STATE OF NEW YORK
DIVISION OF MILITARY AND NAVAL AFFAIRS
330 Old Niskayuna Road
Latham, New York 12110-3514

C-2, DMNA Regulation Number 27-2 **14 September 2021**

Legal Services

MILITARY JUSTICE

1. DMNA Regulation Number 27-2, 30 October 2003, updated C-1, 4 November 2011 is changed as follows:

- Page 555-556 References for DMNA 1057, DMNA 1058, DMNA 1076 dates and form title updated. DMNA 1078 added.

- Appendix 16 DMNA 1057 dated 1 June 2003 replaced with DMNA 1057 dated September 2021.

- Appendix 17 DMNA 1058 dated 1 June 2003 replaced with DMNA 1058 dated September 2021.

- DMNA 1076 dated June 2003 replaced with DMNA 1076 dated September 2021.

- DMNA 1078 Privacy Act Statement dated September 2021 added.

- Part V, Chapter 4, para 4-2, i, (3) updated to read: "Reduction authority pertaining to AGR personnel is not delegated and rests with this Headquarters. Reduction actions will be implemented by completing and forwarding a copy of DMNA Form 1057 completed to part 5 to Headquarters, NYARNG, ATTN: MNHF-AGR after the imposing commander has completed conduct of the proceeding. Prior to any punishment being imposed this Headquarters will review and either approve or disapprove all punishments. Only then will the offender make an election to appeal in part 6. All appeals will then be routed to this command for legal review by MNLA in block 7, and then provided to the appellate authority within this headquarters to determine whether the appeal of the punishment is warranted by completing block 8. All AGR reduction orders will be processed by MNHF-AGR only."

- Part V, Chapter 4, para 4-2, h, (3) added to read: "A fine is collected by receipt of a check or money order made payable to "Division of Military and Naval Affairs," with a note on the check or money order "State Military Fund (20127)." The check or money order is then mailed to: Director of Management and Budget, NYARNG MNBF, DMNA, 330 Old Niskayuna Road, Latham, NY 12110. Include a copy of the completed DMNA 1057 without enclosures, without attachments, and or without classified information with the check or money order when mailed."

- Part V, Chapter 6, para 6-5 updated to read: "A senior authority will act on the appeal expeditiously, accordingly a reasonable decision period should not exceed 30 days absent extraordinary circumstances."

- Part V, Chapter 3, para 3-4, b, (5) updated to read: "If the member is in an inactive duty training (IDT) status the member should be given until the next regularly scheduled drill or 30 days absent extraordinary circumstances. If the member is in a period of annual training, FTNGD orders IAW Title 32, Section 502(f), SAD and or other periods of extended duty status the member should be given 14 days absent extraordinary circumstances."

2. File this change in front of publication for reference purposes.

The proponent of this regulation is the Legal Affairs Office. Users are invited to send comments and suggested improvements and changes on a DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to The Adjutant General, ATTN: MNLA, 330 Old Niskayuna Road, Latham, New York 12110-3514.

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330 Old Niskayuna Road
Latham, New York 12110-3514

DMNA Regulation No. 27-2 **30 October 2003**

Legal Services

MILITARY JUSTICE

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*__SUPERSESSION:__ This regulation supersedes DMNA 27-2, 1 April 1987 and all changes.

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Summary of Change

DMNA Regulation Number 27-2, 30 October 2003
Legal Services – Military Justice

- **Effective 30 October 2003 this new and comprehensive DMNA Regulation regarding military justice is applicable to all members of the Organized Militia of New York State. It is intended to be as similar as possible to the Federal MCM, 1984, while at the same time reflecting the unique aspects and requirements of carrying out Military Justice in Military Forces under State control. Contained herein are many of the recent changes, which have occurred in the Federal Military Rules of Evidence, the UCMJ, the Rules for courts-martial and also, the 1986 Amendments to the Military Law of New York State.**

- **Some specific changes are noteworthy: That an individual cannot object to NJP (Article 15) and instead go to trial by courts-martial; that fines under NJP for both enlisted and officer personnel have been substantially increased; that post-trial review and procedures have been extensively revised; that the previous Military Regulation No. 8 with all changes has been repealed along with previous New York Army National Guard (NYARNG) Regulation 27-1. Further, this regulation shall not apply to any NJP or courts-martial processes initiated prior to its effective date.**

- **The purpose of the New York Regulation for courts-martial (MCM) is to act as a single source of information for commanders and personnel administering the New York State Military Justice System during times of duty when troops are not subject to the Uniform Code of Military Justice (UCMJ) under the Federal Military Justice System.**

- **In order to understand the current Military Justice System of New York, one must review the past federal and State laws.**

- **In 1950, the Congress and President enacted into law the first Uniform Code of Military Justice (UCMJ) (1950). One year later the President executed an executive order creating the MCM - United States, 1951. The first "Uniform Code" and MCM - United States replaced the Army Articles of War (AW) of 1920 and the MCM, U.S. Army, 1949 and the Articles for Government of the Navy (AGW) of 1862.**

- **In 1953, the legislature and Governor of the State of New York after reviewing the report from the Joint Legislative Committee to Study the military law, which reviewed the then new Federal "Uniform Code", and MCM enacted the first revision of the New York State Military Law (NYSML) since 1908. This revised military law incorporated verbatim those sections of the punitive articles from the UCMJ, 1950, and the procedural portions of the MCM, 1951, as were applicable to the militia of the State. Only offenses of a military nature were incorporated such as missing a (troop) movement, insubordinate conduct toward a non-commissioned officer and conduct unbecoming an officer and gentleman. Such offenses normally have no place in a civilian community and, as such, are not usually violations of the State's penal law or other State statutes.**

- **The framers of the NYSML recognized that members of the militia like any other citizens were still subject to the State's penal law and other statutes. Accordingly, many of the more serious offenses contained in the UCMJ, such as murder, manslaughter, burglary, robbery, rape and sodomy were not incorporated into the NYSML.**

- **Section 326 through 333 of Title 32 of the United States Code, entitled <u>National Guard</u>, governs the courts-martial system of the Army National Guard and the Air National Guard when not in federal (active) service. This statute enacted on August 10, 1956, has never been amended to increase military forfeitures and fines to reflect the increase in military pay. Thus, the maximum fines or forfeitures which a summary courts-martial (SCM) may impose are $25.00, a special courts-martial (SPCM) is $100.00, and a general courts-martial (GCM) is $200.00. Unless the Congress of the United States increases these amounts, the legislature of New York due to the Federal "Supremacy Clause" of the United States Constitution, is powerless to act.**

- **Notwithstanding this limitation on the courts-martial sentencing, the New York State legislature did increase the monetary forfeiture to be imposed in a NJP (see NYSML, Section 130.15) to $200.00 if imposed by the Governor, commanding officer of a force, or general or flag officer in command and $150.00 if imposed by any other command.**

- **After several court decisions expanding the rights of an individual in criminal proceedings, the Congress and President in 1968 enacted a revised UCMJ. That same year the President enacted the MCM - United States, 1968. One year later the regulation was revised and has been known as the MCM - United States 1969 (rev. ed.).**

- **In 1970, the New York State Legislature and Governor enacted revisions to the military law to expand the procedural rights of the accused and instituted the Military Justice System following UCMJ, 1968, and MCM, 1969 (rev. ed.).**

- **The Military Justice Act of 1983 passed by both houses of the Congress and signed by the President revised certain portions of the UCMJ, 1983. On August 1, 1984, a MCM - United States became effective.**

- **Both the UCMJ, 1983, and the MCM, 1984, chiefly govern the Regular Component (active duty) of the armed forces and members of the Army Reserve (USAR) and the Air Force Reserve (USAFR) while they are on inactive duty training with written orders voluntarily subjecting them to the UCMJ. However, UCMJ, Article 2(a)(1), subjects the following persons to the UCMJ: "other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it."**

- **The phrase "duty in . . . the armed forces" means active duty. Consequently, if an ARNGUS airman was properly ordered to active duty, as required by 10 U.S.C., Section 672(d) then such soldier or airman would be in an active duty status and amendable to court-martial under the UCMJ.**

- **The UCMJ, 1983, and MCM, 1984, do <u>not</u> govern members of the various State militias unless such militias are activated into federal service in writing by order of the President or such personnel of the militia are individually ordered to federal active duty by written orders specifically stating that such person is subject to the UCMJ.**

- **Effective November 1, 1986, the New York State Legislature and Governor enacted a series of amendments of and additions to the military law. The enactment relates to the convening courts-martial and post-trial procedure and review of courts-martial. The substantive and procedural effects of these changes are reflected in this regulation.**

- **Note that personnel assigned to the National Guard as part of the Active Guard Reserve (AGR) Program, provided they are ordered to full-time duty under Title 32, Section 502(f), are subject to the military law of the State in which they serve and <u>not</u> the UCMJ. This is true not only for persons originally members of the Guard, but also for members who were originally members of the Active Component or AGR personnel now assigned to the Guard of this State. The fact that AGR personnel serving with the National Guard of New York hold an active duty "green" identification card does not subject them to the UCMJ.**

- **In New York State the militia is comprised of the Army National Guard, the Air National Guard, the Naval Militia, the New York Guard and such additional forces as may be created by the Governor.**

- **For purposes of governing the militia while on State duty and in preparing its commanders and troops for possible federal active duty, this regulation will parallel and track the federal MCM, 1984, and modify the same only where appropriate.**

- **Part I of this New York MCM contains a brief description of the New York State Military Justice System, a detailed description of how to prepare and conduct a SCM at the unit level and how to refer more serious charges to a higher command for possible SPCM or GCM. Where a SPCM or GCM is required, military lawyers, judge advocates (JAs), should control the proceedings.**

- **Part II of the regulation contains all of the rules for court-martial for the State of New York.**

- **Part III references the military rules of evidence to be used in court-martial proceedings.**

- **Part IV contains all of the punitive articles together with sample specifications.**

- **Part V contains detailed guidance on the conduct of NJP proceedings (NYSML, Section 130.15).**

- **The appendix contains sample forms and detailed guidance on the conduct of various proceedings.**

- **This regulation is intended to be a complete guide for all matters related to the Military Justice System in New York State.**

- **Recommendations and suggestions to improve this guide are welcomed by the State JA.**

PART I

INTRODUCTION

CHAPTER 1

1-1. Introduction.

a. All forces of the Organized militia of New York State including the Army National Guard, the Air National Guard, the Naval Militia, the New York Guard and such additional forces as may be created by the Governor are subject to the jurisdiction of the NYSML.

b. It should be noted that when members of the Organized militia are ordered to federal active duty pursuant to Title 10, United States Code (USC), Section 672 and when NYARNG or Air National Guard units deploy OCONUS on Title 10 orders they are also concurrently subject to the provisions and jurisdiction of the Federal UCMJ.

c. Therefore, members serving on inactive duty training (IDT) (drills) under Title 32, Section 502, or annual training (AT) under Title 32, Section 503, or on federal training duty (FTTD) under Title 32, or while on administrative duty, attending administrative nights or on additional training days, whether paid or unpaid, or on state active duty (SAD) are all subject to NYSML.

1-2. The Code of Military Justice.

a. Part of the NYSML includes Article 7, The Code of Military Justice. Contained in the Code of Military Justice are the punitive articles (Sections 130.73 to 130.115) which are generally offenses of a military nature. (See Part IV of this regulation)

b. However, since the members are also subject to the penal laws of the State of New York or of the state in which they are performing duty, the punitive articles in the State Code of Military Justice do not contain the more serious offenses such as murder, manslaughter, robbery, burglary, rape, sodomy, etc. Such offenses should be referred to the police where the offense occurred. The state where the offense occurred or the United States Government may exercise jurisdiction over these or other offenses not covered in the NYSML.

c. While the New York State Code of Military Justice and this regulation are patterned after the UCMJ, 1983, and the MCM - United States, 1984, respectively, the State Code and Rules are tailored to be more practical for a largely part-time force.

d. In order that commanders, JAs and members of the Organized militia be familiar with the forms and procedures utilized under the federal active duty system, the forms and procedures utilized to process a State court-martial are the same forms utilized by the active services, as modified for State use.

PART I

CHAPTER 2

THE MILITARY JUSTICE SYSTEM

2-1. General. The military justice system is comprised of judicial proceedings known as courts-martial and NJP proceedings commonly referred to as Article 15 proceedings (referring to Article 15 of the UCMJ or Section 130.15 of the NYSML).

2-2. The courts-martial system.

a. The goal of the courts-martial system is to achieve justice. As in American criminal courts, SPCM and GCM are adversary proceedings. That is, lawyers representing the Government and the accused vigorously present the facts, law, and arguments most favorable to each side following the rules of procedure and evidence. Based upon these presentations the military judge decides questions of law. The court-martial applies the law and decides questions of fact. Only a court-martial can determine the ultimate question of innocence or guilt. Any GCM or SPCM conviction is a State court conviction.

b. There are three types of courts-martial:

(1) General Courts-Martial (GCM).

(2) Special Courts-Martial (SPCM) (including bad conduct discharge (BCD) SPCM).

(3) Summary Courts-Martial (SCM).

2-3. General Courts-Martial (GCM). The GCM tries the most serious offenses and may adjudge the most severe sentences authorized by law. It consists of at least five members, as well as a military judge. A GCM may consist of a military judge alone where the judge approves a written request from the accused for such trial.

a. GCM shall have the power to sentence to: confinement with hard labor not to exceed two-hundred days, fines not exceeding two-hundred dollars, confinement with hard labor in lieu of fines imposed not exceeding one day for each dollar of fine imposed, forfeiture of pay and allowance not exceeding two-hundred dollars, dismissal,

dishonorable discharge, bad conduct discharge, reprimand, reduction of noncommissioned officers to an inferior grade, and to combine any two or more of such punishments in the sentences imposed.

b. In both GCM and SPCM, an enlisted member may request that at least one-third of the total membership of the court be enlisted personnel.

c. General courts-martial may be convened by order of The Adjutant General, the commanding officer of a force of the Organized militia, the commanding officer of a division or corresponding unit of the Army National Guard or the commanding officer of a wing or corresponding unit of the Air National Guard. A sample format for an Order Convening Courts-Martial is contained in Appendix 3.

