the punishment. Before acting on an appeal from a punishment, the authority that is to act on the appeal may refer the case to a judge advocate for consideration and advice.

✓(i) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial or a civilian court of competent jurisdiction for a serious crime or offense growing out of the same act or omission and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial and, when so shown, it shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

✓(j) Whenever a punishment of forfeiture of pay is imposed under this article, the forfeiture may apply to pay accruing before, on, or after the date that punishment is imposed.

✓(k) Regulations may prescribe the form of records to be kept of proceedings under this article and may prescribe that certain categories of those proceedings shall be in writing.

*Annotation to Article 15*

This provision is derived in large part from section 815, Art. 15, UCMJ but is extensively modified to incorporate practical changes.

The punishments are adopted from the UCMJ with clarifying language that excludes correctional custody, confinement on bread and water, and detention of pay. The punishments were adjusted to correlate with rank. Most states do not maintain a "correctional custody" facility, and a detention of pay is little more than a forced savings plan. Language that restricted the imposition of a fine or forfeiture with a reduction in rank simultaneously was eliminated.

The available punishments are intended to provide commanding officers maximum flexibility in achieving the purposes of non-judicial punishment. Unlike many existing state codes, but like the UCMJ, punishments are cumulative, meaning in appropriate cases, commanding officers, within the authority granted in the article, may impose more than one of them for an offense. Also, unlike many existing state codes, but like the UCMJ, reduction in grade may be more than one grade below the one held by the enlisted member at the time of the offense.

Forfeitures and fines are based on the comparable active duty pay of the accused at the grade held at the time of the offense, except when the offense was committed while the accused was on state active duty, in which case, the forfeiture or fine is based on the amount of pay the accused was entitled to for a comparable period on state active duty.

The issue of forfeiture and fine fiscal audits was discussed. Currently any forfeiture would revert back to the federal government. Innovative methods or procedures or creative fiscal law developments that would circumvent this

monetary loss to the state were beyond the scope of this project. The collection of fines is discussed in Article 142. The ability to take forfeiture from funds currently due and earned is clarified.

Punishments in terms of days or months may be either consecutive to accommodate longer duty periods or not consecutive so that the punishment may be imposed on succeeding duty days in keeping with the definition of 'day' in Article 1. (a) (7).

The UCMJ provides a right to demand trial by court-martial in all cases except for those embarked upon a vessel. Most state statutes codified similar language without modification. *See, e.g.,* A.R.S. § 26-1015; 20 Del. C § 163; Idaho Code § 46-1107; Iowa Code § 29B.14; K.S.A. § 48-2301; La. R. S. § 29:115; Minn. Stat. § 192A.085. Other states do not grant the accused any statutory rights. *See, e.g.,* A.C.A. § 12-64-301; Fla. Stat. § 250.35; O.C.G.A. § 38-2-360; HRS § 124A21; Ind. Code Ann. § 10-2-5-6; KRS § 35.070; MCL § 32.1015. The discussions highlight two separate rights of the accused: (1) the right to demand a court-martial, and (2) the separate right to counsel in a nonjudicial proceeding.

This Code provides that any judge advocate may review NJP actions at any time within the proceeding.

Any regulations prescribed for this article are pursuant to Article 36 (The Governor or The Adjutant General Prescribe Rules) and Article 140 (Delegation by the Governor). No subordinate commander may prescribe rules unless pursuant to proper delegation in accordance with the Model Code.

#### SUBCHAPTER IV. COURT-MARTIAL JURISDICTION

##### 322.16 Article 16. Courts-martial classified ✓

✓ The three kinds of courts-martial in the state military forces are as follows:

✓ (1) General courts-martial, consisting of any of the following:

✓ (A) A military judge and not less than 5 members.

✓ (B) Only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.

✓ (2) Special courts-martial, consisting of any of the following:

✓ (A) A military judge and not less than 3 members. An accused may waive twelve members and proceed to a special court-martial with not less than six members.

✓ (B) Only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in subsection (1) (B) so requests.

✓ (3) Summary courts-martial, consisting of 1 commissioned officer.

##### *Annotation to Article 16*

The types of courts-martial were adopted from Section 816, Art. 16, CMJ with clarifying language, deleting the death penalty requirements and a special court-martial without a presiding military judge. This latter court-martial option was eliminated because it is not exercised in reality and would not result in a state criminal conviction. Every state general and special court-martial will have a military judge.

##### 322.17 Article 17. Jurisdiction of courts-martial in general.

✓ Each component of the state military forces has court-martial jurisdiction over all members of the particular component who are subject to this code. Additionally, the state military forces have court-martial jurisdiction over all members subject to this code.

*Annotation to Article 17*

This provision was derived from section 817, Art. 17 UCMJ. The drafters intended that the Army and Air National Guard have jurisdiction over their members, each other's members, any member of the Naval Militia, and any member of the State Defense Force or State Guard. The Naval Militia and the State Guard Force *only* have jurisdiction over *their members* and not the Army or Air Guard members. Section (b) of the UCMJ was deleted because the drafters acknowledged that all state military forces are under the command of the state adjutant general, thus review by a different component of the state military forces as directed by the state adjutant general is appropriate. Obliteration of branch or department distinctions creates expediency and flexibility. In practice, the review will most likely be hedged within the respective branch of the state National Guard forces, but this article recognizes the future joint force structure.

