



# State of Wisconsin


LEGISLATIVE REFERENCE BUREAU

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

Date Transfer Requested: 11/03/2008 (Per: CJS)



Appendix A ... Pt. 01 of 04

 The 2007 drafting file for LRB-4378

has been transferred to the drafting file for

**2009 LRB-0589**

☛ This cover sheet, the final request sheet, and the final version of the 2007 draft were copied on yellow paper, and returned to the original 2005 drafting file.

☛ The attached 2007 draft was incorporated into the new 2009 draft listed above. For research purposes, this cover sheet and the complete drafting file were transferred, as a separate appendix, to the 2009 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

## 2007 DRAFTING REQUEST

### Bill

Received: **05/14/2008**

Received By: **chanaman**

Wanted: **As time permits**

Identical to LRB:

For: **Revisor of Statutes**

By/Representing: **Bruce Hoesly**

This file may be shown to any legislator: **NO**

Drafter: **chanaman**

May Contact:

Addl. Drafters:

Subject: **State Govt - miscellaneous**

Extra Copies:

Submit via email: **YES**

Requester's email: **Don.Dyke@legis.wisconsin.gov**

Carbon copy (CC:) to: **Laura.Rose@legis.wisconsin.gov**

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### Pre Topic:

No specific pre topic given

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### Topic:

Revisor's correction bill

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### Instructions:

See Attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	chanaman 05/14/2008	csicilia 05/22/2008		_____			
/P1		csicilia 05/23/2008	nmatzke 05/22/2008	_____	cduerst 05/22/2008		
/1			jfrantze 05/23/2008	_____	cduerst 05/23/2008		
/2	rnelson2	wjackson	jfrantze	_____	cduerst		

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/4			pgreensl	_____	lparisi		
			05/27/2008	_____	05/27/2008		

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*John Setf*  
5/23/08

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*Jb*  
5/23

*J/W*  
5/23



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/1 cjs 5/23  
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5/23  
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FE Sent For:

5/22/08

<END>

**Ryan, Robin**

**From:** Barron, Julio R Lt Col NGWI [julio.barron2@us.army.mil]  
**Sent:** Tuesday, January 09, 2007 5:07 PM  
**To:** Terry McArdle; Sweet, Richard; Milsap, Randi - DMA; Dziobkowski, David M Maj NGWI; Ryan, Robin; Nelson, Robert P.; Shannon, Pam; Rep.Schneider; Olson, Larry L. Mr NGWI  
**Subject:** RE: Wisconsin CMJ drafting process  
**Attachments:** Proposed WCMJ.doc

Ladies and Gentlemen -

Based on my discussions with Dick Sweet, Terry McArdle, and Randi Milsap, I have revised the proposed Wisconsin Code of Military Justice to conform accordingly.

Please note, I have also deleted the Sodomy offense, Punitive Article 125 per discussions with Rep. Mark Gundrum.

The attachment is the revised product.

Should any additional revisions become necessary, please do not hesitate to contact me.

An analysis which compares the current WCMJ with the proposed WCMJ should be finalized by the end of this month ; I will forward that work product when completed.

I extend my appreciation to each of you for your assistance in the development of this legislation.

Thank you.

v/r,

Lt Col Julio R. Barron  
 Staff Judge Advocate  
 Wisconsin National Guard  
 2400 Wright Street  
 Madison, Wisconsin 53708-8111  
 Telephone: 608-242-3077 / DSN 724-3077  
 Fax: 608-242-3082 / DSN 724-3082  
[julio.barron2@us.army.mil](mailto:julio.barron2@us.army.mil)

*including in  
 for Act  
 200 Correction  
 Bill File  
 LRB/4378*

-----Original Message-----

**From:** Sweet, Richard [mailto:Richard.Sweet@legis.wisconsin.gov]  
**Sent:** Tuesday, January 09, 2007 9:36 AM  
**To:** Terry McArdle; Julio R Lt Col NGWI Barron; Milsap, Randi - DMA; David Dziobkowski  
**Cc:** Rep.Schneider; Olson, Larry - DMA; Ryan, Robin; Nelson, Robert P.; Shannon, Pam  
**Subject:** Wisconsin CMJ