2-4. Actions After Forwarding Charges in GCM.

a. The Section 130.32 investigation which is an investigation under Section 130.32 of NYSML, may be ordered by any convening authority, and is required before any charge or specification is referred to a GCM by the convening authority for such court. The offenses investigated by the appropriate commander and forwarded as charges to the convening authority are the basis of this investigation. The officer appointed to conduct the investigation pursuant to Section 130.32 must inquire into the truth of the matter set forth in the charges and make a recommendation regarding disposition of the charges in the interest of justice and discipline. For guidance on conducting such investigations, see DA Pam 27-17, modifying its advice for statue use where appropriate. A sample Investigating Officer's (IO) Report (DMNA Form 1051) is contained in Appendix 2.

b. At the Section 130.32 investigation, the accused shall be advised of the charges against him/her and his/her right to counsel. He is entitled to be represented by civilian counsel, at his own expense, or by military counsel of his selection, if reasonably available. At such investigation, the accused shall have the full opportunity to examine and cross-examine witnesses as well as present anything he may desire on his own behalf. The IO shall examine all available witnesses requested by the accused.

c. If after such investigation, the charges are forwarded to the convening authority, they shall be accompanied by a statement summarizing the testimony taken on both sides. A copy of this summary shall be given to the accused. NOTE: Where an investigation is conducted prior to the time the accused is charged, a further investigation after charging will not be required unless:

(1) The accused was not present at the investigation and given the opportunity for representation, examination and presentation, or

(2) The accused after being informed of the charges demands a further investigation. Even in such cases where the accused participated in the investigation, he/she is entitled to demand a further investigation if at the time of the initial investigation he/she had not been charged.

d. Certain Time Limitations. Where a person is ordered into arrest or confinement when being held for trial by a GCM, the charges, together with the investigation and all other papers shall be forwarded to the GCM convening authority within eight days.

e. Role of Staff JA (SJA). No matter shall be referred by the GCM convening authority to trial by GCM without consideration and advice of the State JA shall review the charges and specifications as to legal and factual sufficiency. He/she may make such formal changes to the charges as are necessary to have them conform to the evidence.

f. Service of Charges. The trial counsel to whom court-martial charges are referred shall have a copy of the charge served upon the accused. In peacetime no person shall be brought to trial by GCM within five days after service of charges, or in the case of a SPCM, within three days.

2-5. Special Courts-Martial (SPCM). The SPCM is the intermediate court in our military justice system. A SPCM may not try a commissioned officer, but may try warrant officers. The membership of non-BCD SPCM may take any of three forms. It may consist of:

a. At least three members.

b. At least three members and a military judge, or

c. Solely of a military judge if the accused so requests in writing. If an enlisted accused requests in writing that the court have

(1) SPCM shall have the power to sentence to: confinement with hard labor not exceeding one-hundred days, fines not exceeding one-hundred dollars, confinement with hard labor in lieu of fines imposed not exceeding one day for each dollar of fine imposed, forfeiture of pay and allowances not exceeding one-hundred dollars, bad conduct discharge, reprimand, reduction of noncommissioned officers to an inferior grade, and to combine any two or more of such punishments in the sentences imposed.

(2) The military judge of a SPCM is detailed by the convening authority, and he must be a commissioned officer of a force of the Organized militia or a person on the State Reserve List or State Retired List who is a member of the Bar of New York and who is certified to be qualified for duty as a military judge by the State JA. The convening authority shall appoint a trial counsel and defense counsel, together with such assistance as he/she deems necessary or appropriate.

(3) Charges are referred for trial by a SPCM by means of completing the endorsement on Part V of the Charge Sheet, DMNA Form 1050 (see Appendix 1).

(4) A SPCM may be convened by:

(a) Any person who may convene a GCM,

(b) The commanding officer of a force of the Organized militia, or of a garrison, fort, camp, station, air base or other place where members of a force of the Organized militia are on duty,

(c) The commanding officer of a division, brigade, regiment, detached or separate battalion, or corresponding unit of the Army National Guard, the New York Guard or of any other land force of the Organized militia,

(d) The commanding officer of a wing, group, detached or separate squadron or corresponding unit of the Air National Guard,

(e) The commanding officer of any naval vessel, and the commanding officer of any area, brigade, battalion, division, marine battalion or separate marine company of the Naval Militia,

(f) The commanding officer of any separate or detached command or group of detached units of any of the forces of Organized militia placed under a single commander, or

(g) The commanding officer or officer in charge of any other command when empowered by The Adjutant General. (See Appendix 3 for form for Order Convening Courts-Martial)

When any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed advisable by him/her.

(5) How a SPCM works. A SPCM, like a GCM or SCM, is put into motion by the preparation of charges. Any person subject to the State Code may prefer charges. That person must sign the charges and specifications under oath before a commissioned officer, and state that he or she has personal knowledge of or has investigated the matter set forth in the charges and specifications and that they are true to the best of that person's knowledge and beliefs. The immediate commander shall cause the accused to be informed of the charges preferred against him/her. (See Appendix 1 for form of Charge Sheet, DMNA Form 1050) Upon receiving the charges, the convening authority determines their disposition. The convening authority can dismiss any or all of the charges, forward them to another commander for disposition, or refer any or all of them to a court-martial. If the convening authority decides to refer the charges to a SPCM (or any other court-martial for which he is the convening authority), he or she will cause a convening order to be drawn up designating the type of court-martial and detailing the members. When the court-martial will meet may also be designated.

(6) Once charges have been preferred against an accused, they are forwarded to the appropriate commander exercising SPCM convening authority. This authority reviews the options applicable. (See N.Y.R.C.M. 40L-405) If it is determined that the matter should be tried by a SPCM, the convening authority then refers the matter to such court. Consequently, referral is the order of the convening authority that charges against an accused will be tried by a specified court-martial.

(7) Consultation with a JA as to the appropriate disposition of the charges is essential. If the convening authority finds or is advised by a JA that there are reasonable grounds to believe an offense tri-able by court-martial was committed, that the accused committed it and that the specification alleges an offense, then the case will be referred to trial. After referral, the trial counsel serves a copy of the charge sheet on the accused. The accused cannot be brought to trial before a SPCM over his/her objection within three days after service of the charges.

(8) Besides forwarding and referring charges to court-martial, the convening authority has additional responsibilities. The convening authority must detail properly qualified trial and defense counsel to the court-martial. If the proceeding is to be a BCD SPCM, the convening authority must cause a reporter to be detailed so that a verbatim record can be prepared. One of the most important responsibilities of the convening authority is the detail of the members to the court-martial. Members should be those persons who in the opinion of the convening authority are best suited to the duty by reason of age, training, experience and temperament. The members shall be commissioned officers. However, if the accused has so requested, there may be an enlisted person designated to serve as one of the court members.

(9) Once the court-martial has taken place, the convening authority has certain responsibilities concerning the findings and sentence of the court-martial. (See Appendix 11 for forms of Sentences) Findings and sentence should be reported to the convening authority without delay. The accused is entitled to submit matters for consideration to the convening authority regarding the findings and sentence adjudged. The convening authority may modify the findings and sentence of a court-martial as a command prerogative. He or she may approve, disapprove, commute or suspend the sentence in whole or in part. In taking action on the findings, the convening authority can dismiss a charge by setting aside the finding of guilty or change a finding of guilty to a finding of guilty to a lesser included offense. The convening authority cannot increase the punishment or add additional findings of guilty. Before taking action, the convening authority should seek the advice and recommendations of the SJA.

(10) Once the convening authority has acted on the findings and sentence, an approved sentence of a bad conduct discharge or any confinement is referred by the State JA to a Board of Military Review. Such sentences are not executed until the appeal process is exhausted. Further, any sentence of dismissal or dishonorable discharge must be approved by the Governor.

(11) A SPCM proceeding is complicated and time-consuming. It should be reserved for offenses which cannot be handled either by SCM or NJP. The above information is an overview of how the SPCM works; it is by no means complete and exhaustive. Before taking steps to convene a SPCM, JA assistance should be requested.

(12) BCD SPCM. In some instances a SPCM is authorized by the convening authority to adjudge a bad conduct discharge as part of its maximum sentence. This proceeding differs from an ordinary SPCM in that a verbatim (word-for-word transcript) court record is required and a military judge must be detailed. In the case of persons charged with absent without leave under Section 130.82 of the NYSML, personal jurisdiction of BCD SPCM can be obtained over such persons by means of substituted service under the provisions of Section 308 of the Civil Practice Law and Rules provided that diligent efforts have been made to deliver the charges to the accused. (See Appendix 19 for form of Affidavits of Service) However, if personal jurisdiction is obtained in this manner, the BCD SPCM shall not have the power to adjudge confinement. (See New York PCM 804(c) and NYSML, Section 130.3(d))

2-6. Summary Courts-Martial (SCM). The SCM is a court composed of one officer, who may be either a lawyer or a non-lawyer. However, SJAs shall preside over summary courts, whenever practicable. It is designed to handle relatively minor crimes. The SCM has simplified procedures which are outlined in Appendix 9, Guide for SCM.

a. A SCM may be convened by:

(1) Any person who may convene a GCM or SPCM.

(2) The field grade commander of any Organization authorized a commander in the grade of lieutenant colonel or equivalent, or higher.

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

(4) A superior competent authority to any of the above.

b. SPCM shall have the power to sentence to: confinement with hard labor for not exceeding twenty-five days, fines not exceeding twenty-five dollars, confinement with hard labor in lieu of fines imposed not exceeding one day for each dollar of fine imposed, forfeiture of pay and allowances not exceeding twenty-five dollars, reprimand, reduction of non-commissioned officers to an inferior grade, and to combine any two or more of such punishments in the sentences imposed.

c. NOTE: That under the NYSML only enlisted personnel may be tried by a SCM. Therefore, commissioned officers and warrant officers are not subject to SCM.

d. An accused may not be tried by SCM over objection to such a trial. Prior to trial an accused should indicate in writing an acceptance of disciplinary action under SCM. If the accused objects to trial by SCM, the summary court officer will return the charge sheet to the convening authority for disposition. If the accused consents to trial by SCM the summary court officer will proceed to trial.

e. Troops performing duty outside the United States may be subject to the laws of the foreign jurisdiction, the UCMJ and the Status of Forces Agreement (SOFA) or treaties with the foreign government. In all such instances a JA should be consulted to clarify the issues of jurisdiction.

2-7. Summary Courts-Martial Conducted by Judge Advocate Officer.

a. In order to avoid the common criticism of the traditional SCM as being "a one man prosecutor, judge and jury" and to avoid the appearance and accusation of "command influence," JA officers shall, where practicable, serve as the SCM officer.

b. JA officers are attorneys familiar with military law and military procedures as well as the rules of evidence. Their professional training in examining facts and applying the law to come to a judgment will expedite "the military justice system."

c. Since most JA officers would be objective disinterested parties who are assigned to a general or flag staff or attached to a brigade, squadron or wing, the appearance of possible command influence will be greatly minimized if not completely eliminated.

d. By utilization of JA officers as SCM officers, the rights of the accused will be further safeguarded by ensuring that the proceeding is conducted under due process of law.

e. While it is not mandatory that a JA serve as the SCM, it is encouraged where practicable. If a JA (regardless of rank) is not utilized as a SCM officer, a disinterested field grade officer should be detailed on orders to serve as the SCM.

f. Regardless of whether a JA or field grade officer serves as a SCM, the procedures to be followed are outlined in Appendices 9 and 10, and DA Pam 27-7 (where appropriate to a State SCM).

2-8. How a Summary Courts-Martial (SCM) works.

a. Once an offense is committed it should be investigated by the commanding officer of the accused to the extent deemed necessary to obtain all pertinent facts, witnesses, documents, etc. If charges are preferred, the accused is served with a copy and notation is made thereof on the charge sheet (see Part III, paragraph 12 on the charge sheet, DMNA Form 1050). The charge sheet is then forwarded to the proper SCM convening authority (see paragraph 2-6a). Receipt of the charges should be noted in Part IV, paragraph 13, of the charge sheet. Thereafter, if the convening authority determines that the charges should be referred to a SCM, the convening order may be by notation signed by the convening authority in Part V of the charge sheet.

b. In due course the trial is held (see Appendix 9), and the record of trial is prepared (see Appendix 10, DMNA Form 1056) and is returned to the convening authority for action. The action taken by the convening authority is shown in paragraph 13 on all copies of the record of trial and is thereafter signed by the convening authority. This endorsement to the record of trial formalizes the convening authority's action in the case and operates as the order promulgating that action. A formal promulgating order is not required.

c. The record of trial is forwarded to the JA of the supervisory authority, where the record is legally reviewed by a JA. Once the review is done, the JA "signs off" on the record indicating that it is legally sufficient, or if corrective action is necessary to cure errors in the record, the JA either initiates corrective action to be taken by the supervisory authority or sends it back for corrective action by the convening authority.

d. When the legal review (and corrective action, if any) is completed, the record of trial is filed in the member's MPRJ by forwarding a copy to DMNA, ATTN: ____. A sample completed record of trial can be found in Appendix 10 to this regulation.

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PART I

CHAPTER 3

NON-JUDICIAL PUNISHMENT (NJP)

3-1. General. Where a commander determines that NJP is the appropriate vehicle for dealing with an offense, he/she will resort to Section 130.15 of the NYSML. This section is the functional equivalent of Article 15 of the UCMJ. Such proceedings are governed by Part V of this regulation.

3-2. Who may Impose Section 130.15 punishment. A company grade officer in command may impose NJP as outlined by regulation. If a company grade officer does not feel that company grade punishment is adequate for the offense, the case should be forwarded to the field grade commander with a request that the field grade commander exercise authority under the provisions of Section 130.15. (See Appendix 17, Request to Superior to Exercise Article 15 Jurisdiction, DMNA Form 1058) The company grade commander may not recommend punishment. As appropriate, the field grade commander may return the case to the company grade commander for disposition. A superior may not direct a subordinate commander to take action or dictate the type of punishment to be imposed. A field grade commander may impose punishment as outlined by regulation. A general or flag officer may impose punishment as outlined by regulation.

3-3. No right to demand courts-martial. National Guard enlisted personnel whether on orders under Title 32, United States Code, or state active duty under NYSML may not demand trial by court-martial in lieu of NJP.