322.18 ✓ **Article 18.** Jurisdiction of general courts-martial

✓ Subject to article 17, general courts-martial have jurisdiction to try persons subject to this code for any offense made punishable by this code, and may, under limitations as the Governor may prescribe, adjudge any punishment not forbidden by this code.

*Annotation to Article 18*

This court-martial was adopted from section 818, Art. 18, UCMJ with clarifying language, specifically deleting the death penalty considerations and the punishment limits. The Governor may prescribe regulations that will list the punishments applicable to the various punitive articles. See Article 56 (adopting the punishments provided in the UCMJ). Language was adopted from the UCMJ with clarifying provisions providing for flexible punishment limits that are imposed depending on the type of courts-martial.

322.19 ✓ **Article 19.** Jurisdiction of special courts-martial

✓ Subject to article 17, special courts-martial have jurisdiction to try persons subject to this code for any offense made punishable by this code, and may, under limitations as the Governor may prescribe, adjudge any punishment not forbidden by this code except dishonorable discharge, dismissal, confinement for more than one year, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year.

*Annotation to Article 19*

This court-martial was adopted from Section 819, Article 19, UCMJ with clarifying language, incorporating punishment changes previously discussed in Articles 15 and 18. Hard labor without confinement was deleted as impractical and fiscally burdensome upon the state. A record, equivalent to that of general courts-martial, is required. The record of a court-martial within a state is addressed in Articles 54, 64 and 65.

322.20 ✓ **Article 20.** Jurisdiction of summary courts-martial

- ✓ (a) Subject to article 17, summary courts-martial have jurisdiction to try persons subject to this code, except officers, cadets, candidates, and midshipmen, for any offense made punishable by this code under limitations as the Governor may prescribe.
- ✓ (b) No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if that person objects. If objection to trial by summary court-martial is made by an accused, trial by special or general court-martial may be ordered, as may be appropriate. Summary courts-martial may, under limitations as the Governor may prescribe, adjudge any punishment not forbidden by this code except dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

*Annotation to Article 20*

This article was adopted from Section 820, Art. 20, UCMJ with clarifying language.

✓ **SUBCHAPTER V. APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL**

377-77 ✓ **Article 22. Who may convene general courts-martial**

(a) General courts-martial may be convened by any of the following:

- ✓ (1) The Governor.
- ✓ (2) The Adjutant General.
- ✓ (3) The commanding general officer of any force of the state military forces.
- ✓ (4) The commanding officer of a division or a separate brigade.
- ✓ (5) The commanding officer of a separate wing.

✓ (b) If any commanding officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by a superior authority if considered desirable by the authority.

*Annotation to Article 22*

This article was adopted from the Section 822, Art. 22, UCMJ with clarifying language. 32 U.S.C. section (b) (1) authorizes the President of the United States to convene state general courts-martial of National Guard members not in Federal service, and is the only federal officer so authorized. The 2002 amended version retained the authority of POTUS to convene a state court-martial in 32 U.S.C. 327 (b) (1). Cognizant that 32 U.S.C. § 327(b) (1) was retained but recognizing certain constitutional dilemmas, the drafters did not see the need to incorporate that section of Title 32 herein again. Additionally, article 1(a)(5) defines commanding officer as a commissioned officer of the state military forces thus ensuring that an officer serving exclusively on federal active duty and without state authority could not convene a state court-martial. The Code provides that a superior competent (i.e., convening) authority may elect to reserve the courts-martial convening authority to themselves. R.C.M. 140(a); 504(b) (1); 504(b)(2). The Model State Manual requires that such reservation be in writing. The convening authority may only be a brigade or wing commander if, in the case of a brigade, it is not part of a division in the state military forces where the brigade is located, and in the case of a wing, if the wing is part of another state's military forces, although located in a

~~different state.~~

322-23 ✓ **Article 23.** Who may convene special courts-martial

- ✓(a) Special courts-martial may be convened by any of the following:
- ✓(1) Any person who may convene a general court-martial.
  - ✓(2) The commanding officer of a garrison, fort, post, camp, station, Air National Guard base, or naval base or station.
  - ✓(3) The commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army National Guard.
  - ✓(4) The commanding officer of a wing, group, separate squadron, or corresponding unit of the Air National Guard.
  - ✓(5) The commanding officer or officer in charge of any other command when empowered by The Adjutant General.
- ✓(b) If the officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by a superior authority if considered desirable by the superior competent authority.

*Annotation to Article 23*

This article was adopted from Section 823, Art. 23, UCMJ with clarifying language.

322-24 ✓ **Article 24.** Who may convene summary courts-martial

- ✓(a) Summary courts-martial may be convened by any of the following:
- ✓(1) Any person who may convene a general or special court-martial.
  - ✓(2) The commanding officer of a detached company or other detachment, or corresponding unit of the Army National Guard.
  - ✓(3) The commanding officer of a detached squadron or other detachment, or corresponding unit of the Air National Guard.
  - ✓(4) The commanding officer or officer in charge of any other command when empowered by The Adjutant General.
- ✓(b) When only one commissioned officer is present with a command or detachment that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may, however, be convened in any case by superior competent authority if considered desirable by that authority.

*Annotation to Article 24*

This article was adopted from Section 824, Art. 24, UCMJ with clarifying language. Insertion of the term "corresponding unit" provides for future currency with future military force doctrine or structural changes.