Terry/Dave, et al.,

I spoke with Julio just a few minutes ago. He is going to clean up some of the provisions we discussed yesterday. For example, he is going to delete the reserved articles. As I mentioned to him, if something comes in later, we can always sandwich it

05/21/2008

in by inserting a statutory section that goes out one more digit after the decimal point. He is also going to delete "the term" in the various definitions. In addition, he is going to delete Articles 145 to 148. Finally, I mentioned that Article 1(b) is not needed; if any portion of the draft just uses "he", we could change it to "he or she" or use a noun instead of a pronoun. Julio mentioned that he could get us a revised draft by the end of January. He mentioned that this would include a description of how the proposed Code differs from the current Code.

I started looking at the Code and how it could be structured as a ch. 22. As we discussed yesterday, each of the Part titles could be Subchapter titles. The Articles could each be placed in a separate statutory section, but the Article number would be retained in the section. For example, Article 1 would be 22.001. Each of the sections would go out 3 places after the decimal point, and I would suggest starting the subchapters with the following numbers:

22.001 Article 1.  
22.050 Article 7.  
22.100 Article 15.  
22.150 Article 16.  
22.200 Article 22.  
22.300 Article 30.  
22.400 Article 36.  
22.500 Article 55.  
22.600 Article 59.  
22.700 Article 77.  
22.800 Article 135.

These are just my initial suggestions. The Legislative Reference Bureau is the final arbiter of format.

***Dick Sweet***

Richard Sweet  
Senior Staff Attorney  
Wisconsin Legislative Council  
(608)266-2982  
richard.sweet@legis.wisconsin.gov

WISCONSIN CODE OF MILITARY JUSTICE  
TABLE OF CONTENTS

	<u>Page</u>
PART I. GENERAL PROVISIONS	
• <b>Article 1.</b> Definitions; gender neutrality	1-6
• <b>Article 2.</b> Persons subject to this code; jurisdiction	6
• <b>Article 3.</b> Jurisdiction to try certain personnel	6-7
• <b>Article 5.</b> Territorial applicability of the code	7
• <b>Article 6.</b> Judge Advocates	7-8
PART II. APPREHENSION AND RESTRAINT	
• <b>Article 7.</b> Apprehension	8
• <b>Article 9.</b> Imposition of restraint	9-9
• <b>Article 10.</b> Restraint of persons charged with offenses	9
• <b>Article 11.</b> Place of Confinement; Reports and receiving of prisoners	9-10
• <b>Article 12.</b> Confinement with enemy prisoners prohibited	10
• <b>Article 13.</b> Punishment prohibited before trial	10
• <b>Article 14.</b> Delivery of offenders to civil authorities	10-11
PART III. NON-JUDICIAL PUNISHMENT	
• <b>Article 15.</b> Commanding Officer's non-judicial punishment	11-14
PART IV. COURT-MARTIAL JURISDICTION	
• <b>Article 16.</b> Courts-martial classified	14
• <b>Article 17.</b> Jurisdiction of courts-martial in general	14
• <b>Article 18.</b> Jurisdiction of general courts-martial	15
• <b>Article 19.</b> Jurisdiction of special courts-martial	15
• <b>Article 20.</b> Jurisdiction of summary courts-martial	15
PART V. APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL	
• <b>Article 22.</b> Who may convene general courts-martial	16
• <b>Article 23.</b> Who may convene special courts-martial	16-17
• <b>Article 24.</b> Who may convene summary courts-martial	17
• <b>Article 25.</b> Who may serve on courts-martial	17-18
• <b>Article 26.</b> Military judge of a general or special court-martial	18-19

- **Article 27.** Detail of trial counsel and defense counsel 19-20
- **Article 28.** Detail or employment of reporters and interpreters 20
- **Article 29.** Absent and additional members 20-21

**PART VI. PRE-TRIAL PROCEDURE**

- **Article 30.** Charges and specifications 21-22
- **Article 31.** Compulsory self-incrimination prohibited 22
- **Article 32.** Investigation 22-23
- **Article 33.** Forwarding of charges 23
- **Article 34.** Advice of judge advocate and reference for trial 23-24
- **Article 35.** Service of charges 24