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PART I

CHAPTER 4

THE ROLE OF THE COMMANDER IN THE MILITARY JUSTICE SYSTEM

4-1. General.

a. All commanders are responsible for the leadership, military order and discipline of their troops in order to perform their mission.

b. "Discipline" has been defined by the Powell Report on the UCMJ as "a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed. This is not generally characteristic of a civilian community. Development of this state of mind among soldiers or sailors is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice - - the two are inseparable."

c. Since most New York State troops are not performing duty on a full-time basis twenty-four hours a day, seven days a week, fifty-two weeks a year, like their counterparts in the active services, discipline among State troops sometimes becomes more lax than that of the active forces.

d. While this may be appropriate under some circumstances, it is not to be encouraged. If the State troops which are part of the "Ready Reserve" of the active forces are to successfully perform their mission upon an activation into the regular active forces, discipline must be maintained at all times. If troops maintain discipline at all times, the adjustment or assimilation phase that all troops must undergo during an activation will be shortened, thus alleviating some of the "culture shock" the troops may initially experience.

e. In order to maintain military order and discipline, commanders must have a working understanding of the military justice system and learn to utilize the same. A commander who does not know how to use the military justice system on inactive duty will not miraculously know how to immediately use it upon activation. Therefore, not only is it imperative to use the military justice system to maintain good order and discipline within a unit, it is part of the military training not only of the commander, but of his/her troops.

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PART I

CHAPTER 5

THE COMMANDER'S LEGAL OPTIONS

5-1. Introduction. Regardless of how a commander learns of an alleged offense, the matter must be promptly and adequately investigated. However, during the course of the investigation, ensure that a suspect's rights are not violated. (See Chapter 6)

5-2. Courses of Action. Once a commander has determined that an offense has been committed, he/she must take one of the following courses of action:

a. If the offense is minor, he/she may impose NJP. (See Part V of this regulation)

b. If the offense is more serious, the commander may refer same to a commander empowered to convene a SCM. (See paragraph 2-6.a. of this Part I) The commander empowered to convene a SCM may appoint a SCM officer. A request should first be made to a command with JA personnel to have such command either detail on orders a JA officer to act as a SCM, or to simply give approval to the subordinate command to detail a particular JA as SCM. Using the latter procedure, the approval of the higher command would be noted in the instruction portion of Part V of the charge sheet. By so doing, a separate order detailing the SCM would not be necessary. If a JA is not reasonably available for such detail, the command from the JA is requested shall immediately so notify the subordinate command and instead detail a disinterested field grade officer to serve as a SCM.

c. In any event, the commander shall prepare or cause to be prepared the charge sheet, DMNA Form 1050. (See Appendix 1)

d. If the charges are more serious, the command may refer such charges to a SCM convening authority. However, due to the nature of the offenses contained in the State Code of Military Justice (Part V of this regulation) convening a SCM or GCM will rarely be appropriate.

e. If the offense is a violation of State Penal Law, local police should be sought to enforce the violation of State Penal Law.

f. NOTE: The commander may also utilize a board of officers for the administrative elimination of troublesome personnel. (Army National Guard see AR 135-178 and Air National Guard see ANGR 39-10.)

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PART I

CHAPTER 6

RIGHTS WARNING GIVEN TO THE ACCUSED

6-1. General.

a. Section 130.31 of the NYSML is the equivalent of Article 31 of the UCMJ. This section requires that no person subject to this code may compel any person to answer any question which may tend to incriminate himself/herself. Accordingly, no questioning of any accused or person suspected of an offense may take place without that person having been advised of the following:

(1) The nature of the accusation.

(2) That he/she has a right to remain silent.

(3) That is he/she gives up the right to remain silent, any statement he/she makes may be used against him/her as evidence in a court-martial.

b. Although not specifically referred to in Section 130.31, the suspect or accused shall also be further advised that he/she has a right to consult with counsel before answering any questions or deciding whether he/she should answer any questions. He/she should be further advised that he/she may seek the assistance of counsel at any stage of questioning should he/she consent to be questioned.

c. Where the suspect or accused requests counsel, a JA shall be provided by the State at no expense to the person and without regard to his/her indigence or lack thereof before the interrogation proceeds. In addition, the suspect or accused may retain civilian counsel at no expense to the State.

d. After receiving Section 130.31 warnings, the suspect may indicate that he/she wishes to waive his/her rights to remain silent and to consult with a lawyer. These rights must be waived freely, knowingly, and intelligently. The suspect may then be questioned concerning the offense. If the suspect indicates that he/she wishes to consult a lawyer, the accused should not be questioned until a lawyer is present. (See Appendix 20 - Procedural Rights Warning Form, DMNA Form 106)

e. If the accused or suspect indicates that he/she does not wish to answer questions, no questions should be asked. In any case, it is essential that the commander not use a tone of voice which could lead the suspect to believe that he/she is being threatened or which plays down the importance of the warning. If this is done, it may later be held that the suspect's agreement to answer questions was gained by coercion or improper inducement. The statement would then be inadmissible in a trial by court-martial. A company commander may decide not to question a suspect if other evidence is available.

f. If the person being interviewed is not suspected of having committed an offense, but is merely a witness to the offense or has knowledge of it, there is no legal requirement to give the individual a rights warning. During the questioning, the commander may begin to suspect that the witness was involved in the offense. This may happen when it appears that the witness was actually an accomplice or an accessory to the crime. The commander will then stop the questioning, inform the witness of the offense of which he/she is now suspected, and advise him/her of the rights previously described.

PART I

CHAPTER 7

PREPARATION, PREFERRAL AND FORWARDING OF CHARGES

7-1. Preparation of Charges. Where a commander determines that NJP is inadequate, yet the offense does not warrant a GCM or SPCM, a SCM may be utilized. The commander will use DMNA Form 1050 (Charge Sheet), a sample copy of which is contained in Appendix 1. This form must be prepared in an original and four (4) copies.

a. While a commander is responsible for preparation of the charge sheet, there is no legal requirement that he/she do it personally. The preparation of the charge sheet is a critical function of the commander. Whenever possible, the commander will seek the assistance of a JA officer. Once the charges and specifications have been prepared and signed under oath, they are a public record and should not be altered except on the advice of a JA.

b. The accuser (i.e., the person who believes that the charges and specifications are true) will sign in Part III, DMNA Form 1050. While the accuser is usually the commander, it may be any person subject to the NYSML. A superior authority may not order anyone to act as an accuser. The signing of the charge sheet must be made before a commissioned officer authorized to take oaths. (See NYSML, Section 131.2) The accuser must take the oath.

c. The next step in the process, i.e., preferral of the charges against the accused, requires that the commander or his/her representative read the charges and specifications to the accused. The commander or commander's representative will then complete Part III, paragraph 12, DMNA Form 1050.

d. The commander or his/her designated representative will next forward the charge sheet and all allied information as well as exhibits to the commander exercising summary court jurisdiction. (See paragraph 7-2 below)

7-2. Forwarding and Referral of Charges.

a. Letter of transmittal. A letter of transmittal is used to forward the charge sheet and allied information to the court-martial convening authority. (See Appendix 12) This letter contains information about the accused and the commander's specific recommendation for disposition of the charges. The commander must personally sign

the letter of transmittal and attach one copy to each set of the charge sheet and allied material. When making a recommendation for the disposition of the charges, the commander will consider the nature of the offenses, the personal history of the accused, and whether the accused should be eliminated from the service. After considering these matters, the company commander will relate the punishment to the type of court-martial which may impose it. The commander must keep in mind that charges against an accused will be tried by the lowest court which has power to adjudge an appropriate and adequate punishment.

b. Allied papers. Military police or CID reports of investigation, if available, should be forwarded with the charges. If these investigation reports are not completed when the company commander is ready to forward the charges, the charges should be forwarded with a statement saying that the reports will follow when they become available. Initial and interim reports received by the commander may be forwarded with the charge sheet. Under no circumstances should a commander delay the forwarding of charges until completion of the final CID or military police reports.

c. Witness statements. All available witness statements should be forwarded with the charge sheet. Witness statements and summaries of expected testimony may be sworn or unsworn. While in most cases it is best to attach written statements from all available witnesses, it is not necessary to delay forwarding the charges to obtain them. Handwritten statements may be attached to the charges if the typing will cause unnecessary delay.

d. Available documentary evidence. In order to safeguard documentary evidence, originals should not be forwarded with the charge sheet. It is sufficient to forward copies of the documents. For example, if the case is based on a fOrged check it would be unwise to forward the original and risk its loss in transmittal.

e. Extracts of Military Records of Previous Convictions (DD Form 493). This document is prepared by the personnel officer at the request of the company commander and should be forwarded with the charges.

f. Personal evaluation sheet. The personnel evaluation sheet, a local form, contains information concerning the accuser’s military record and the company commander's evaluation of the accuser’s conduct and efficiency.

g. Time limits. The prompt disposition of charges is essential to our system of military justice. An unexplained delay in the processing of charges at any stage may result in the dismissal of charges. When a question concerning a delay is brought up at trial, the burden is on the State to justify the delay and show that it was not intentional or due to an oppressive design or neglect on the part of the command. The period of time for which the State is accountable starts when the accused is placed in restraint or when charges have been preferred.

h. At any stage of the proceedings, the company commander should call a JA for advice if there are any questions or doubts.

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PART I

CHAPTER 8

PREPARATION FOR TRIAL BY SUMMARY COURT-MARTIAL (SCM)

8-1. General. Upon receipt of the charges and accompanying papers referred by the convening authority, the SCM should consider, among other aspects of the case, the following:

a. The file received will normally include several copies of the charge sheet, written statements of witnesses or summaries thereof, any documentary evidence such as DA Form 1379 as utilized by the Army National Guard and as utilized by the Air National Guard indicating a change in personnel status for cases involving absence without leave, and copies of the record of previous convictions (if any).

b. The SCM may use statements of witnesses contained in the file only for the purpose of preparing for trial, that is, to determine the order of witnesses and the questions the SCM will ask and for certain other limited purposes such as impeachment of the testimony of a witness at trial by previously inconsistent statements.

c. The SCM may not use a military policy report as a substitute for live witnesses except to the extent the accused consents after being advised that he/she need not do so, and that he/she is entitled to have the witnesses present.

d. In preparing for trial, the SCM may locate and obtain for use at the trial any relevant documentary or real evidence, even if it was not contained or mentioned in the file as received.

e. The SCM may consider as evidence in the case only the testimony and other evidence admissible under the Rules of Evidence (Part III) which is actually received as evidence at the trial in the presence of the accused.

f. A record of previous convictions will rarely be admissible on the question of guilt or innocence. Therefore, you may consider previous convictions only for the purpose of determining what sentence is appropriate in the event you have found the accused guilty.

g. Remember, that any offense to which the accused pleads not guilty, the accused must be presumed to be innocent until guilt beyond a reasonable doubt is established by legal and competent evidence received at the trial in the accused's presence.

8-2. Examination of the Charge Sheet.

a. Determine whether the pay of the accused entered on page 1 of the charge sheet is consistent with the accused's grade and length of service. If the pay of the accused as reflected on the charge sheet appears to be inaccurate, determine the facts and make appropriate corrections on all copies of the charge sheet. The SCM should initial any changes.

b. Correct any obvious administrative, clerical or typographical errors on the charge sheet and initial each. Corrections of the charges and specifications which involve the inclusion of any person, offense, or matter not fairly included in the charges as referred for trial will not be made. If the charges or specifications are faulty in some material respect, return the file to the convening authority, explaining the reason for returning it.

c. Ascertain whether the endorsement by which the case has been referred for trial is administratively correct, including the designation of the court-martial order by which the SCM was detailed. If it is determined that the referral for trial is incorrect, return the file to the convening authority with an explanation.

d. Ascertain whether the charges are sworn. If they are not, confer with the accuser to determine whether he/she desires to swear to the truth of the charges. An accused may not be tried on unsworn charges over hi/her objection.

8-3. Determining the Law Applicable to the Case.

a. Familiarize yourself with the elements of the offenses charged, i.e., the specific acts or omissions and the accompanying mental state, if applicable, which constitutes the prescribed conduct. Assistance in this regard can be obtained by reading the description of the offense or offenses in Part IV of this regulation. Also, check to see if each offense charged refers to the proper section of NYSML.

b. Be sure that each specification presented in support of each offense charged actually alleges an offense in that if the allegations of the specification were proved beyond a reasonable doubt at trial, they would satisfy the elements of that offense. If it is concluded that the wording of the specification departs so materially from an applicable form specification that either no offense is alleged for the specification is ambiguous, return the file to the convening authority stating the reasons for returning it.

c. If the accused is charged with a failure to obey a regulation or written order and a copy of the directive is not included in the file, obtain copies of the directive and be familiar with its provisions.

8-4. Preparation for Initial Session and Procurement of Witnesses.

a. Arrange for a location at which the initial session may be held. This location must accommodate the hearing of witness testimony. Set a time, date and uniform for the initial session.

b. Notify the accused, through his/her commanding officer, to be at the prescribed location in appropriate uniform at the time set for the initial session.

c. Notify all witnesses who you intend to call to be ready to appear at the place of trial upon further notification by you. For planning purposes, you should notify the witnesses of a tentative time and date at which they may be required to appear. However, if the accused should plead guilty to the charges, you may have no need to call the witnesses. Furthermore, if the accused requests additional witnesses to testify in his/her behalf or if he/she is granted a continuance to obtain additional evidence, the date on which the witnesses will be called to testify in his/her behalf or if he/she is granted a continuance to obtain additional evidence, the date on which the witnesses will be called to testify may have to be postponed. By alerting the witnesses to be ready to appear, if needed, but by not requiring their appearance until you notify them, you permit them to continue to perform their regular duties without interruption and without requiring them to appear needlessly.

8-5. Procedure for the Summary Court.

a. The SCM should determine the order in which the witnesses are to be called. Witnesses for the State should be called first, normally in an order which will permit the facts of the case to be presented, as nearly as possible, in a chronological manner.

b. The SCM should not take the testimony of any witness by telephone at the trial without the accused's consent. However, if in preparing the case or during the trial, the SCM feels a need to make further inquiry he/she may communicate by telephone or otherwise with prospective witnesses or others, except the accused, for the purpose of determining the extent of their knowledge concerning the case. The SCM must not consider such an out-of-court statement as evidence in the case unless it becomes the subject of a stipulation of fact or testimony to which the accused specifically and knowledgeably consents.

c. Determine the admissibility and authentication of any documentary evidence. Assign exhibit numbers to all documentary evidence and any real evidence (physical objects) in the order in which the SCM intends to use them at trial. When the SCM actually receives (admits) an exhibit in evidence at the trial, mark it "Received in Evidence," followed by your initials.

d. Again, utilize the Guide for SCM (Appendix 9) and DA Pam 27-7.