**Article 25.** Who may serve as a member on courts-martial

- (a) Any commissioned officer of the state military forces is eligible to serve on all courts-martial for the trial of any person subject to this code.
- (b) Any warrant officer of the state military forces is eligible to serve on general and special courts-martial for the trial of any person subject to this code, other than a commissioned officer.
- (c) Any enlisted member of the state military forces who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member subject to this code, but that member shall serve as a member of a court only if, before the conclusion of a session called by the military judge under article 39(a) prior to trial or, in the absence of a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least 1/3 of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If the members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.
- (d) When it can be avoided, no person subject to this code may be tried by a court-martial any member of which is junior to the accused in rank or grade.
- (e) When convening a court-martial, the convening authority shall detail members of the state military forces as, in the convening authority's opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of the state military forces is eligible to serve as a member of a general or special court-martial when that member is the accuser, a witness, or has acted as investigating officer or as counsel in the same case.
- (f) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case.
- (g) The convening authority may delegate the authority under this article to a judge advocate or to any other principal assistant.
- (h) In this article, "unit" means any regularly organized body of the state military forces not larger than a company, a squadron, a division of the naval militia, or a body corresponding to one of them.

*Annotation to Article 25*

This article was adopted from Section 825, Art. 25, UCMJ with clarifying language. Discussion was raised over the definition of "principle assistant." It is not defined in the UCMJ. The drafters intend that this term be defined in the Manual. Although the UCMJ only excludes prosecution witnesses as court members in the same case, the drafters exclude any witness from being a court member in the same case, in fairness to all parties.

**Article 26.** Military judge of a general or special court-martial

- (a) A military judge shall be detailed to each general and special court-martial. The military judge shall preside over each open session of the court-martial to which the military judge has been detailed.
- (b) A military judge shall be qualified as follows:
- (1) A commissioned officer of an organized state military force.
  - (2) A member in good standing of the bar of the highest court of a State or a member of the bar of a Federal court for at least 5 years.
  - (3) Certified as qualified for duty as a military judge by the senior force judge advocate which is the same force as the accused.
- (c) In the instance when a military judge is not a member of the bar of the highest court of the State, the military judge shall be deemed admitted on motion, subject to filing with the senior force judge advocate of the same force as the accused setting forth the qualifications provided in subsection (b).
- (d) The military judge of a general or special court-martial shall be designated by the state senior force judge advocate of the same force as the accused if possible, or otherwise by the senior of the senior force judge advocates, or a designee, for detail by the convening authority. Neither the convening authority nor any staff member of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to performance of duty as a military judge.
- (e) No person is eligible to act as military judge in a case if that person is the accuser or a witness, or has acted as investigating officer, trial counsel, or defense counsel in the same case.
- (f) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel nor vote with the members of the court.

#### *Annotation to Article 26*

This article was adopted from Section 826, Art. 26, UCMJ with clarifying and modifying language. The military judge must be a commissioned officer of an organized state military force. There is no requirement that a military judge be a member of the same state military force or the same branch of the convening authority or accused. The drafters recognize that a judge may have to qualify pursuant to state requirements including bar membership. The state needs to address this area if a conflict exists. The federal case law that supports a separate military justice system should support separate state military justice systems including military judges with uniquely military qualifications. An out-of-state military judge would enhance the concept of an independent judiciary. This article provides that the military judge must be a member of a state military force. Specifically excluded are active duty judge advocates or retirees there from or a person who is a resident of the state and is a judge of any court of record of the state or formerly held such posts. This eliminates the concern over civilian political appointments and avoids federal active duty oversight by a judge with little familiarity or experience with the National Guard culture or structure. Thus, active component officers are excluded. This gives credibility to the position while allowing a wide range of flexibility to fill the need. The minimum five (5) year requirement applies to both state bar and Federal court membership. Although the UCMJ only excludes prosecution witnesses as military judges in the same case, the drafters exclude any witness from being a military judge in the same case, in fairness to all parties.

The section on *pro hac vice* was added to provide for utilization of other state military judges and to document the qualifications of the military judge for challenge.

**Article 27.** Detail of trial counsel and defense counsel

(a) (1) For each general and special court-martial the authority convening the court shall detail trial counsel, defense counsel, and assistants as are appropriate.

(2) No person who has acted as investigating officer, military judge, witness or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Except as provided in subsection (c), trial counsel or defense counsel detailed for a general or special court-martial must meet all of the following:

(1) A judge advocate as defined in this code.

(2) In the case of trial counsel, a member in good standing of the bar of the highest court of the State of Wisconsin.

(c) In the instance when a defense counsel is not a member of the bar of the highest court of the State, the defense counsel shall be deemed admitted on motion, subject to filing with the military judge setting forth the qualifications that counsel is all of the following:

(1) Commissioned officer of the armed forces of the United States or a component thereof.

(2) Member in good standing of the bar of the highest court of a state.

(3) Certified as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy, or the Marine Corps, or a judge advocate as defined in this code.

(d) Trial counsel detailed to a court-martial shall be considered a prosecutor under state statutes.