**PART VII. TRIAL PROCEDURE**

- **Article 36.** Governor or The Adjutant General may prescribe rules 24-25
- **Article 37.** Unlawfully influencing action of court 25
- **Article 38.** Duties of trial counsel and defense counsel 27-27
- **Article 39.** Sessions 27
- **Article 40.** Continuances 27
- **Article 41.** Challenges 27-28
- **Article 42.** Oaths 28
- **Article 43.** Statute of limitations 29-30
- **Article 44.** Former jeopardy 30
- **Article 45.** Pleas of the accused 30-31
- **Article 46.** Opportunity to obtain witnesses and other evidence 31
- **Article 47.** Refusal to appear or testify 31-32
- **Article 48.** Contempts 32
- **Article 49.** Depositions 32-33
- **Article 50.** Admissibility of records of courts of inquiry 33
- **Article 50a.** Defense of lack of mental responsibility 33-34
- **Article 51.** Voting and rulings 34-35
- **Article 52.** Number of votes required 35
- **Article 53.** Court to announce action 36
- **Article 54.** Record of trial 36

PART VIII. SENTENCES

• <b>Article 55.</b> Cruel and unusual punishments prohibited	36-37
• <b>Article 56.</b> Maximum limits	37
• <b>Article 57.</b> Effective date of sentences	37-38
• <b>Article 57a.</b> Deferment of sentences	38
• <b>Article 58.</b> Execution of confinement	39
• <b>Article 58a.</b> Sentences: reduction in enlisted grade upon approval	39
• <b>Article 58b.</b> Sentences: forfeiture of pay and allowances during confinement	39-40

PART IX. POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

• <b>Article 59.</b> Error of law; lesser included offense	40
• <b>Article 60.</b> Action by the convening authority	41-42
• <b>Article 61.</b> Withdrawal of appeal	42-43
• <b>Article 62.</b> Appeal by the State	43-44
• <b>Article 63.</b> Rehearings	44
• <b>Article 64.</b> Review by the State Judge Advocate	44-46
• <b>Article 65.</b> Disposition of records after review by the convening authority	46
• <b>Article 67a.</b> Review by State Appellate Authority	46
• <b>Article 70.</b> Appellate counsel	46-47
• <b>Article 71.</b> Execution of sentence; suspension of sentence	47
• <b>Article 72.</b> Vacation of suspension	48
• <b>Article 73.</b> Petition for a new trial	48
• <b>Article 74.</b> Remission and suspension	48-49
• <b>Article 75.</b> Restoration	49
• <b>Article 76.</b> Finality of proceedings, findings, and sentences	49-50
• <b>Article 76a.</b> Leave required to be taken pending review of certain court-martial convictions	50
• <b>Article 76b.</b> Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment	50-52

PART X. PUNITIVE ARTICLES

• <b>Article 77.</b> Principals	52
• <b>Article 78.</b> Accessory after the fact	52
• <b>Article 79.</b> Conviction of lesser included offense	53
• <b>Article 80.</b> Attempts	53