PART I

CHAPTER 9

ABSENT WITHOUT LEAVE (AWOL) AND UNAUTHORIZED ABSENCE (UA)

9-1. Introduction.

a. Chapters 9 and 10 have been developed to assist NYARNG commanders deal with AWOL problems. In order to effectively accomplish his/her mission, a commander should maximize the use of his/her personnel assets (service members). If a commander's unit is understaffed due to an excessive number of members being AWOL, the commander will be hard-pressed to accomplish his/her mission and have his/her unit be an effective force.

b. Accordingly, commanders should take such measures to ensure the members are present for duty when prescribed and correct situations which produce excessive AWOLs.

9-2. Objective. The purpose of this regulation is to provide commanders with guidance and the measures that can be taken from a military justice perspective to ensure attendance for duty of his/her members.

9-3. Definitions. In order to deal with the issues of attendance of members for duty some definitions should be reviewed.

a. AWOL is defined in the NYSML, Section 130.82, as any person subject to this code who without proper authority:

(1) Fails to go to his/her appointed place of duty at the time prescribed, or

(2) Goes from that place, or

(3) Absents himself /herself or remains absent from his/her unit, Organization or other place of duty at which he/she is required to be at the time prescribed shall be punished as a court-martial may direct. The terms AWOL or UA for purposes of this regulation are identical. The NYSML, like the UCMJ, 1983, enumerates related offenses to AWOL such as Missing Movement, NYSML, Section 130.83, and Desertion, NYSML, Section 130.81.

b. Missing movement is defined as any person subject to this code who through neglect or design misses the movement of a ship, aircraft or unit with which he/she is required in the course of duty to move shall be punished as a court-martial may direct.

c. Desertion is defined as:

(1) Any member of the Organized militia who:

(a) Without proper authority goes or remains absent from his/her place of service, Organization, or place of duty with intent to remain away there from permanently, or

(b) Quits his/her unit or Organization or place of duty with intent to avoid hazardous duty or to shirk important service, or

(c) Without being regularly separated from one of the forces of the Organized militia enlists or accepts an appointment in the same or another one of the forces of the Organized militia without fully disclosing the fact that he/she has not been so regularly separated is guilty of desertion.

(2) Any officer of the Organized militia who, having tendered his/her resignation and prior to due notice of the acceptance of same, quits his/her post or proper duties without leave and with intent to remain away there from permanently is guilty of desertion.

(3) Any person found guilty of desertion or attempted desertion shall be punished as a court-martial may direct.

9-4. Measures to Prevent AWOL.

a. Orientation of unit members. Unit commanders, unit personnel officers, or personnel noncommissioned officers must ensure that members are fully aware of and understand their obligations. The members must further be made aware of the prerequisites for participation and the actions that will result from unsatisfactory participation. This information is furnished by:

(1) Advising each newly assigned enlisted member of the principal provisions of (a) through (h) below as they relate to enlistment or assignment. Emphasis will be placed on the member's responsibility to keep his/her commander informed of current mailing address as required by AR 135-133, Chapter 3. Enlisted members will also be required to furnish the name and address of a person who will always know their address.

(a) Service obligations.

(b) Participation requirements.

(c) Excused absences from training.

(d) Unexcused absences from training.

(e) Relocation of residence (transfer to new unit).

(f) Unit training schedule. Inform each newly assigned member where it is posted and that it is his/her responsibility to keep informed of the training schedule.

(g) Reassignment and removal from assignment.

(h) Consequences of failure to participate satisfactorily (NJP and courts-martial).

b. Obtaining from each member with statutory or contractual obligation, a statement acknowledging attendance at an orientation. The statement will show that the member understands his/her service obligations and the participation requirements. The ARNG will sign a Statement of Understanding of Reserve Obligation and Responsibilities (NGR 600-200, NGB Form 590). These statements will be signed in the presence of and countersigned by the unit commander, unit personnel officer, or personnel noncommissioned officer. A new statement will be obtained from each member whenever changes are made in the governing regulations which affect service obligations. This also includes participation requirements and/or the consequences of failure to participate satisfactorily. At least once annually, each member will review, initial and date his/her signed orientation statement.

c. Screening the Military Personnel Records Jacket (MPRJ), U.S. Army, of each newly assigned enlisted member to ensure that the proper statement (b) above has been prepared. If this document is missing, the member must acknowledge an understanding of the service requirements by signing and dating the proper document.

d. Filing the statement in the member's MPRJ as a permanent document.

9-5. Factors to Consider.

a. The reasons for the failure of members to report for duty at the prescribed time and place may have several sources. It is the responsibility of commanders, as managers, to investigate these reasons and take corrective action.

b. The following factors should be considered in selecting an appropriate course of action. They include, but are not limited to, the following:

(1) The nature of the failure to report for duty.

(a) Was it intentional, or was it inadvertent, i.e., a breakdown in communication or transportation? Did the member know where and when he/she was to report, or was there a breakdown in a mode of transportation to the place of duty?

(b) If the failure to report for duty was intentional.

1. Did the individual fail to report for duty for reasons of personal necessity, i.e., conflicting civilian employment schedule, or illness of individual or close family member, or unalterable civilian vacation schedules?

2. Did the member fail to report for duty for selfish reasons, i.e., going to a social or athletic event?

3. Did the member fail to report for duty due to fear of discrimination or harassment from members of the unit, i.e., a personality conflict between a commissioned officer and the member?

9-6. Other Factors to Consider.

a. The age and maturity of the individual.

b. The length of service of the individual.

c. The rank of the individual.

d. The frequency of the unauthorized absences.

e. Prior counseling, reprimands or disciplinary actions.

9-7. Commander's Options. In order to reduce unauthorized absences, the commander shall employ the following measures:

a. Telephone inquiry to individual.

b. Counseling (oral).

c. Admonition (oral or written).

d. Reprimand.

e. Withholding of privileges.

f. Restriction.

g. Extra duties.

h. Forfeiture of pay.

i. Reduction in grade.

j. Administrative separation.

k. Courts-martial.

NOTE: Procedures "e" through "k" can only be accomplished through NJP or courts-martial. NJP is administered in accordance with Part V of this regulation. Measures such as restriction, withholding of privileges and extra duties should not be imposed when the member is in IDT status.

9-8. Telephone Inquiry of Individual.

a. Upon the discovery of a member who has not reported for duty, the commander or his/her designee shall telephone the absent member's home to ascertain his/her whereabouts and the reason for the member's failure to report for duty.

b. The caller shall impress upon the member or other person who answers the telephone that such unauthorized absence will not be tolerated and that if there is a problem with him/her reporting for duty that he/she should explain such reasons.

c. The caller shall maintain a log of the calls indicating the date and time called, the individual and telephone number called, the name of the caller and any remarks made by the individual called or other person with whom the caller spoke. A sample log is attached to this regulation as Appendix 21.

d. If the individual does not have a legitimate reason for his/her failure to report for duty he/she should be advised to report for AWOL counseling by the commander or his/her designee on or prior to the next scheduled duty day. (See Appendix 23 for appropriate action on absences)

9-9. Notification by Mail. In addition to the telephone call, the absent individual should be forwarded two copies of a letter, one by regular mail and the other by certified mail, return receipt requested, advising him/her that he/she was AWOL on a particular duty day for a particular period of time and that he/she had an obligation to report for duty as prescribed and that h/she should advise the commander if there exists any legitimate reason for his/her failure to report for duty. The letter should also advise the member that he/she may be subject to NJP or courts-martial for his/her unauthorized absence. A copy of such letter is attached as Appendix 22.

9-10. Counseling. Counseling is the least severe procedure in the management of improper conduct. Counseling should be informal and private. It is used to correct behavior which will require disciplinary measures, if continued. Counseling is a positive non-disciplinary management tool used primarily to correct or improve future behavior or conduct.

9-11. Admonition. The admonition, either oral or written, is suitable for first time AWOLs. This is the lowest level of a disciplinary action and, in effect, serves as a first time warning that, if the AWOL is repeated, more severe discipline may be imposed. When imposing this form of discipline, the member should be allowed to explain his/her actions and offer facts in mitigation or justification. The member should also be specifically advised that, if the misconduct is repeated more severe discipline will be imposed. An admonition may be included as a reprimand.

9-12. Reprimand.

a. The reprimand is an act of formal censure by a commander which reproves or rebukes the individual for his/her AWOL.

b. Both the written administrative admonition or reprimand will contain a statement that it has been imposed as an administrative measure and not a punishment under NYSML, Section 130.15. Admonitions and reprimands imposed as punishment under Section 130.15, whether administered orally or in writing, should state clearly that they were imposed as punishment under that section. The written statement should contain, as a minimum, the following:

(1) An enumeration of the date, time and place from which the member was absent without leave.

(2) The statement that the admonition/reprimand is imposed as punishment under Section 130.15 or as administrative action.

(3) The statement that the letter of admonition or reprimand will remain on file as a temporary document not less than one (1) year, or to the next reenlistment, whichever is greater.

9-13. Other Remedies.

a. If, after investigating the facts surrounding the individual's reasons for not reporting for duty as prescribed, the commander concludes that the individual is sincere and desires to participate in the unit and is an asset to the unit, but has a problem with a senior noncommissioned officer, the commander may consider:

(1) Reassignment of the individual within the unit,

(2) Transfer of the individual to another unit, or

(3) Equivalent training or substituted unit training assemblies (SUTAs) pursuant to NGR 350-1, paragraphs 2-7, 4-5 and 4-10.

9-14. Further Measures. If the foregoing measures prove fruitless to deter future AWOLs, the commander should consider disciplinary measures such as NJP pursuant to NYSML, Section 130.15. (See Part V of this regulation), or courts-martial pursuant to Article of the NYSML, (see Parts I and II of this regulation), and New York State Regulation for Courts-Martial.

9-15. Separation. If the individual continues to accrue unauthorized absences after the foregoing measures have been utilized, the commander should seriously consider separation from the military pursuant to Chapter 7 of NGR 600-200, or appropriate Air Force regulations.

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PART I

CHAPTER 10

APPREHENSION OF PERSONS
(See Chapter 3 of Part II for More Detailed Procedures)

10-1. Apprehension in AWOL Cases.

a. The apprehension of persons AWOL is explicitly authorized by NYSML, Section 130.7:

"(a) Apprehension is the taking into custody of a person.

"(b) Any person authorized under regulations issued pursuant to this chapter (see Rule 302. N.Y.R.C.M.) to apprehend persons subject to this code, any marshal of a court-martial appointed pursuant to the provisions of this chapter and any peace officer acting pursuant to his/her special duties or may apprehend persons subject to this code upon reasonable belief that an offense has been committed and that the person apprehended committed it**."**

b. Apprehension in the NYSML is the equivalent of "arrest" in civilian terminology, and there must be grounds for ordering a person to be apprehended. The person must be subject to the jurisdiction of the NYSML, i.e., presently a member of the Organized militia and there must be probable cause to apprehend the person. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense (AWOL) has been or is being committed and the person to be apprehended committed or is committing it. Reasonable grounds means that there must be the kind of reliable information that a reasonably prudent person would rely on which makes it more likely than not that something is true. The person who determines probable cause may rely on the reports of others.

c. The person authorizing or ordering apprehension shall be the immediate commander of the person about whom a report of an AWOL offense was received. The commander, in conjunction with authorizing or ordering an apprehension, shall cause to be prepared DMNA Form 1057, NJP, or DMNA Form 1050, a Courts-Martial Charge Sheet, setting forth the charges and specifications of the alleged offense. A copy of DMNA Form 1057 or DMNA Form 1050 shall be attached to a written Order or Authorization for Apprehension, DMNA Form 1062. (See Appendix 24) The DMNA Form 1062 and supporting papers will be reviewed by a JA who shall initial under the

authorizing signature, and the Order of Apprehension shall be delivered to the person who or agency which shall execute the apprehension.

d. The person making the apprehension must be one authorized to do so by Rule 302(b) of N.Y.R.C.M. An apprehension for an AWOL offense shall be made by military law enforcement officials, civilian law enforcement officials, or commissioned, warrant, petty and noncommissioned officers (E8 or above) on either an IDT, AT or SAD status. Whenever possible, apprehension should be carried out by or in conjunction with state, city or local police or local sheriff's departments. Where no state, city or local police or sheriff's department personnel are available, apprehension may be executed by unit personnel without law enforcement assistance only if the use of force is not required or utilized. Under no circumstances are unit personnel to use handcuffs or other restraining devices.

e. Apprehension, as used in the context of AWOL recovery, is not meant to be a form of restraint, and must not be construed or treated as a form of punishment, detention or confinement. Discipline or punishment of AWOL cases can only be administered through Article 15 or court-martial process.

f. Apprehension herein is utilized only to secure the delivery of a person to his/her unit while in a drill or AT status for purposes of disciplining the individual. The use of physical force, restraint or coercion by unit members is not authorized. NOTE: Paragraphs g and h below are not applicable if apprehension is being effected by a peace officer, i.e., state police, sheriff's office personnel or local police officers.

g. Apprehension is made by clearly notifying the person to be apprehended that he/she is in custody. Such notification should be in substantially the following format:

Are you (name and rank of AWOL service member)?

Pursuant to the Order of _____ Commander of _____ and a Warrant of Apprehension, dated _____. (hand copy of warrant and charge sheet to person being detained) You are being taken into custody for violation of the State Code of Military Justice, NYSML, Section 130.82 for being AWOL. You are directed to accompany me to the armory pursuant to the aforesaid warrant.

This notice must be given orally or in writing by the person making the apprehension, and force or restraint to effect custody must not be used, if performed by unit personnel.