*Annotation to Article 27*

This article is derived from Section 827, Art. 27, UCMJ. It is anticipated that before detailing trial or defense counsel or appropriate assistants, the convening authority will consult with the senior force judge advocate of the commander of the force of the state military forces who serves as that commander's chief legal advisor and who is a member of the same force as the accused. The same standards for appointment to a general or special courts-martial apply. See the annotation to Article 38 for more information on state prosecutorial authority. The detail of counsel requires the trial counsel to be a member of the state bar in order to prosecute in the name of the state. The same requirement is not necessary for defense counsel, and this Code provides for out-of-state defense counsel, including reservists and active duty judge advocates. The *pro hac vice* requirement for defense counsel should satisfy state bar practice issues.

**Article 28.** Detail or employment of reporters and interpreters

Under regulations as may be prescribed, the convening authority of a general or special court-martial or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court and may detail or employ interpreters who shall interpret for the court.

*Annotation of Article 28*

This article was adopted from Section 828, Art. 28, UCMJ with clarifying language.

**Article 29.** Absent and additional members

- (a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.
- (b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below 5 members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than the applicable minimum number of 5 members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.
- (c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below 3 members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than 3 members, unless the accused waives the number of members. The trial shall proceed with the new members present as if no evidence had been introduced previously at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation is read to the court in the presence of the military judge, the accused, and counsel for both sides.
- (d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of article 16(1)(B) or (2)(B), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation is read in court in the presence of the new military judge, the accused, and counsel for both sides.

*Annotation to Article 29*

This article was derived from Section 829, Art. 29, UCMJ. In the UCMJ, subsection (b) was recently subdivided into (b) (1) and (b) (2) through Pub. L. No. 108-21 enacted on April 30, 2003. Subsection (b) (2) dealing with the death penalty is deleted and subsection (b) has not been further subdivided in this code.

**SUBCHAPTER VI. PRE-TRIAL PROCEDURE**

**Article 30.** Charges and specifications

- (a) Charges and specifications shall be signed by a person subject to this code under oath before a commissioned officer authorized by article 136(a) to administer oaths and shall state all of the following:

(1) The signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications.

(2) The facts are true to the best of the signer's knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made in the interest of justice and discipline, and the person accused shall be informed of the charges as soon as practicable.

#### *Annotation to Article 30*

This article was adopted from Section 830, Art. 30, UCMJ with clarifying language. The military methodology of charges and specifications is not utilized in state criminal justice systems. For purposes of uniformity, and specifically for purposes of training, the UCMJ method was adopted. The drafters raised the issue of whether to follow state criminal procedures or the UCMJ procedures for a court-martial. For the reasons discussed in the annotation to Article 26, the UCMJ procedures were adopted as applicable.

#### **Article 31. Compulsory self-incrimination prohibited**

(a) No person subject to this code may compel any person to incriminate himself or herself or to answer any question the answer to which may tend to incriminate him or her.

(b) No person subject to this code may interrogate or request any statement from an accused or a person suspected of an offense without first informing that person of the nature of the accusation and advising that person that the person does not have to make any statement regarding the offense of which the person is accused or suspected and that any statement made by the person may be used as evidence against the person in a trial by court-martial.

(c) No person subject to this code may compel any person to make a statement or produce evidence before any military court if the statement or evidence is not material to the issue and may tend to degrade the person.

(d) No statement obtained from any person in violation of this article or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against the person in a trial by court-martial.

#### *Annotation to Article 31*

This article was adopted from Section 831, Art. 31, UCMJ with clarifying language. This article applies when suspicion attaches regardless of custody status. This provision exceeds any federal constitutional requirement for the rights warning when a suspect is in custody. The drafters adopt the greater protections of the Code to maintain consistency with the UCMJ.

#### **Article 32. Investigation**

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against the accused and of the right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in article 38 and in regulations prescribed under that article. At that investigation, full opportunity shall be given to the accused to cross-examine witnesses against the accused, if they are available, and to present anything the accused may desire in the accused's own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after the accused is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in the accused's own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused is afforded all of the following:

- (1) Present at the investigation;
- (2) Informed of the nature of each uncharged offense investigated; and
- (3) Afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this code but failure to follow them does not constitute jurisdictional error.

*Annotation to Article 32*

This article was adopted from Section 832, Art.32 UCMJ with clarifying language.

**Article 33.** Forwarding of charges

When a person is held for trial by general court-martial, the commanding officer shall within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the person exercising general court-martial jurisdiction. If that is not practicable, the commanding officer shall report in writing to that person the reasons for delay.

*Annotation to Article 33*

This article was adopted from Section 833, Art. 33 UCMJ with clarifying language.

**Article 34.** Advice of judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to a judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless the convening authority has been advised in writing by a judge advocate that all the following conditions are met:

(1) The specification alleges an offense under this code.

(2) The specification is warranted by the evidence indicated in the report of investigation under article 32, if there is a report.

(3) A court-martial would have jurisdiction over the accused and the offense.

(b) The advice of the judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the judge advocate that does all of the following:

(1) Expressing conclusions with respect to each matter set forth in subsection (a).

(2) Recommending action that the convening authority take regarding the specification.

(c) If the specification is referred for trial, the recommendation of the judge advocate shall accompany the specification.