• <b>Article 81.</b> Conspiracy	53
• <b>Article 82.</b> Solicitation	53-54
• <b>Article 83.</b> Fraudulent enlistment, appointment, or separation	54
• <b>Article 84.</b> Unlawful enlistment, appointment, or separation	54
• <b>Article 85.</b> Desertion	54-55
• <b>Article 86.</b> Absence without leave	55
• <b>Article 87.</b> Missing movement	55
• <b>Article 88.</b> Contempt toward officials	55-56
• <b>Article 89.</b> Disrespect toward superior commissioned officer	56
• <b>Article 90.</b> Assaulting or willfully disobeying superior commissioned officer	56
• <b>Article 91.</b> Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	56-57
• <b>Article 92.</b> Failure to obey order or regulation	57
• <b>Article 93.</b> Cruelty and maltreatment	57
• <b>Article 94.</b> Mutiny or sedition	57-58
• <b>Article 95.</b> Resistance, flight, breach of arrest, and escape	58
• <b>Article 96.</b> Releasing prisoner without proper authority	58
• <b>Article 97.</b> Unlawful detention	58
• <b>Article 98.</b> Noncompliance with procedural rules	58-59
• <b>Article 99.</b> Misbehavior before the enemy	59
• <b>Article 100.</b> Subordinate compelling surrender	59-60
• <b>Article 101.</b> Improper use of countersign	60
• <b>Article 102.</b> Forcing a safeguard	60
• <b>Article 103.</b> Captured or abandoned property	60-61
• <b>Article 104.</b> Aiding the enemy	61
• <b>Article 105.</b> Misconduct as prisoner	61
• <b>Article 107.</b> False official statements	61-62
• <b>Article 108.</b> Military property — Loss, damage, destruction, or wrongful disposition	62
• <b>Article 109.</b> Property other than military property — Waste, spoilage, or destruction	62
• <b>Article 110.</b> Improper hazarding of vessel	62
• <b>Article 111.</b> Drunken or reckless operation of a vehicle, aircraft, or vessel	63
• <b>Article 112.</b> Drunk on duty	63-64
• <b>Article 112a.</b> Wrongful use, possession, etc., of controlled substances	64
• <b>Article 113.</b> Misbehavior of sentinel	64
• <b>Article 114.</b> Dueling	65

• <b>Article 115.</b> Malingering	65
• <b>Article 116.</b> Riot or breach of peace	65
• <b>Article 117.</b> Provoking speeches or gestures	65-66
• <b>Article 120.</b> Rape and carnal knowledge	66
• <b>Article 121.</b> Larceny and wrongful appropriation	66
• <b>Article 122.</b> Robbery	66-67
• <b>Article 123.</b> Forgery	67
• <b>Article 123a.</b> Making, drawing, or uttering check, draft, or order without sufficient funds.	67
• <b>Article 124.</b> Maiming	67
• <b>Article 126.</b> Arson	68
• <b>Article 127.</b> Extortion	68
• <b>Article 128.</b> Assault	68
• <b>Article 129.</b> Burglary	68
• <b>Article 130.</b> Housebreaking	68
• <b>Article 131.</b> Perjury	68-69
• <b>Article 132.</b> Frauds against the government	69
• <b>Article 133.</b> Conduct unbecoming an officer and a gentleman	70
• <b>Article 134.</b> General article	70

**PART XI. MISCELLANEOUS PROVISIONS**

• <b>Article 135.</b> Courts of inquiry	70-71
• <b>Article 136.</b> Authority to administer oaths and to act as notary	71-72
• <b>Article 137.</b> Articles to be explained	72
• <b>Article 138.</b> Complaints of wrongs	72
• <b>Article 139.</b> Redress of injuries to property	73
• <b>Article 140.</b> Delegation by the Governor	73
• <b>Article 141.</b> Payment of fees, costs, and expenses	73-74
• <b>Article 142.</b> Payment of fines and disposition thereof	74
• <b>Article 143.</b> Uniformity of interpretation	74
• <b>Article 144.</b> Immunity for action of military courts	74

**WISCONSIN CODE OF MILITARY JUSTICE**  
**PART I. GENERAL PROVISIONS**

**Article 1. Definitions**

(a) In this Act, 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 —

(A) any information or material that has been determined by an official of the United States or any state pursuant to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national or state security, and

(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 Act.

(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 article 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 such duty.

(9) “Enlisted member” means a person in an enlisted grade.

(10) “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

(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, or

(B) certified as an non-federally recognized judge advocate, under regulations promulgated pursuant 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 such military justice duties required by this Code. If there is no such judge advocate available, then such certification may be made by such senior judge advocate of the commander of another force in the state military forces, as the convening authority directs.

(11) "May" is used in a permissive sense. The phrase "no person may . . ." means that no person is required, authorized, or permitted to do the act prescribed.

(12) "Military court" means a court-martial or a court of inquiry.

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

(14) "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), 125 (Sodomy), 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.

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

(16) "Officer" means a commissioned or warrant officer.

(17) "Officer in charge" means a member of the naval militia, the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(18) "Record," when used in connection with the proceedings of a court-martial, means —

(A) an official written transcript, written summary, or other writing relating to the proceedings; or

(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.