Any person or persons making an apprehension should maintain custody of the person apprehended and deliver to and inform as promptly as possible the immediate commander of the person apprehended or any official higher in the chain of command of the person apprehended if it is impractical to inform the immediate commander.

h. In the event the person being taken into custody refuses to accompany the apprehending official back to the armory, such person should be given a notice in substantially in the following format:

Your refusal to accompany me pursuant to an order of your commander and the Warrant of Apprehension is a further violation of the State Code of Military Justice and may result in further charges, and additional judicial proceedings pursuant to the State Code of Military Justice. Such proceedings could result in a less than honorable discharge and/or confinement in a civilian jail.

i. The failure or refusal of the person apprehended to cooperate or to remain at drill or AT may result in a further violation of NYSML, but such action on the part of the person apprehended is not a reason or cause for any person, other than a peace officer, to use physical force, restraint or detention to prevent the person apprehended from leaving.

j. An apprehension by unit personnel may be made at any time or any place except by means of entering a private dwelling where the person to be apprehended resides. In other words apprehensions at personal residences are only permissible to the extent of being "pursuant to at-the-door" contact with the individual to be apprehended. Of course, law enforcement personnel may enter if they so choose to carry out our warrants.

k. A person who is not a resident of a private dwelling entered may not challenge the legality of an apprehension made without a search or arrest warrant, but the persons making an apprehension do not have authority to execute civilian arrest or search warrants.

l. A complete written report of the apprehension, including date, time and location thereof shall be filed with the immediate commander of the person apprehended as soon as reasonably practicable after the apprehension is made.

m. In the case of apprehensions made pursuant to courts-martial charges, unit personnel should attempt to serve a copy of the charge sheet on the accused prior to the issuance of a Warrant of Apprehension. (See Rules 308, 602 and 804) This is well advised because if the individual has been notified of the charges by service of the charge sheet (so as to satisfy the rule requirements of having the opportunity to prepare

defense) then the court-martial may proceed upon the individual being brought before the court-martial by execution of the Warrant of Apprehension. If not, then all that can be accomplished when the individual is first brought in is service of the charge sheet and arraignment (reading of the charges and taking a plea).

PART II
RULES FOR COURTS-MARTIAL

CHAPTER 1
GENERAL PROVISIONS

Rule 101. Scope, title.

a. In general. The administration of military justice in the state military forces is governed by relevant sections of the NYSML, Article 7, and this regulation with one part being the rules for courts-martial.

b. Title. These rules may be known and cited as the New York Rules for Courts-Martial (NYRCM).

Rule 102. Purpose and Construction.

a. Purpose. These rules are intended to provide for the just determination of every proceeding relating to trial by court-martial.

b. Construction. These rules shall be construed in such a manner as to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. These rules shall be construed consistently with the principles of law and rules of evidence generally recognized in the trial of cases in the courts-martial of the United States, where not contrary to or inconsistent with the code. (See NYSML, Section 130.36)

Rule 103. Definitions and Rules of Construction. The following definitions and rules of construction apply throughout the regulation, unless otherwise expressly provided.

a. "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.

b. "Active state duty" means full time military duty in the active service of the State ordered by the Governor or under his authority, and while going to and returning from such duty.

c. "Code" means the State Code of Military Justice set forth in NYSML, Article 7.

d. "Commander" means a commissioned officer in command or an officer in charge except in Part V or unless the context indicates otherwise.

e. "Commanding officer" includes only commissioned officers.

f. "Convening authority" includes a commissioned officer in command for the time being and successors in command.

g. "Copy" means an accurate reproduction, however made. Whenever necessary and feasible, a copy may be made by handwriting.

h. "Court-martial" includes, depending on the context:

(1) The military judge and members of a GCM or SPCM, or

(2) The military judge when a session of a GCM or SPCM is conducted without members under NYSML, Section 130.39, or

(3) The military judge when a request for trial by military judge alone has been approved under N.Y.R.C.M. 903, or

(4) The members of a SPCM when a military judge has not been detailed, or

(5) The SCM officer.

i. "Days" means when a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall count as one day.

j. "Detail" means to order a person to perform a specific temporary duty, unless the context indicates otherwise.

k. "Enlisted member" means a person in an enlisted grade in any force of the Organized militia.

l. "Explosive" means gunpowder, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. and 232(5) or 844(j).

m. "Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

n. "General officer" means an officer of a force of the Organized militia serving in or having the grade of general, lieutenant general, major general, brigadier general, admiral, vice admiral, rear admiral, or commodore.

o. "Grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

p. "Includes" means "includes but is not limited to."

q. "Joint" in connection with military Organization connotes activities, operations, Organizations, and the like in which elements of more than one military service of the same nation participate.

r. "JA" means an officer of a force of the Organized militia who is a member of the JA General's Corps or who is designated as a JA.

s. "Legal officer" means an officer of the New York Naval Militia designated to perform legal duties for a command.

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

u. "Members" means the members of a court-martial are the voting members detailed by the convening authority.

v. "Military judge" means the presiding officer of a GCM or a SPCM detailed in accordance with NYSML Section 130.26. Except as otherwise expressly provided, in the context of a SCM "military judge" includes the SCM officer or in the context of a SPCM without a military judge, the president. Unless otherwise indicated in the context, "the military judge" means the military judge detailed to the court-martial to which charges in a case have been referred for trial.

w. "Officer" means commissioned officer, including a commissioned warrant officer.

x. "Officer in charge" means a member of the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

y. "Organized militia" means the Organized militia, the composition of which is stated in NYSML, Section 2.

z. "Original." With respect to the appointment of a member of the armed forces in a Regular or Reserve Component, refers to his/her most recent appointment in that component that is neither a promotion nor a demotion.

(aa) "Party." Party, in the context of parties to a court-martial, means:

(1) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question, and

(2) Any trial or assistant trial counsel representing the State, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

(bb) "Pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

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

(dd) "Spouse" means husband or wife, as the case may be.

(ee) "SJA" means a JA so designated in the Army, Air Force or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a JA.

(dd) "Sua sponte" means that the individual involved acts on his or her initiative, without the need for a request, motion, or application.

(ee) "Superior commissioned officer" means a commissioned officer superior in rank or command.

(ff) The word "vehicle" includes every description of carriage or other artificial contrivance used or capable of being used as a means of transportation on land.

(gg) The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used as a means of transportation on water.

(hh) "Supplies" includes material, equipment and stores of all kinds.

Rule 104. Unlawful command influence.

a. General prohibitions.

(1) Convening authorities and commanders. No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings. (See NYSML 130.37(a))

(2) All persons subject to the code. No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case of the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts. (See NYSML, Section 130.37(a))

(3) Exceptions.

(a) Instructions. Subsections a(1) and (2) of this rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial. (See NYSML, Section 130.37(a))

(b) Court-martial statements. Subsections a(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel. (See NYSML, Section 130.37(a))

(c) Offense. Subsections a (1) and (2) of this rule do not prohibit appropriate action against a person for an offense committed while detailed as a military judge, counsel, or member of a court-martial or while serving as individual counsel.

b. Prohibitions concerning evaluations.

(1) Evaluation of member of defense counsel. 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 Organized militia is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the Organized militia, or in determining whether a member of the Organized militia should be retained. No person subject to the code may:

(a) Consider or evaluate the performance of duty of any such person as a member of a court-martial, or

(b) Give a less favorable rating or evaluation of any defense counsel because of the zeal with which such counsel represented any accused. (See NYSML, Section 130.37(b))

(2) Evaluation of military judge.

(a) GCM. Neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a GCM which relates to the performance of duty as a military judge.

(b) SPCM. The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a SPCM which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of The Adjutant General which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

Rule 105. Direct communications. Convening authorities and SJAs; among SJAs.

a. Convening authorities and SJAs. Convening authorities shall, at all times, communicate directly with their SJAs in matters relating to the administration of military justice.

b. Among SJAs and with the JA General. The SJA of any command is entitled to communicate directly with the SJA of a superior or subordinate command, or with the State JA. (See NYSML, Section 130.6(b))

Rule 106. Delivery of military offenders to civilian authorities.

a. In general. A person subject to the code and under military control accused of an offense against civilian authority may be delivered, upon request, to the civilian authority for trial. A member may be placed in restraint by military authorities for this purpose only upon receipt of a duly issued warrant for the apprehension of the member or upon receipt of information establishing probable cause that the member committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for such time as is reasonably necessary to effect the delivery. (See NYSML, Section 130.14)

b. Offenses not under the code. In each case not involving an offense cognizable under the code, the determination to deliver or to refuse to deliver, a person subject to the code and under military control to civil authority must be made by or under the authority of a general officer. That officer or his/her designee may (if delivery is made) and must (if delivery is refused), make an immediate telephone report to The Adjutant General, giving the circumstances surrounding the commission of the alleged offense, the evidence leading to a reasonable belief that the person committed that offense and, in the case of refusal, the reason for the failure to make deliver.

c. Delivery of prisoner. When delivery under this rule is made in any civil authority of a person undergoing sentence of a court-martial if followed by conviction in a civilian criminal tribunal, will interrupt the execution of the sentence of the court-martial, and the person, after having answered to the civil authorities for his/her offense, must be returned to military custody upon the request of The Adjutant General, for completion of the court-martial sentence.

Rule 107. Rules of court. The Adjutant General and persons designated by him, may make rules of court not inconsistent with N.Y.R.C.M. and the code for the conduct of court-martial proceedings. (See NYSML, Section 130.36) In the event such rule or rules are not promulgated, the conduct of court-martial proceedings shall be in compliance with the UCMJ, so long as same is not inconsistent with the N.Y.R.C.M.

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PART II

CHAPTER 2

JURISDICTION

Rule 201. Jurisdiction in general.

a. Nature of courts-martial jurisdiction.

(1) The jurisdiction of courts-martial is entirely penal or disciplinary.

(2) This code applies in all places within the State. It also applies to all persons subject to the code while serving outside the State and applies while such persons are going to and returning from such service outside the State in like manner and to the same extent as while those persons are serving within the State. (See NYSML, Section 130.5(a))

(3) The jurisdiction of a court-martial with respect to offenses under the code is not affected by the place where the court-martial sits. (See NYSML, Section 130.5(b))

b. Requisites of court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:

(1) The court-martial must be convened by an official empowered to convene it. See NYSML, Section 130.22, in the case of a GCM; NYSML, Section 130.23, in the case of a SPCM; and NYSML, Section 130.24, and Part I, this manual, in the case of a SCM; and

(2) The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. (See NYSML, Section 130.16) As used here, "personnel" includes only the military judge, the members and the SCM officer; and

(3) Each charge before the court-martial must be referred to it by competent authority (see NYSML, Section 130.34); and

(4) The accused must be a person subject to court-martial jurisdiction (see NYSML, Section 130.2); and

(5) The offense must be subject to court-martial jurisdiction. (See NYSML, Sections 130.34 and 130.73 to 15)

c. Contempt. A court-martial may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both. (See NYSML, Section 130.48)

d. Exclusive and nonexclusive jurisdiction.

(1) Courts-martial have exclusive jurisdiction of purely military offenses.

(2) An act or omission which violates both the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal.

(3) Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, the determination of which tribunal within the State, or the United States will exercise jurisdiction is a matter for the State, the United States, or the municipalities concerned, and is not a right of the suspect or accused.

e. Reciprocal jurisdiction.

(1) Each armed force has court-martial jurisdiction over all persons subject to the code. (NYSML, Sections 130.17 and 130.2.)

(2) A member of one armed force may be tried by a court-martial convened by a member of another armed force when the accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the Organized militia. An accused should not ordinarily be tried by a court-martial convened by a member of a different component of the Organized militia except when the above circumstances exist. However, failure to comply with this policy does not affect an otherwise valid referral.

(3) Nothing in this rule prohibits detailing to a court-martial a military judge who is a member of a component of the Organized militia different from that of the accused or the convening authority, or both.

(4) In all cases, review after that by the officer with authority to convene a GCM for the command which held the trial, where that review is required by the code, must be carried out by the component of the Organized militia of which the accused is a member.

f. Types of courts-martial.

(1) GCM. Subject to subsection e, a GCM may try any person subject to the code for any offense made punishable by the code. Upon a finding of guilty of an offense made punishable by the code, a GCM may adjudge any punishment authorized under NYSML, Section 130.18.

(2) SPCM. Subject to subsection e, a SPCM may try any person subject to the code except commissioned officers (see Title 32, U.S.C., Section 328) for any offense made punishable by the code. Upon a finding of guilty, a SPCM may adjudge any punishment authorized under NYSML, Section 130.19. A bad conduct discharge cannot be adjudged unless a complete record of the proceedings and testimony before the court has been made.

(3) SCM. See N.Y.R.C.M. 1301(c) and (d)(1).

g. Concurrent jurisdiction of other military tribunals. The provisions of the code and this manual conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals. (See NYSML, Section 130.12)

Rule 202. Persons subject to the jurisdiction of courts-martial.

a. In general. Courts-martial may try any person when authorized to do so under the code. (See NYSML, Section 130.2)

b. Attachment of jurisdiction over the person.

(1) In general. Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction attaches, such jurisdiction shall continue for all purposes of trial, sentence and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial.

(2) Procedure. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction; arrest; or confinement and preferral of charges.

Rule 203. Jurisdiction over the offense.

To the extent permitted by the United State or New York State Constitutions, courts-martial may try any offense under the code.

PART II

CHAPTER 3

INITIATION OF CHARGES, APPREHENSION, PRETRIAL, RESTRAINT, RELATED MATTERS

Rule 301. Report of offense.

a. Who may report. Any person may report an offense subject to trial by court-martial.

b. To whom reports conveyed for disposition. Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

Rule 302. Apprehension.

a. Definition and scope.

(1) Definition. Apprehension is the taking of a person into custody. (NYSML, Section 130.7(a).)

(2) Scope. This rule applies only to apprehensions made by persons authorized to do so under subsection b of this rule with respect to offenses subject to trial by court-martial. Nothing in this rule limits the authority of the federal or State law enforcement officials to apprehend persons, whether or not subject to trial by court-martial, to the extent permitted by applicable enabling statutes and other law. Nothing in this rule shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified. (See NYSML, Section 130.9(e))

b. Who may apprehend. The following officials may apprehend any person subject to trial by court-martial. (See NYSML, Section 130.7):

(1) Military law enforcement officials. Security police, military police, master-at-arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the code or not, when, in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties.

(2) Civilian law enforcement officials. Peace officers acting pursuant to their special duties police affairs.

(3) Commissioned, warrant, petty, and noncommissioned officers. All commissioned, warrant, petty, and noncommissioned officers on SAD, AT or during IDT or when on any ordered military duty.

(4) Civilians authorized to apprehend deserters. Under NYSML, Section 130.8, any civil officer having authority to apprehend offenders under laws of the United States of the any state, territory, commonwealth, or possession, when the apprehension is of a deserter from the Organized militia.

c. Grounds for apprehension. A person subject to the code may be apprehended for an offense tri-able by court-martial upon probable cause to apprehend. (See also NYSML, Section130.9(d)) Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. Persons authorized to apprehend under subsection b(2) of this rule may also apprehend persons subject to the code who take part in quarrels, frays, or disorders among persons subject to the code, wherever they occur.

d. How an apprehension may be made.