(d) If the charges or specifications are not correct formally or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

*Annotation to Article 34*

This article was adopted from Section 834, Art. 34, UCMJ with clarifying language. The primary change to this provision permits any judge advocate — not only the convening authority's staff judge advocate — to provide this advice. The drafters assumed that judge advocates would address any conflict of interest or ethical considerations potentially inherent in this action. The changes would permit judge advocates from other units to provide this advice if such conflicts arose or judge advocate manpower resources were an issue.

**Article 35.** Service of charges

The trial counsel shall serve or caused to be served upon the accused a copy of the charges. No person may, against the person's objection, be brought to trial before a general court-martial case within a period of five days after the service of charges upon the accused, or in a special court-martial, within a period of three days after the service of charges upon the accused.

*Annotation to Article 35*

This article was adopted from Section 835, Art. 35, UCMJ with clarifying language. The absence of including the 39 (a) session after 'brought to trial' although included in the UCMJ, was deemed unnecessary since under this code, Article 39 is part of the trial.

## SUBCHAPTER VII. TRIAL PROCEDURE

### **Article 36.** Governor may prescribe regulations

Pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial cases arising under this code, and for courts of inquiry, may be prescribed by the Governor by regulations, or as otherwise provided by law, which shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces but which may not be contrary to or inconsistent with this code.

#### *Annotation to Article 36*

This article was adopted from Section 836, Art. 36, UCMJ with clarifying language. Although the federal Manual for Courts-Martial is an Executive Order, the drafters recognized other methods of state manual implementation. State administrative procedure acts may apply to the Governor's "regulation." Governors can also act pursuant to an Executive Order and an adjutant general can issue regulations as an inherent function of command authority. For purposes of uniformity in state military court proceedings, the drafters chose to have states adopt the federal Military Rules of Evidence in lieu of the states' respective evidence rules. This decision ensures that defense counsel and military judges from other states and trial counsel from the home state operate under the same set of evidentiary rules.

### **Article 37.** Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, or officer serving on the commanding officer's staff, may censure, reprimand, or admonish the court or any member, the military judge, or counsel, with respect to the findings or sentence adjudged by the court or with respect to any other exercise of its or their functions in the conduct of the proceedings. No person subject to this code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or court of inquiry or any member, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to their judicial acts. The foregoing provisions of the subsection shall not apply with respect to the any of the following:

(1) General instructional or informational courses in military justice if the courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial.

(2) Statements and instructions given in open court by the military judge, summary court-martial officer, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the state military forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the state military forces, or in determining whether a member of the state military forces should be retained on active status, no person subject to this code may, in preparing any report, do any of the following:

(1) Consider or evaluate the performance of duty of any member as a member of a court-martial or witness.

(2) Give a less favorable rating or evaluation of any counsel of the accused because of zealous representation before a court-martial.

*Annotation to Article 37*

This article was adopted from section 837, Art. 37, UCMJ with clarifying language. Prohibitions against retaliation against court members, military judges and counsel in (a) were extended to staff officers of the commanding officer or convening authority which are beyond that provided in the UCMJ. The drafters extended this protection in (b) to witnesses of a court-martial.

**Article 38.** Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall be a member in good standing of the State bar and shall prosecute in the name of the State, and shall, under the direction of the court, prepare the record of the proceedings.

(b) (1) The accused has the right to be represented in defense before a general or special court-martial or at an investigation under article 32.

(2) The accused may be represented by civilian counsel at the provision and expense of the accused.

(3) The accused may be represented by:

(A) Military counsel detailed under article 27.

(B) Military counsel of the accused's own selection if that counsel is reasonably available as determined under paragraph (7).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused by military judge at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under article 27 to detail counsel, in that person's sole discretion may do any of the following:

(1) Detail additional military counsel as assistant defense counsel.

(2) If the accused is represented by military counsel of the accused's own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The senior force judge advocate of the same force of which the accused is a member, shall determine whether the military counsel selected by an accused is reasonably available.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel may:

(1) Forward for attachment to the record of proceedings a brief of matters as counsel determines should be considered in behalf of the accused on review, including any objection to the contents of the record which counsel considers appropriate.

(2) Assist the accused in the submission of any matter under article 60.

(3) Take other action authorized by this code.

#### *Annotation to Article 38*

This article was adopted from Section 838, Art. 38, UCMJ with clarifying language. Section (a) expands the language of "state" to include "people" and "commonwealth" as deference to those sovereignties so called. Discussion arose regarding the issue of what state authority allowed judge advocates to prosecute. The drafters concluded that coordination with the state's attorney general would be essential to ensure that judge advocates can prosecute with the cooperation and acknowledgement of the civilian state prosecutors. Those states that adopted the Uniform Commission Military Justice Act of 1961 adopted language from this article that reads: "The trial counsel . . . shall prosecute in the name of the state." The drafters contemplated whether this would be sufficient authority to support a court-martial conviction as a state conviction. Most state statutes addressing attorney general and state attorney appointments require that the attorney be a member of that state bar. Pursuant to Article 27, trial counsel must be a member of the state bar. Subsection (b) (7) substituted senior force judge advocate of the same force of which the accused is a member or the Secretary as the authority to determine military counsel availability. Language dealing with limitations on availability was deleted as superfluous and more appropriately found in existing regulations. Unlike the UCMJ, Subsection (b) (7) in the Code leaves to the specified judge advocate to determine 'reasonable availability' rather than providing for regulations.

#### **Article 39. Sessions**

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to article 35, call the court into session without the presence of the members for the purpose of any of the following:

(1) Hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty.