(19) "Shall" is used in an imperative sense.

(20) "State" means the State of Wisconsin.

(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 such 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 title 32, United States Code, 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, the state defense force, 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.

#### *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. 1, § 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:*

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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.

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

(a) This code applies to all members of the state military forces at all times.

(b) Subject matter jurisdiction is established if a nexus exists between an offense, either military or non-military, and the state military force. Courts-martial have primary jurisdiction of military offenses as defined in article 1(a)(14) of this code. 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 such a 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.

## **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.

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

(a) This code has applicability at all times and 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, which is limited only by the prohibition of double jeopardy.

(b) Courts-martial and courts of inquiry 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.

**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

## **PART II. APPREHENSION AND RESTRAINT**

### **Article 7. Apprehension**

- (a) Apprehension is the taking of a person into custody.
- (b) Any person authorized by this code or by chapter 47 of title 10, United States Code, or by regulations issued under either, to apprehend persons subject to this code, any marshal of a court-martial appointed pursuant 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 who take part therein.
- (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 such 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.

### **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 such 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.

**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.

**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, confinement shall be in a civilian or military confinement facility.
- (b) No person authorized to receive prisoners pursuant 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 such officer, of the offense charged against the prisoner, unless otherwise authorized by law.
- (c) Every person authorized to receive prisoners pursuant to subsection (a) to whose charge a prisoner is committed shall, within twenty-four (24) hours after that commitment or as soon as the person is relieved 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.

### **Article 12.** Confinement with enemy prisoners prohibited

No member of the state military forces may be placed in confinement in immediate 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.

### **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 such 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.

### **Article 14.** Delivery of offenders to civil authorities

(a) A person subject to this code accused of an offense against civil authority may be delivered, upon request, 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.

**PART III. NON-JUDICIAL PUNISHMENT**

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

(a) Under such 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 pursuant 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 upon enlisted members of the officer's command —

- (1) an admonition;
- (2) a reprimand;
- (3) the withholding of privileges for not more than six (6) months which need not be consecutive;
- (4) the forfeiture of pay of not more than seven (7) days' pay;
- (5) a fine of not more than seven (7) days' pay;
- (6) a 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 fourteen (14) days, which need not be consecutive; and
- (8) restriction to certain specified limits, with or without suspension from duty, for not more than fourteen (14) days, which need not be consecutive.

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

- (1) any punishment authorized in subsections (b)(1), (2), and (3);
- (2) the forfeiture of not more than one-half (1/2) of one (1) month's pay per month for two (2) months;

(3) a fine of not more than one (1) month's pay;

(4) a 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 (2) pay grades;

(5) extra duties, including fatigue or other duties, for not more than forty-five (45) days which need not be consecutive; and

(6) restriction to certain specified limits, with or without suspension from duty, for not more than sixty (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 —

(1) upon officers of the officer's command —

(A) any punishment authorized in subsections (c)(1), (2), (3), and (6); and

(B) arrest in quarters for not more than thirty (30) days which need not be consecutive.

(2) upon enlisted members of the officer's command —

(A) any punishment authorized in subsection (c).

(e) Whenever any of those punishments 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) 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 —

(1) mitigate reduction in grade to forfeiture of pay;

(2) mitigate arrest in quarters to restriction; or

(3) 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 fifteen (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. § 1 0-2-5-6; 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.

## PART IV. COURT-MARTIAL JURISDICTION

### Article 16. Courts-martial classified

The three kinds of courts-martial in the state military forces are —

- (1) general courts-martial, consisting of —
  - (A) a military judge and not less than five (5) members; or
  - (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 —
  - (A) a military judge and not less than three (3) members; or
  - (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; and
- (3) summary courts-martial, consisting of one (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.

### 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 Army and Air National Guard 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 acknowledge 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.



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

Subject to article 17 of this code, general courts-martial have jurisdiction to try persons subject to this code for any offense made punishable by this code, and may, under such 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.

**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 such limitations as the Governor may prescribe, adjudge any punishment not forbidden by this code except dishonorable discharge, dismissal, confinement for more than one (1) year, forfeiture of pay exceeding two-thirds (2/3) pay per month, or forfeiture of pay for more than one (1) 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.