(1) In general. An apprehension is made by clearly notifying the person to be apprehended that that person is in custody. This notice must be given orally or in writing. (NYSML, Section 130.9(b) and (c))

(2) Warrants. Neither warrants nor any other authorization shall be required for an apprehension under these rules except as required in subsection e(2) of this rule.

(3) Use of force. Any person authorized under these rules to make an apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

e. Where an apprehension may be made.

(1) In general. An apprehension may be made at any place, except as provided in subsection e(2) of this rule.

(2) Private dwellings. A private dwelling includes dwellings, on or off a military installation, such as single-family houses, duplexes, and apartments. The quarters may be owned, leased, or rented by the residents, or assigned, and may be occupied on a temporary or permanent basis. "Private dwelling" does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places. No person may enter a private dwelling for the purpose of making an apprehension under these rules unless:

(a) Pursuant to consent under Mil. R. Evid. 314(e) or 316(d)(2),

(b) Under exigent circumstances described in Mil. R. Evid. 315(g) or 316(d)(4)(B),

(c) In the case of a private dwelling which is military property or under military control, or nonmilitary property in a foreign country,

(i) If the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists, or ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(ii) If the person to be apprehended is not a resident of a private dwelling, the entry has been authorized by an official listed Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry.

(d) In the case of a private dwelling not included in subsection e(2)(c) of this rule.

(i) If the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority, or

(ii) If the person to be apprehended is not a resident of the private dwelling the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority.

A person who is not a resident of the private dwelling entered may not challenge the legality of his/her own apprehension on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in this subsection e(2) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

Rule 303. Preliminary inquiry into reported offenses.

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses tri-able by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses. The commander should seek the advice of his/her SJA before taking any action.

Rule 304. Pretrial restraint.

a. Types of pretrial restraint. Pretrial restraint is moral or physical restraint on a person's liberty, arrest, or confinement. (NYSML, Section 130.9(a).)

(1) Conditions on liberty. Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) Arrest. Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits. A person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving guard, or bearing arms. The status arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(3) Confinement. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. (See N.Y.R.C.M. 305)

b. Who may order pretrial restraint?

(1) Of officers and warrant officers. Only a commanding officer to whose authority the officer or warrant officer is subject may order pretrial restraint of that officer or warrant officer. (NYSML, Section 130.9(c).)

(2) Of enlisted persons. Any officer may order pretrial restraint of any enlisted person.

(3) Delegation of authority. The authority to order pretrial restraint of officers and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) Authority to withhold. A superior competent authority may withhold from a subordinate the authority to order pretrial restraint. An order withholding such authority shall be in writing.

c. When a person may be restrained. No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense tri-able by court-martial has been committed,

(2) The person to be restrained committed it, and

(3) The restraint ordered is required by the circumstances.

d. Procedures for ordering pretrial restraint. Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person must be delivered personally by the authority who issues it or through other persons subject to the code. (NYSML, Section 130.9(b).) The order to an officer must be delivered personally by the authority who issues it or by another commissioned officer (NYSML, Section 130.9(c).) Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

e. Notice of basis for restraint. When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint. (NYSML, Section 130.10.)

f. Punishment prohibited. Pretrial restraint is not punishment and must not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense, which is the basis for that restraint. Prisoners being held for trial must not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. (NYSML, Section 130.13.) Prisoners must be afforded facilities and treatment under regulations of the Department of Corrections of the State of New York.

g. Release. Except as otherwise provided in N.Y.R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint terminates when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

h. Administrative restraint. Nothing in this rule prohibits limitations on a service member imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

Rule 305. Pretrial confinement.

a. In general. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges. It is executed only at a guardhouse or at a jail, penitentiary, or prison designated by the Governor or Commissioner of the Department of Corrections, State of New York, for that purpose. (NYSML, Section 130.11.)

b. Who may be confined? Any person who is subject to the code may be confined if the requirements of this rule are met.

c. Who may order confinement? See N.Y.R.C.M. 304(b). No provost marshal, commander or a guard, master-at-arms or warden, keeper or officer of a city or county jail or of any other jail, penitentiary, or prison designated by the Governor or Commissioner of the Department of Corrections may refuse to his/her charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him/her, of the offense charged against the prisoner. (NYSML, Section 130.12(a).)

d. When a person may be confined. No person may be ordered into pretrial confinement except for probable cause. (NYSML 130.9(d).) Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense tri-able by court-martial has been committed,

(2) The person confined committed it, and

(3) Confinement is required by the circumstances.

e. Advice to the accused upon confinement. Each person must be promptly informed of:

(1) The nature of the offenses for which held,

(2) The right to remain silent and that any statement made by the person may be used against the person,

(3) The right to retain civilian counsel at no expense to the State, and the right to request assignment of military counsel, and

(4) The procedures by which pretrial confinement will be reviewed.

f. Military counsel. If requested by the prisoner, military counsel must be provided to the prisoner before the initial review under subsection i of this rule. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner must be so informed. Unless otherwise provided by regulations of The Adjutant General, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

g. Who may direct release from confinement. Any commander of a prisoner, an officer appointed by The Adjutant General to conduct the review under subsection i of this rule, or once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

h. Notification and action by commander.

(1) Report. Unless the commander of the prisoner ordered to pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer, or the commander of a guard, master-at-arms, warden, keeper or officer of a city or county jail or of any other jail, penitentiary or prison designated by the Governor or Commissioner of the Department of Corrections to whose charge the prisoner was committed must, within 24-hours after that commitment, cause to be made a report to the commander which must contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement. (See NYSML, Section 130.12(b))

(2) Action by commander.

(a) Decision. Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of report that a member of the commander's unit or Organization has been confined, the commander must decide whether pretrial confinement will continue.

(b) Requirements for confinement. The commander must direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense tri-able by a court-martial has been committed, and

(ii) The prisoner committed it, and

(iii) Confinement is necessary because it is foreseeable that:

- The prisoner will not appear at a trial, pretrial hearing, investigation, or

- The prisoner will engage in serious criminal misconduct, and

- Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense foreign relations of the United States and

specifically includes: a military or defense advantage over any foreign nation or group of nations, a favorable foreign relations position, or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

(c) Memorandum. If continued pretrial confinement is approved, the commander must prepare a written memorandum, which states the reasons for the conclusion that the requirements for confinement in subsection h(2)(b) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents such as witness statements, investigative reports, or official records. This memorandum must be forwarded to the reviewing officer under subsection (i) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared. However, additional information may be added to the memorandum at any time.

i. Procedures for review of pretrial confinement.

(1) In general. A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement must be made within seven (7) days of the imposition of confinement.

(2) By whom made. The review under this subsection must be made by a neutral and detached officer appointed by the senior commander of the unit to which the prisoner was assigned at the time of the alleged commission of the offense.

(3) Nature of review.

(a) Matters considered. The review under this subsection must include a review of the memorandum submitted by the prisoner's commander under subsection h(2)(c) of the rule. Additional written matters may be considered, including any submitted by the accused. The prisoner, and the prisoner's counsel, if any, must be allowed to appear before the reviewing officer and make a statement, if practicable. A representative of the command may appear before the reviewing officer to make a statement.

(b) Rules of evidence. Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the military rules of evidence do not apply to the matters considered.

(c) Standard of proof. The requirements for confinement under subsection h(2)(b) of this rule must be proved by a preponderance of the evidence.

(4) Extension of time limit. The reviewing officer may, for good cause, extend the time limit for completion of the initial review to ten (10) days after the imposition of pretrial confinement.

(5) Action by reviewing officer. Upon completion of review, the reviewing officer must approve continued confinement or order immediate release.

(6) Memorandum. The reviewing officer's conclusions, including the factual findings on which they are based, must be set forth in a written memorandum. A copy of the memorandum and of all documents considered must be maintained and provided to the accused or the Government on request.

(7) Reconsideration of approval of continued confinement. The reviewing officer must, after notice to the parties, reconsider the decision to confine the prisoner upon request based upon any significant information not previously considered.

j. Review by military judge. Once the charges for which the accused has been confined are referred to trial, the military judge must review the propriety of pretrial confinement upon motion for appropriate relief.

(1) Release. The military judge must order release from pretrial confinement only if:

(a) The reviewing officer's decision was an abuse of discretion and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection h(2)(b) of this rule,

(b) Information not presented to the reviewing officer establishes that the prisoner should be released under subsection h(2)(b) of this rule, or

(c) The provisions of subsection (i) (2) or (3) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection h(2)(b) of this rule.

(2) Credit. The military judge must order administrative credit under subsection k of this rule for any pretrial confinement served as provisions of f, h, or i of this rule.

k. Remedy. The remedy for noncompliance with subsection f, h, i or j of this rule is an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit is computed at

the rate of one (1) day credit for each day of confinement served as a result of such noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit is to be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit is to be applied against fine and forfeiture of pay, in that order, if adjudged. For purposes of this subsection, one (1) day of confinement is equal to one (1) day of total forfeiture of a like amount of fine. The credit cannot be applied against any other form of punishment.

l. Confinement after release. No person whose release from pretrial confinement has been directed by a person authorized in subsection g of this rule may be confined again before completion of trial except upon the discovery, after the order of release, of evidence of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

m. Exceptions.

(1) Operational necessity. The Adjutant General may suspend application of subsections e(2) and (3), f, h(2)(a) and (c), and i of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) At sea. Subsections e(2) and (3), h(2)(c), and i of this rule does not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer must be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection h(2)(c) of this rule must be transmitted to the reviewing officer under subsection i of this rule and must include an explanation of any delay in the transfer.

Rule 306. Initial disposition.

a. Who may dispose of offenses. Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense tri-able by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of subordinate commander to act on cases over which authority has not been withheld.

b. Policy. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection c of the rule.

c. How offenses may be disposed of. Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

(1) No action. A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

(2) Administrative action. A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

(3) NJP. A commander may consider the matter pursuant to NYSML, Section 130.15, NJP. (See Part V)

(4) Disposition of charges. Charges may be disposed of in accordance with N.Y.R.C.M. 401.

(5) Forwarding for disposition. A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

d. National security matters. If a commander not authorized to convene GCM finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the GCM convening authority for action under N.Y.R.C.M. 407(b).

Rule 307. Preferral of charges.

a. Who may prefer charges. Any person subject to the code may prefer charges. (NYSML, Section 130.30(a))

b. How charges are preferred, oath. A person who prefers charges must:

(1) Sign the charges and specifications under oath before a person described in NYSML, Section 131.2, authorized to administer oaths, and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief. (NYSML, Section 130.30(a))

c. How to allege offenses.

(1) In general. The format of charge and specification is used to allege violations of the code.

(2) Charge. A charge states the article of the code which the accused is alleged to have violated.

(3) Specification. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. No particular format is required.

(4) Multiple offenses. Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense.

(5) Multiple offenders. A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

d. Harmless error in citation. Error in or omission of the designation of the article of the code or other regulation violated is not a ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

Rule 308. Notification to accused of charges.

a. Immediate commander. The immediate commander of the accused must cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable. (See NYSML, Section 130.30(b))

b. Commanders at higher echelons. When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under subsection a of this rule as soon as practicable.

c. Remedy. The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief may be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.

PART II

CHAPTER 4

FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general.

a. Who may dispose of charges? Only persons authorized to convene courts-martial or to administer NJP under NYSML, Section 130.15 may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

b. Prompt determination. When a commander with authority to dispose of charges receives charges, that commander must promptly determine what disposition will be made in the interest of justice and discipline.

c. How charges may be disposed of. Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in N.Y.R.C.M. 306(b).

(1) Dismissal. When a commander dismisses charges, further disposition under N.Y.R.C.M. 306(c) of the offenses is not barred.

(2) Forwarding charges.

(a) Forwarding to a superior commander. When charges are forwarded to a superior commander for disposition, the forwarding commander must make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification must be noted.

(b) Other cases. When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made.

(c) Forwarding charges against person held for trial by GCM. When a person is held for trial by GCM, the commanding officer must, within eight (8) days after the accused is ordered into arrest or confinement, if practicable, forward through channels the charges, together with the investigation and allied papers, to the GCM convening authority. If the same is not practicable, he/she must report in writing to that authority the reasons for delay. (See NYSML, Section 130.33)

(3) Referral of charges. See N.Y.R.C.M. 403, 404, 407 and 601.

Rule 402. Action by commander not authorized to convene courts-martial.

When in receipt of charges, a commander authorized to administer NJP but not authorized to convene courts-martial may:

a. Dismiss any charges, or

b. Forward them to a superior commander for disposition.

Rule 403. Action by commander exercising SCM jurisdiction.

a. Recording receipt. Immediately upon receipt of sworn charges, and officer exercising SCM jurisdiction over the command shall cause the hour and date of receipt to be entered on the charge sheet.

b. Disposition. When in receipt of charges a commander exercising SCM jurisdiction may:

(1) Dismiss any charges, or

(2) Forward charges (or after dismissing charges, the matter) to a subordinate commander for disposition, or

(3) Forward any charges to a superior commander for disposition, or

(4) Subject to N.Y.R.C.M. 601(d), refer charges to a SCM for trial, or

(5) Unless otherwise prescribed by The Adjutant General, direct a pretrial investigation under N.Y.R.C.M. 405 and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Rule 404. Action by commander exercising SPCM jurisdiction.

When in receipt of charges, a commander exercising SPCM jurisdiction may:

a. Dismiss any charges, or

b. Forward charges (or after dismissing charges, the matter) to a subordinate commander for disposition, or

c. Forward any charges to a superior commander for disposition, or

d. Subject to N.Y.R.C.M. 601(d), refer charges to a SCM or to a SPCM for trial, or

e. Unless otherwise prescribed by The Adjutant General, direct a pretrial investigation under N.Y.R.C.M. 405 and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Rule 405. Pretrial investigation.

a. In general. Except as provided in subsection k of the rule, no charge or specification may be referred to a GCM for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule has no effect if the charges are not referred to a GCM. (See NYSML, Section 130.32(a))

b. Earlier investigation. If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence. (See NYSML, Section 130.32(c))

c. Who may direct investigation. An investigation may be directed under this rule by any court-martial convening authority. The Adjutant General may also give procedural instructions not inconsistent with these rules.

d. Personnel.

(1) Investigating officer. The commander directing an investigation under this rule must detail an officer, not the accuser, as investigating officer, who must conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the case in any other capacity.

(2) Defense counsel.