(2) Hearing and ruling upon any matter which may be ruled upon by the military judge under this code, whether or not the matter is appropriate for later consideration or decision by the members of the court.

(3) Holding the arraignment and receiving the pleas of the accused.

(4) Performing any other procedural function which does not require the presence of the members of the court under this code.

(b) These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of court members and without regard to article 29.

(c) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and the military judge.

*Annotation to Article 39*

This article was adopted from section 839, Art. 39, UCMJ with clarifying language.

**Article 40. Continuances**

The military judge of a court-martial or a summary court-martial may, for reasonable cause, grant a continuance to any party for time, and as often, as may appear to be just.

*Annotation to Article 40*

This article was adopted from Section 840, Art. 40, UCMJ without change.

**Article 41. Challenges**

(a) (1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge or the court shall determine the relevancy and validity of challenges for cause and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below the minimum number of members required by article 16, all parties shall, notwithstanding article 29 of this code, either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

(b) (1) Each accused and the trial counsel are entitled initially to one peremptory challenge of members of the court. The military judge may not be challenged except for cause.

(2) If exercise of a peremptory challenge reduces the court below the minimum number of members required by article 16 of this code, the parties shall, notwithstanding article 29 of this code, either exercise or waive any remaining peremptory challenge, not previously waived, against the remaining members of the court before additional members are detailed to the court.

(3) Whenever additional members are detailed to the court, and after any challenges for cause against additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

*Annotation to Article 41*

This article was adopted from Section 841, Art. 41, UCMJ with clarifying language. The state should determine whether the number of peremptory challenges allowed by this article conflicts with state procedural law. Subsections (a)(2) and (b)(2) reference the minimum number of members necessary to conduct courts-martial (five for a general court-martial and three for a special court-martial). This may conflict with the state law mandating a minimum number of jury member votes necessary for a state criminal conviction. See annotation to Article 52.

## **Article 42. Oaths or Affirmations**

(a) Before performing their respective duties, military judges, general and special courts-martial members, trial counsel, defense counsel, reporters, and interpreters shall take an oath or affirmation in the presence of the accused to perform their duties faithfully. The form of the oath or affirmation, the time and place of the taking, the manner of recording the same, and whether the oath or affirmation shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulation or as provided by law. These regulations may provide that an oath or affirmation to perform faithfully the duties as a military judge, trial counsel, or defense counsel may be taken at any time by any judge advocate or other person certified or designated to be qualified or competent for the duty, and if an oath or affirmation is taken, it need not again be taken at the time the judge advocate or other person is detailed to that duty.

(b) Each witness before a court-martial shall be examined under oath or affirmation.

### *Annotation to Article 42*

This article was adopted in large part from Section 842, Art. 42, UCMJ. The drafters recognize that some states allow an "affirmation" that does not invoke religion, and additional language was added to accommodate those oaths. The drafters added "in the presence of the accused" recognizing that the UCMJ and the Constitution does not require this. Rather, this practice is based on common law.

## **Article 43. Statute of limitations**

(a) Except as otherwise provided in this article, a person charged with any offense is not liable to be tried by court-martial or punished under article 15 of this code if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising court-martial jurisdiction over the command or before the imposition of punishment under article 15 of this code.

(b) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this article.

(c) Periods in which the accused was absent from territory in which the State has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(d) When the United States is at war based on Congressional declaration or by Presidential declaration under the Global War on Terror, the running of any statute of limitations is suspended until two years after the termination of hostilities, as proclaimed by the President or by a joint resolution of Congress, and is applicable to any offense under this code under any of the following circumstances:

(1) Involving fraud or attempted fraud against the United States, any state, or any agency of either in any manner, whether by conspiracy or not.

(2) Committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States or any state.

(3) Committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency.

(e)(1) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations has expired, or will expire within 180 days after the date of dismissal of the charges and specifications, trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.

(2) The conditions referred to in paragraph (1) are that the new charges and specifications satisfy all of the following:

(A) Be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications.

(B) Allege the same acts or omissions that were alleged in the dismissed charges or specifications, or allege acts or omissions that were included in the dismissed charges or specifications.

#### *Annotation to Article 43*

This article was derived from Section 843, Art. 43, UCMJ. In section (a) the drafters combined, for practical reasons, the UCMJ's five (5) year general statute of limitations for trials by court-martial and the two (2) year statute of limitations for imposition of non-judicial punishment, into one three (3) year statute of limitations for both trials by court-martial and non-judicial punishment. Section (a) of the UCMJ was deleted because this Code does not contain provisions for the death penalty. The drafters recommend that desertion not be included because the gravity of the offense is not as great as it is in the active duty component. Discussion arose over desertion as a "Title 10" offense. The statute of limitations tolls while a violator is outside of the state lines and cannot be apprehended by the state police forces of the state in which the violator serves. This is regardless of whether the state law enforcement force where the violator may be located has the authority to apprehend the violator. Paragraph (e) allows for new charges, if previously dismissed, when the statute of limitations has expired or will expire within 180 days if the new charges allege the same acts or omissions originally alleged and those new charges are brought within 180 days of the dismissal. The state is cautioned that while its criminal procedure laws may not allow for new civilian charges if the original, similar charges are dismissed, this Code otherwise provides in the military justice context. The language of this article is intended to cover those wars declared by the President, whether or not actually declared under Article 1 of the Constitution of the United States.