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

- (a) Subject to article 17 of this code, 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 such 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 thereto. 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 such 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 (1) month, restriction to specified limits for more than two (2) months, or forfeiture of more than two-thirds (2/3) of one (1) month's pay.

*Annotation to Article 20*

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

## PART V. APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL

### Article 22. Who may convene general courts-martial

(a) General courts-martial may be convened by—

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

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

### Article 23. Who may convene special courts-martial

(a) Special courts-martial may be convened by —

- (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;
- (4) the commanding officer of a wing, group, separate squadron, or corresponding unit of the Air Force; or

(5) the commanding officer or officer in charge of any other command when empowered by The Adjutant General.

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

*Annotation to Article 23*

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

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

(a) Summary courts-martial may be convened by —

(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;

(3) the commanding officer of a detached squadron or other detachment, or corresponding unit of the Air Force; or

(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 such 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 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) of this code prior to trial or, in the absence of such 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 such 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 one-third (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 such 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. 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.

- (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 as members thereof such 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 subsection to a judge advocate or to any other principal assistant.

#### *Annotation to Article 25*

This article was adopted from Section 825, Art. 25, UCMJ with clarifying language. Discussion was raised over the definition of "principal 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 —
  - (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 five (5) years; and
  - (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 *pro hac vice*, subject to filing a certificate with

the senior force judge advocate which is the same force as the accused setting forth such 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 or a 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 such 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 be —

(1) a judge advocate as defined in article 1(a)(10) of this code; and

(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 *pro hac vice*, subject to filing a certificate with the military judge setting forth the qualifications that counsel is —

(1) a commissioned officer of the armed forces of the United States or a component thereof; and

(2) a member in good standing of the bar of the highest court of a state; and

(3) certified as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy, or the Marine Corps; or

(4) a judge advocate as defined in article 1 (10) of this Code.

#### *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 such 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 five (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 five (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 three (3) members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three (3) 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 thereof 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) of this code, 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 thereof 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.

## **PART 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) of this code to administer oaths and shall state —

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact 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 thereof 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 to answer any question the answer to which may tend to incriminate him.
- (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 therein 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 of this code 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 thereof 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 —

- (1) is present at the investigation;
- (2) is informed of the nature of each uncharged offense investigated; and
- (3) is 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 (8) days after the accused is ordered into arrest or confinement, if practicable, forwards 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 —

- (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 of this code, if there is such a report; and
- (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 —

- (1) expressing conclusions with respect to each matter set forth in subsection (a); and
- (2) recommending action that the convening authority take regarding the specification.

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

(c) 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 such 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 (5) days after the service of charges upon the accused, or in a special court-martial, within a period of three (3) 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.

### **PART VII. TRIAL PROCEDURE**

#### **Article 36. Governor or The Adjutant General may prescribe rules**

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 or The Adjutant General 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 staff thereof, may censure, reprimand, or admonish the court or any member, the military judge, or counsel thereof, 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 thereof, 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 (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial or (2) to 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 such report, (1) consider or evaluate the performance of duty of any such member as a member of a court-martial or witness therein or (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 (Commonwealth/People), and shall, under the direction of the court, prepare the record of the proceedings.

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

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

(2) The accused may be represented —

(A) by military counsel detailed under article 27 of this code; or

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

(3) 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.

(4) 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.

(5) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under article 27 of this code to detail counsel, in that person's sole discretion —

(A) may detail additional military counsel as assistant defense counsel; and

(B) 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.

(6) 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 —

(1) may forward for attachment to the record of proceedings a brief of such 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) may assist the accused in the submission of any matter under article 60 of this code; and

(3) may 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 article 35 of this code, call the court into session without the presence of the members for the purpose of —

(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; and

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

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.

(b) 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 such 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) 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.

(1) If exercise of a challenge for cause reduces the court below the minimum number of members required by article 16 of this code, 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) Each accused and the trial counsel are entitled initially to one (1) peremptory challenge of members of the court. The military judge may not be challenged except for cause.

(1) 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.

(2) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one (1) 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 thereof, 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 such 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.