(a) Detailed counsel. Except as provided in subsection d(2)(b) of this rule, military counsel appointed by The Adjutant General who is a member of the Bar of the State of New York must be detailed to represent the accused.

(b) Individual military counsel. The accused may request to be represented by individual military counsel. Such requests are to be acted on in accordance N.Y.R.C.M. 506(b). When the accused is represented by individual military counsel, counsel detailed to represent the accused is excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed counsel. The investigating officer must forward any request by the accused for individual investigation. That commander shall follow the procedures in R.C.M. 506(b).

(c) Civilian counsel. The accused may be represented by a civilian counsel at no expense to the State. Upon request, the accused is entitled to reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation must not be unduly delayed for this purpose. Representation by civilian counsel must not limit the rights to military counsel under subsections d(2)(a) and (b) of this rule.

(3) Others. The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

(a) Counsel to represent the State, and

(b) A reporter, and

(c) An interpreter.

e. Scope of investigation. The investigating officer must inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges.

f. Rights of the accused. At any pretrial investigation under this rule the accused has the right to:

(1) Be informed of the charges under investigation.

(2) Be informed of the identity of the accuser.

(3) Except in circumstances described in N.Y.R.C.M. 804(b)(2), be present throughout the taking of evidence.

(4) Be represented by counsel.

(5) Be informed of the witnesses and other evidence than known to the investigating officer.

(6) Be informed of the purpose of the investigation.

(7) Be informed of the right against self-incrimination under NYSML, Section 130.31.

(8) Cross-examine witnesses who are produced under subsection g of this rule.

(9) Have witnesses produced as provided for in subsection g of this rule.

(10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection g of this rule.

(11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer.

(12) Make a statement in any form.

g. Production of witnesses and evidence, alternatives.

(1) In general.

(a) Witnesses. Except as provided in subsection g(4)(a) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, must be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the

significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1) and (6) is not "reasonably available."

(b) Evidence. Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the State and which is relevant to the investigation and not cumulative must be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

(2) Determination of reasonable availability.

(a) Military witnesses. The investigating officer must make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer must inform the parties. Otherwise, the immediate commander of the witness must be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under N.Y.R.C.M. 906(b)(3).

(b) Civilian witnesses. The investigating officer must decide whether a civilian witness is reasonably available to appear as a witness.

(c) Evidence. The investigating officer must make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer must so inform the parties. Otherwise, the custodian of the evidence must be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under N.Y.R.C.M. 906(b)(3).

(d) Action when witness or evidence is not reasonably available. If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer must include a statement of the reasons for the determination in the report of investigation.

(3) Witness expenses. Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule.

(4) Alternatives to testimony.

(a) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements,

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed,

(iii) Prior testimony under oath,

(iv) Depositions,

(v) Stipulations of fact or expected testimony,

(vi) Unsworn statements, and

(vii) Offers of proof of expected testimony of that witness.

(b) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(i) Sworn statements,

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed,

(iii) Prior testimony under oath, and

(iv) Depositions of that witness.

(5) Alternatives to evidence.

(a) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection 9(4)(b) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(b) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

(iii) An alternative to testimony, when permitted under subsection g(4)(b) of this rule, in which the evidence is described.

h. Procedure.

(1) Presentation of evidence.

(a) Testimony. All testimony is to be taken under oath, except that the accused may make an unsworn statement. The defense is to be given wide latitude in cross-examining witnesses.

(b) Other evidence. The investigating officer must inform the parties what other evidence will be considered. The parties must be permitted to examine all other evidence considered by the investigating officer. (See NYSML, Section 130.32(b))

(c) Defense evidence. The defense has full opportunity to present any matters in defense, extenuation, or mitigation. (NYSML, Section 130.32(b))

(2) Objections. Any objection alleging failure to comply with this rule, except subsection j, must be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer cannot rule on any objection. An objection is to be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

(3) Access by spectators. Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or by the investigating officer.

(4) Presence of accused. The further progress of the taking of evidence must not be prevented and the accused must be considered to have waived the right to be present, whenever the accused:

(a) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present), or

(b) After being warned by the investigating officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

i. Military Rules of Evidence. The Military Rules of Evidence - other than Mil. R. Evid. 301, 302, 303, 305, and Section V - do not apply in pretrial investigations under this rule.

j. Report of investigation.

(1) In general. The investigating officer must make a timely written report of the investigation to the commander who directed the investigation.

(2) Contents. The report of investigation must include:

(a) A statement of names and Organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why.

(b) The substance of the testimony taken on both sides, including any stipulated testimony. (NYSML, Section 130.32(b))

(c) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence.

(d) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation.

(3) Distribution of the report. The investigating officer must cause the report to be delivered to the commander who directed the investigation. The commander must promptly cause a copy of the report to be delivered to each accused.

(4) Objections. Any objection to the report must be made to the commander who directed the investigation within five (5) days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges of taking other action within the 5 day period.

k. Waiver. The accused may waive an investigation under this rule. Such waiver must be in writing. In addition, failure to make a timely objection under this rule, including an objection to the report, constitutes waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

Rule 406. Pretrial advice.

a. In general. Before any charge may be referred for trial by a GCM, it must be referred to the SJA of the convening authority for consideration and advice. (NYSML, Section 130.34(a))

b. Contents. The advice of the SJA must include a written and signed statement which sets forth that person's:

(1) Conclusion with respect to whether each specification alleges an offense under the code,

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report),

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense, and

(4) Recommendation of the action to be taken by the convening authority.

c. Distribution. A copy of the advice for the SJA must be provided to the defense if charges are referred to trial by GCM.

Rule 407. Action by commander exercising GCM jurisdiction.

a. Disposition. When in receipt of charges, a commander exercising GCM jurisdiction may:

(1) Dismiss any charges,

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition,

(3) Forward any charges to a superior commander for disposition,

(4) Refer charges to a SCM or a SPCM for trial,

(5) Unless otherwise prescribed by The Adjutant General, direct a pretrial investigation under N.Y.R.C.M. 405, after which additional action under this rule may be taken, or

(6) Subject to N.Y.R.C.M. 601(d), refer charges to a GCM.

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PART II

CHAPTER 5

COURT-MARTIAL COMPOSITON AND PERSONNEL CONVENING COURTS-MARTIAL

Rule 501. Composition and personnel of courts-martial.

a. Composition of courts-martial. (NYSML, Section 130.16)

(1) GCM. GCM consist of:

(a) A military judge and not less than five (5) members, or

(b) A military judge alone if requested by the accused and approved under N.Y.R.C.M. 903.

(2) SPCM. SPCM consist of:

(a) Not less than three (3) members,

(b) A military judge and not less than three (3) members, or

(c) A military judge alone if detailed and if requested and approved under N.Y.R.C.M. 903.

b. Counsel in GCM and SPCM. Military trial and defense counsel must be detailed to GCM and SPCM. Assistant trial and associate or assistant defense counsel may be detailed. (NYSML, Section 130.27(a))

c. Other personnel. Other personnel, such as reporters, interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed or employed as appropriate but need not be detailed by the convening authority personally. (NYSML, Section 130.28)

Rule 502. Qualifications and duties of personnel of courts-martial.

a. Members.

(1) Qualifications. (NYSML, Section 130.25) The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are

best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be in a duty status and must be:

(a) An officer; or

(b) A warrant officer, except when the accused is an officer; or

(c) An enlisted person, if the accused is an enlisted person and has made a timely request under N.Y.R.C.M. 503(a)(2) for members of whom at least one-third are enlisted persons.

(2) Duties. The members of a court-martial determine whether the accused is proven guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this manual, reports of decided cases, or any other reference material, except the president of a SPCM without a military judge may use such materials in open session.

b. President.

(1) Qualifications. The president of a court-martial must be the detailed member senior in rank then serving.

(2) Duties. The president has the same duties as the other members and also:

(a) Presides over closed sessions of the members of the court-martial during their deliberations,

(b) Speaks for the members of the court-martial when announcing the decision of the members of requesting instructions from the military judge, and

(c) In a SPCM without a military judge, performs the duties assigned by this manual to the military judge except as otherwise expressly provided. (NYSML, Section 130.26)

c. Qualifications of military judge. A military judge must be an officer who is a member of the bar of a force of the Organized militia on the State Reserve List or State Retired List and who is certified to be qualified for duty as a military judge by the State JA. In addition, the military judge of a GCM must be designated for such duties by the State JA, or his designee, certified to be qualified for duty as a military judge of a GCM, and assigned and directly responsible to the State JA General or his designee. As used in this subsection "military judge" does not include the president of a SPCM without a military judge.

d. Counsel.

(1) Certified counsel required. Only persons qualified under NYSML, Section 130.27(b) (in the case of a GCM), or NYSML, Section 130.37(c) (in the case of a SPCM), as competent to perform duties as counsel in courts-martial may be detailed as defense counsel or associate defense counsel in GCM or SPCM or as trial counsel in GCM.

(2) Other military counsel. Any officer may be detailed as trial counsel in SPCM, or as assistant trial counsel or assistant defense counsel in GCM or SPCM.

(3) Qualifications of individual military and civilian defense counsel. Individual military or civilian defense counsel who represents an accused in a court-martial must be:

(a) A member of the bar of a federal court or of the bar of the highest court of a state, or

(b) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.

(4) Disqualifications. No person is to act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(a) The accuser,

(b) An investigating officer,

(c) A military judge, or

(d) A member.

No person who has acted as counsel or assistant counsel for a party may serve as counsel or assistant counsel for an opposing party in the same case. (NYSML, Section 130.27(a))

(5) Duties of trial and assistant trial counsel. The trial counsel prosecutes cases on behalf of the State and causes the record of trial of such cases to be prepared. (NYSML, Section 130.38(a)) Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the service. (NYSML, Section 130.38(d))

(6) Duties of defense and associate or assistant defense counsel. Defense counsel represents the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged. (NYSML, Section130.38(b)) Under the supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service. (NYSML, Section 130.38(e))

e. Interpreters, reporters, escorts, bailiffs, clerks and guards.

(1) Qualifications. Interpreters and reporters shall have the same qualifications as persons performing equivalent functions in the courts of the State of New York, or on active duty in the military forces of the United States. Any person who is not disqualified under subsection e(2) of this rule may serve as escort, bailiff, clerk, or orderly, subject to removal by the military judge. (NYSML, Section 130.28)

(2) Disqualifications. In addition to any disqualifications which may be prescribed by The Adjutant General, no person is to act as interpreter, reporter, escort, bailiff, clerk or orderly in any case in which that person is or has been in the same case:

(a) The accuser,

(b) A witness,

(c) An investigating officer,

(d) Counsel for any party, or

(e) A member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) Duties. In addition to such other duties as The Adjutant General may prescribe, the following persons may perform the following duties:

(a) Interpreters. Interpreters must interpret for the court-martial or for an accused who does not speak or understand English.

(b) Reporters. Reporters must record the proceedings and testimony and must transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(c) Others. Other personnel detailed for the assistance of the court-martial are to have such duties as may be imposed by the military judge.

(4) Payment of reporters, interpreters. The Adjutant General may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

f. Action upon discovery of disqualification or lack of qualifications. Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule must cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

Rule 503. Detailing members, military judge, and counsel.

a. Members.

(1) In general. the convening authority must detail qualified persons as members for courts-martial. (NYSML, Section 130.25(d)(2))

(2) Enlisted members. An enlisted accused may, before assembly, request orally on the record or in writing that enlisted persons serve as members of the GCM or SPCM to which that accused's case has been or will be referred. If such a request is made, an enlisted accused may not be tried by a court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total number of members unless eligible enlisted members cannot

be obtained because of physical conditions or military exigencies. If the appropriate number of enlisted members cannot be obtained, the court-martial may be assembled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why enlisted members could not be obtained which must be appended to the record of trial. (NYSML, Section 130.25(c))

(3) Members from another command or component. A convening authority may detail as members of a GCM or a SPCM persons under that convening authority's command or made available by their commander, even if those persons are members of a force of the Organized militia different from that of the convening authority.

b. Military judge.

(1) By who detailed. The military judge must be detailed by the convening authority and is directly responsible to the State JA.

(2) Record of detail. The order detailing a military judge must be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement must indicate by whom the military judge was detailed.

(3) Military judge from a different armed force. A military judge from one force of the Organized militia may be detailed to a court-martial convened by another force of the Organized militia when permitted by the State JA. The State JA may delegate authority to make military judges available for this purpose.

c. Counsel.

(1) By whom detailed. For GCM and SPCM, trial and defense counsel, assistant trial and defense counsel, and associate defense counsel are to be detailed by the authority convening the court-martial. (NYSML, Section 130.27(a)) If authority to detail counsel has been delegated to a person, that person may detail himself /herself as counsel or a court-martial.

(2) Record of detail. The order detailing a counsel must be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement must indicate by whom the counsel was detailed.

(3) Counsel from a different component. A person from one force of the Organized militia may be detailed to serve as counsel in a court-martial in a different force of the Organized militia when permitted by the State JA. The State JA may delegate authority to make persons available for this purpose.

Rule 504. Convening courts-martial.

a. In general. A court-martial is created by a convening order of the convening authority.

b. Who may convene courts-martial.

(1) GCM. A GCM may be convened by order of The Adjutant General, the commander of a force of the Organized militia, the commanding officer of a division or corresponding unit of the Air National Guard (NYSML, Section 130.22)

(2) SPCM. Unless otherwise limited by superior competent authority, a SPCM may be convened by persons occupying positions designated in NYSML, Section 130.23(a).

(a) Definition. For purposes of NYSML, Sections 130.22 and 130.23(a), a command or unit is "separate or detached" when isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline. "Separate or detached" is used in a disciplinary sense and not necessarily in a tactical or physical sense.

(b) Determination. If a commander is in doubt whether the command is separate or detached, the matter is to be determined:

(i) In the Army National Guard or the Air National Guard, by the officer exercising GCM jurisdiction over the command; or

(ii) In the Naval Militia, by the flag or general officer in command or the senior officer present who designated the detachment.

(3) SCM. See N.Y.R.C.M. 1302(a).

(4) Delegation prohibited. The power to convene courts-martial may not be delegated.

c. Disqualification.

(1) Accuser. An accuser may not convene a GCM or SPCM for the trial of the person accused. (NYSML, Section 130.23(b))

(2) Other. A convening authority junior in rank to an accuser may not convene a GCM or SPCM for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a GCM or SPCM or the trial of the accused.