#### **Article 44. Former jeopardy**

(a) No person may, without his or her consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial under this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial under this article.

*Annotation to Article 44*

This article was adopted from section 844, Art. 44, UCMJ with clarifying language, deleting any reference to death penalty cases.

**Article 45.** Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though the accused had pleaded not guilty.

(b) With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event, the proceedings shall continue as though the accused had pleaded not guilty.

*Annotation to Article 45*

This article was adopted from Section 845, Art. 45, UCMJ with clarifying language, deleting any reference to death penalty cases. The Code deleted reference to regulations permitting the immediate entering of a finding of guilty on a plea of guilty; and thus no implementing regulations are required.

**Article 46.** Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence as prescribed by regulations and provided by law. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall apply the principles of law and the rules of courts-martial generally recognized in military criminal cases in the courts of the armed forces of the United States, but which may not be contrary to or inconsistent with this code. Process shall run to any part of the United States, or the Territories, Commonwealths, and possessions, and may be executed by civil officers as prescribed by the laws of the place where the witness or evidence is located or of the United States.

*Annotation to Article 46*

This article was adopted from of the United States UCMJ with clarifying language adding "and may be executed by civil officers as prescribed by the laws of the State where the witness is located or of the United States." The actual process that issues from the court-martial proceeding will follow federal military justice procedures, but in order to allow for fast and effective service under the various states' service of process procedures, the service of process will comply with the state process requirements where the witness or evidence is located, facilitating a more expeditious enforcement process.

**Article 47.** Refusal to appear or testify

(a) Any person not subject to this code who may be punished by the military court in the same manner as a court of the State, if all of the following apply to that person:

(1) Has been duly subpoenaed to appear as a witness or to produce books and records before a court-martial or court of inquiry, or before any military or civil officer designated to take a deposition to be read in evidence before a court.

(2) Has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending a court of the State.

(3) Willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce.

(b) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

#### *Annotation to Article 47*

This article was adopted from Section 847, Art. 47, UCMJ with clarifying language. The drafters added the production of 'books and records' to (a) (1) to expand the article's coverage beyond what the UCMJ provides in recognition of reality.

Authorizing military courts to punish violations the same as civilian courts in the state eliminates the need to cede jurisdiction to civilian prosecutors and courts as provided in (b) and (c) of the UCMJ. All persons not subject to the Code may be charged under the state laws for failure to appear or testify. The authorization of military courts to punish violations as could a civilian court of the state under state law provides jurisdiction to the military court to punish persons not subject to the code, but under state civilian law, which the Code incorporates by reference here. This is a valid exercise of jurisdiction to the military court when the Code is enacted into law by the State.

The maximum fines and the sentencing for those absent military witnesses were adopted from the UCMJ with clarifying language for the sake of uniformity. All other witnesses not subject to the Code may be charged under the state laws for failure to appear or testify.

Fiscal law questions regarding which government entity will pay for fees, mileage, etc., of witnesses was addressed. Because the state is the government entity prosecuting the case, funding sources for witness costs could include the state court operating budget, adjutant general appropriations, or, possibly, "Title 32" funds. Use of "Title 32" funds is supported in that courts-martial are considered training for judge advocates and members of the military justice team.

#### **Article 48. Contempt**

A military judge may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. A person subject to this code may be punished for contempt by confinement not to exceed 30 days or a fine of \$100, or both. A person not subject to this code may be punished for contempt by a military court in the same manner as a court of the State.

#### *Annotation to Article 48*

Those persons subject to the Code may be punished for contempt as defined by this Code. The military judge has the authority to punish for contempt. The State Model Code does not allow the president or panel members to punish for contempt. This is congruent with civilian criminal procedures wherein the judge, not the jury, punishes

for contempt. Those persons not subject to the Code are subject to the state statutes on contempt.

#### **Article 49. Depositions**

(a) At any time after charges have been signed as provided in article 30, any party may take oral or written depositions unless the military judge or summary court-martial officer hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, digital image or file, or similar material, may be played in evidence before any military court, if any of the following apply:

(1) The witness resides or is beyond the State in which the court is ordered to sit, or beyond one hundred miles from the place of trial or hearing;

(2) The witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, non amenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing.

(3) The present whereabouts of the witness is unknown.

#### *Annotation to Article 49*

This article was adopted from Section 849, Art. 49, UCMJ with clarifying language, excluding all references to capital cases. Although many states do not allow depositions in state criminal matters, the worldwide mission of the military and military exigencies necessitate deposition use for courts-martial. The military judge or court-martial convening authority may forbid a deposition for good cause. The use of the term "for good cause" is a term allowing for broad application by the military judge or court-martial convening authority. The drafters added 'digital image or file' in (d) in recognition of modern technology although it is not included in the UCMJ.

#### **Article 50. Admissibility of records of courts of inquiry**

(a) In any case not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of evidence.

(b) Testimony may be read in evidence only by the defense in cases extending to the dismissal of a commissioned officer.

(c) Testimony may also be read in evidence before a court of inquiry.

#### *Annotation to Article 50*

This article was adopted from Section 850, Art. 50, UCMJ excluding all references to capital cases.

**Article 50a.** Defense of lack of mental responsibility

(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the court as to the defense of lack of mental responsibility under this article and charge them to find the accused any one of the following:

- (1) Guilty.
- (2) Not guilty.
- (3) Not guilty only by reason of lack of mental responsibility.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only or a summary court-martial officer, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge or summary court-martial officer shall find the accused of any of the following:

- (1) Guilty.
- (2) Not guilty.
- (3) Not guilty only by reason of lack of mental responsibility.

(e) Notwithstanding the provisions of article 52 of this code, the accused shall be found not guilty only by reason of lack of mental responsibility if any of the following apply:

(1) A majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

(2) In the case of a court-martial composed of a military judge only or a summary court-martial officer, the military judge or summary court-martial officer determines that the defense of lack of mental responsibility has been established.

*Annotation to Article 50a*

This article was adopted from Section 850a, Art. 50a, UCMJ.

**Article 51.** Voting and rulings

(a) Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall as soon as possible announce the result of the ballot to the members of the court.

(b) The military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the court. However, the military judge may change the ruling at any time during the trial. Unless the ruling is final, if any member objects, the court shall be cleared and closed and the question decided by a voice vote as provided in article 52, beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them with all of the following:

(1) The accused shall be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt.

(2) The case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted.

(3) If there is a reasonable doubt as to the degree of guilt, the finding shall be in a lower degree as to which there is no reasonable doubt.

(4) The burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the State.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of a court-martial shall make a general finding and shall in addition, on request, find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear.

#### *Annotation to Article 51*

This article was adopted from Section 851, Art. 51, UCMJ with clarifying language.

#### **Article 52. Number of votes required**

(a) No person may be convicted of an offense except as provided in article 45(b) or article 51(d) or by the concurrence of 2/3 of the members present at the time the vote is taken.

(b) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion relating to the question of

the accused's mental responsibility is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

*Annotation to Article 52*

This article was adopted from Section 852, Art. 52, UCMJ with clarifying language, deleting all references to death penalty cases. Section (a) allows for a conviction by two-thirds of the members, however, states generally require a unanimous vote for a criminal conviction. Because courts-martial are statutory courts, the state constitution should not be an impediment to the number of votes herein. Nevertheless, the state must determine whether the two-thirds vote of a voting body (as little as three members in the case of the special court-martial) will constitutionally or statutorily allow the imposition of a state criminal conviction. Section (b) was eliminated because military offenses are capped by a ten-year sentence, therefore, there could not be a three-fourths concurrence vote by members for a sentence longer than this as per the UCMJ. Hence, this section is inapplicable and is absent from the current Model State Code. The tie vote on the insanity issue was adopted from the UCMJ.

**Article 53.** Court to announce action

A court-martial shall announce its findings and sentence to the parties as soon as determined.

*Annotation to Article 53*

This article was adopted from Section 853, Art. 53, UCMJ.

**Article 54.** Record of trial

(a) Each general and special court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his or her death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member, if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge, the record shall be authenticated by the court reporter under the same conditions which would impose a duty on a member under this subsection.

(b) A complete verbatim record of the proceedings and testimony shall be prepared in each general and special court-martial case resulting in a conviction, and in all other court-martial cases, the record shall contain matters as may be prescribed by regulations.

(c) Each summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner as may be prescribed by regulations.

(d) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

*Annotation to Article 54*

This article was adopted from Section 854, Art. 54, UCMJ with the distinction that the records of all general and

special courts-martial will be verbatim. The drafters consolidated the UCMJ provisions without regard to differences in sentences. Also, the drafters added the authority of the court reporter to authenticate the record in summary courts-martial.

## SUBCHAPTER VIII. SENTENCES

### **Article 55.** Cruel and unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment may not be adjudged by a court-martial or inflicted upon any person subject to this code. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

#### *Annotation to Article 55*

This article was adopted from Section 848, Art. 48, UCMJ without change.

### **Article 56.** Maximum limits

- (a) The punishment which a court-martial may direct for an offense may not exceed ten years confinement.
- (b) A conviction by a general court-martial of any military offense for which an accused may receive a sentence of confinement for more than 1 year is a felony offense.
- (c) Except for convictions by a summary court-martial, all other offenses are misdemeanors.
- (d) A conviction by a summary court-martial is not a criminal conviction.
- (e) The limits of punishment for violations of the punitive articles under Subchapter X shall be prescribed by the Governor according to articles 18, 19, and 20, but under no instance shall any punishment exceed that authorized by this code.

#### *Annotation to Article 56*

This article follows the numbering system of Section 856, Art. 56, UCMJ but is more extensive. The drafters set a maximum sentence of ten years confinement and eliminated the death penalty. Types of crimes were delineated by types of courts-martial and in conjunction with the terms of the sentence. Additionally, the characterization of discharge is prescribed as is contained in the federal Manual for Courts-Martial. The issue of discharge validity and effect on the reserve appointment in the federal system was discussed. If a state court-martial dishonorably discharges the member, the member is discharged from the state military forces but does not lose federal membership. The member may be free to secure another position in another state's National Guard or another reserve component. The active duty component may have to effectuate regulatory changes to recognize or incorporate state punitive discharges as a basis for removal of federal recognition and discharge. Since the state Code establishes that state court-martial is a civilian criminal conviction, a valid discharge basis currently exists in federal regulations.