(3) Action when disqualified. When a commander who would otherwise convene a GCM or SPCM is disqualified in a case, the charges must be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser or, if in the same chain of command, who is superior in command to the accuser.

d. Convening orders.

(1) GCM and SPCM. A convening order for a GCM or SPCM must designate the type of court-martial and detail the members and may designate where the court-martial will meet. If the convening authority has been designated by The Adjutant General, the convening order must so state.

(2) SCM. A convening order for a SCM must designate that it is a SCM and detail the SCM, and may designate where the court-martial will meet. If the convening authority has been designated by The Adjutant General, the convening order must so state.

(3) Additional matters. Additional matters to be included in convening orders may be prescribed by The Adjutant General.

e. Place. The convening authority must ensure that an appropriate location and facilities for courts-martial are provided.

Rule 505. Changes of members, military judge, and counsel.

a. In general. Subject to this rule, the members, military judge and counsel may be changed by an authority competent to detail such persons. Members also may be excused as provided in subsections c(1)(b)(ii) and c(2)(a) of this rule.

b. Procedure. When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge, such persons are to be detailed in accordance with N.Y.R.C.M. 503. An order changing the members of the court-martial, except one which excuses members without replacement, must be reduced to writing before authentication of the record of trial.

c. Changes of members. (See NYSML, Section 130.29)

(1) Before assembly.

(a) By convening authority. Before this court-martial is assembled, the convening authority may change the members of the court-martial without showing cause.

(b) By convening authority's delegate.

(i) Delegation. The convening authority may delegate authority to excuse individual members to the SJA or legal officer or other principal assistant to the convening authority.

(ii) Limitations. Before the court-martial is assembled, the convening authority's delegate may excuse members without cause shown, however, no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority's delegate in any one court-martial. After assembly the convening authority's delegate may not excuse members.

(2) After assembly.

(a) Excusal. After assembly no member may be excused, except:

(i) By the convening authority for good cause shown on the record,

(ii) By the military judge for good cause shown on the record, or

(iii) As a result of challenge under N.Y.R.C.M. 912.

(b) New members. New members may be detailed after assembly only when, as a result of excusals under subsection c(2)(a) of this rule, the number of members of the court-martial is reduced below a quorum, or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third the total membership.

d. Changes of detailed counsel.

(1) Trial counsel. An authority competent to detail trial counsel may change the trial counsel and any assistant trial counsel at any time without showing cause.

(2) Defense counsel.

(a) Before formation of attorney-client relationship. Before an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail defense counsel may excuse or change such counsel without showing cause.

(b) After formation of attorney-client relationship. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) Under N.Y.R.C.M. 506(b)(3),

(ii) Upon request of the accused or application for withdrawal by such counsel under N.Y.R.C.M. 506(c), or

(iii) For other good cause shown on the record.

e. Change of military judge.

(1) Before assembly. Before the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge, without cause shown on the record.

(2) After assembly. After the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge only when, as a result of disqualification under N.Y.R.C.M. 902 or for good cause shown, the previously detailed military judge is unable to proceed.

f. Good cause. For purposes of this rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances, which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconvenience, which is incident to normal conditions of military life.

Rule 506. Accused's rights to counsel.

a. In general. The accused has the right to be represented before a GCM, SPCM or SCM by civilian counsel if provided at no expense to the State. The accused has the right to be represented by either the military counsel detailed under NYSML Section 130.27, or military counsel of the accused's own selection, if reasonably available before a GCM or SPCM. The accused is entitled to be represented by both the military counsel detailed under NYSML, Section 130.27, and if the accused so requests, in which event the detailed military counsel will act as associate counsel to the individual military counsel. (NYSML, Section 130.38(b))

b. Individual military counsel.

(1) Reasonably available. Subject to this subsection, The Adjutant General must define "reasonably available." While so assigned, the following persons are not reasonably available to serve as individual military counsel because of the nature of their duties or positions:

(a) A general or flag officer;

(b) A trial or appellate military judge;

(c) A trial counsel;

(d) An appellate defense or government counsel;

(e) A principal legal advisor to a command, Organization, or agency and, when such command, Organization, or agency has GCM jurisdiction, the principal assistant of such an advisor;

(f) An instructor or student at a service school or academy.

The Adjutant General may determine other persons to be not reasonably available because of the nature or responsibilities of their assignments, geographic considerations, exigent circumstances, or military necessity. A person who is a member of a force of the Organized militia different from that of which the accused is a member is reasonably available to serve as individual military counsel for such accused to the same extent as that person is available to serve as individual military counsel for an accused in the same force of the Organized militia as the person requested. The Adjutant General may prescribe circumstances under which exceptions may be made to the prohibitions in this subsection when merited by the existence of an attorney-client

relationship regarding matters relating to a charge in question. However, if the attorney-client relationship arose solely because the counsel represented the accused on review under NYSML, Section 130.67, this exception does not apply.

(2) Procedure. Subject to this subsection, The Adjutant General may prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for an individual military counsel are to be made by the accused or the detailed defense counsel through the trial counsel to the convening authority. If the requested person is among those not reasonably available under subsection b(1) of this rule or under regulations of The Adjutant General, the convening authority must deny the request and notify the accused unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or investigation for which requested, be among those so listed as not reasonably available. If the accused makes such a claim, or if the person is not among those so listed as not reasonably available. If the accused's request makes such a claim, or if the person is not among those so listed, as not reasonably, the convening authority must forward the request to the commander or head of the Organization, activity, or agency to which the requested person is available in accordance with the procedure prescribed by The Adjutant General.

This determination is a matter within the sole discretion of that authority. An adverse determination may be reviewed upon request of the accused through that authority to the next higher commander or level of supervision.

c. Excusal or withdrawal. Except as otherwise provided in N.Y.R.C.M. 505(d)(2) and a of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

d. Waiver. The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver is to be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused is disruptive or fails to follow basic rules of decorum and procedure.

e. Non-lawyer present. Subject to the discretion of the military judge, the accused may have present and seated at the counsel table for purpose of consultation persons qualified to serve as counsel under N.Y.R.C.M. 502.

PART II

CHAPTER 6

REFERRAL, SERVICE, AMENDMENT AND WITHDRAWAL OF CHARGES

Rule 601. Referral.

a. In general. Referral is an order of a convening authority that charges against an accused will be tried by a specified court-martial.

b. Who may refer? Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor unless the power to do so has been withheld by superior competent authority.

c. Disqualification. An accuser may not refer charges to a GCM or SPCM.

d. When charges may be referred.

(1) Basis for referral. If the convening authority finds or is advised by a JA that there are reasonable grounds to believe that an offense tri-able by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. the finding may be based on hearsay in whole or in part. The convening authority or JA may consider information from any source and is not limited to the information reviewed by any previous authority, but a case may not be referred to a GCM except in compliance with subsection d(2) of this rule. The convening authority or JA is not required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(2) GCM. The convening authority may not refer a specification under a charge to a GCM unless:

(a) There has been substantial compliance with the pretrial investigation requirements of N.Y.R.C.M. 405, and

(b) The convening authority has received the advice of the SJA required under N.Y.R.C.M. 406.

These requirements may be waived by the accused.

e. How charges are referred.

(1) Order, instructions. Referral is made by the personal order of the convening authority. The convening authority may include proper instructions in the order.

(2) Joinder of offenses. At the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related.

Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

(3) Joinder of accused. Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

f. Superior convening authorities. Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral.

Rule 602. Service of charges.

The trial counsel detailed to the court-martial to which charges have been referred for trial must cause to be served upon each accused a copy of the charge sheet. In time of peace, no person may, over objection, be brought to trial - including a session under NYSML, Section 130.39(a) before a GCM within a period of five (5) days after service of charges, or before a SPCM within a period of three (3) days after service of charges. In computing these periods, the date of service of charges and the date of trial are excluded; holidays and Sundays are included. (NYSML, Section 130.35)

Rule 603. Changes to charges and specifications.

a. Minor changes defined. Minor changes in charges and specifications are any except those which add a party, offense, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged.

b. Minor changes before arraignment. Any person forwarding, acting upon, or prosecuting charges on behalf of the State except an investigating officer appointed under N.Y.R.C.M. 405 may make minor changes to charges or specifications before arraignment.

c. Minor changes after arraignment. After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

d. Major changes. Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

Rule 604. Withdrawal of charges.

a. Withdrawal. The convening authority or a superior competent authority may for any reason proper cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

b. Referral of withdrawn charges. Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

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PART II

CHAPTER 7

PRETRIAL MATTERS

Rule 701. Discovery.

a. Disclosure by the trial counsel. Except as otherwise provided in subsections f and g(2) of this rule, the trial counsel must provide the following information or matters to the defense:

(1) Papers accompanying charges, convening order, statements. As soon as practicable after service of charges under N.Y.R.C.M. 602, the trial counsel must provide the defense with copies, permit the defense to inspect:

(a) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a hearing or new trial;

(b) The convening order and any amending orders; and

(c) Any sworn or signed statement relating to an offense charged in the case, which is in the possession of the trial counsel.

(2) Documents, tangible objects, reports. After service of charges, upon request of the defense, the trial counsel must permit the defense to inspect:

(a) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(b) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof which are within the possession, custody, or control of military authorities, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(3) Witnesses. Before the beginning of trial on the merits the trial counsel must notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(a) In the prosecution case-in-chief, and

(b) To rebut a defense of alibi or lack of mental responsibility when trial counsel has received timely notice under subsection b(1) or (2) of this rule.

(4) Prior convictions of accused offered on the merits. Before arraignment the trial counsel must notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and must permit the defense to inspect such records when they are in the trial counsel's possession.

(5) Information to be offered at sentencing. Upon request of the defense the trial counsel must:

(a) Permit the defense to inspect such written material as will be presented by the prosecution at the pre-sentencing proceedings, and

(b) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the pre-sentencing proceedings under N.Y.R.C.M. 1001(b).

(6) Evidence favorable to the defense. The trial counsel must, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel, which reasonably tends to:

(a) Negate the guilt of the accused to an offense charged,

(b) Reduce the degree of guilt of the accused to an offense charged, or

(c) Reduce the punishment.

b. Disclosure by the defense. Except as otherwise provided in subsections f and g(2) of this rule, the defense must provide the following information to the trial counsel:

(1) Notice of alibi. The defense must notify the trial counsel before the beginning of trial on the merits of its intent to offer a defense of alibi. Such notice by the defense must disclose the specific place or places at which the defense claims the accused to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the accused intends to rely to establish such alibi.

(2) Mental responsibility. If the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to the defense of lack of mental responsibility, the defense must, before the beginning of trial on the merits, notify the trial counsel of such intention.

(3) Documents and tangible objects. If the defense requests disclosure under subsection a(2)(a) of this rule, upon completion with such request by the Government, the defense, on request of the trial counsel, must permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) Reports of examination and tests. If the defense requests disclosure under subsection a(20(b) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, must (except as provided in N.Y.R.C.M. 706 and Mil. R. of Evid. 302) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof which are within the possession, custody, or control or the defense case-in-chief at trial or which were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) Inadmissibility of withdrawn defense. If an intention to rely upon a defense under subsection b(1) or (2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not admissible in any court-martial against the accused who gave notice of the intention.

c. Failure to call witness. The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, is not grounds for comment upon a failure to call the witness.

d. Continuing duty to disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party must promptly notify the other party or the military judge of the existence of the additional evidence or material.

e. Access to witnesses and evidence. Each party must have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

f. Information not subject to disclosure. Nothing in this rule is to be construed to require the disclosure of information protected from disclosure by the Mil. R. of Evid. Nothing in this rule requires the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

g. Regulation of discovery.

(1) Time, place, and manner. The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) Protective and modifying orders. Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement must be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) Failure to comply. If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(a) Order the party to permit discovery,

(b) Grant a continuance,

(c) Prohibit the party from introducing evidence or raising a defense not disclosed, and

(d) Enter such other order as is just under the circumstances.

This rule does not limit the right of the accused to testify in the accused's behalf.

h. Inspect. As used in this rule "inspect" includes the right to photograph and copy.

Rule 702. Depositions.

a. In general. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under NYSM, Section 130.32, or a court-martial. (See NYSML, Section 130.49)

b. Who may order. A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

c. Request to take deposition.

(1) Submission of request. At any time after charges have been preferred, any party may request in writing that a deposition be taken.

(2) Contents of request. A request for a deposition must include:

(a) The name and address of the person whose deposition is requested or, if the name of the person is unknown, a description of the office or position of the person;

(b) A statement of the matters on which the person is to be examined;

(c) A statement of the reasons for taking the deposition; and

(d) Whether an oral or written deposition is requested.

(3) Action on request.

(a) In general. A request for a deposition may be denied only for good cause.

(b) Written deposition. A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under N.Y.R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

(c) Notification of decision. The authority who acts on the request must promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(d) Waiver. Failure to renew before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

d. Action when request is approved.

(1) Detail of deposition officer. When a request for a deposition is approved, the convening authority must cause the deposition to be taken before and authenticated by any military or civil officers authorized by the laws of the State or by the laws of the place where the deposition is taken to administer oaths.

(2) Assignment of counsel. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition must ensure that counsel qualified as required under N.Y.R.C.M. 502(d) are assigned to represent each party.

(3) Instructions. The convening authority may give instructions not inconsistent with this rule to the deposition officer.

e. Notice. The party at whose request a deposition is to be taken must give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may, for cause shown, extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

f. Duties of the deposition officer. In accordance with this rule, and subject to any instructions under subsection d(3) of this rule, the deposition officer must:

(1) Arrange a time and place for taking the deposition and notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under N.Y.R.C.M. 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim or videotaped record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

g. Procedure.

(1) Oral depositions.

(a) Rights of accused. At an oral deposition, the accused has the rights to:

(i) Be present except when: (a) the accused, absent good cause shown, fails to appear after receiving notice of time and place of the deposition; (b) the accused is disruptive within the meaning of N.Y.R.C.M. 804(b)(2); or (c) the deposition is ordered in lieu of production of a witness on sentencing under N.Y.R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in N.YR.C.M. 506.

(b) Examination of witnesses. Each witness giving an oral deposition must be examined under oath. The scope and manner of examination and cross-examination must be such as would be allowed in the trial itself. The Government must make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the State or other document and to which the accused would be entitled at the trial.

(2) Written depositions.

(a) Rights of accused. The accused has the right to be represented by counsel as provided in N.Y.R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a SCM.

(b) Presence of parties. No party has a right to be present at a written deposition.

(c) Submission of interrogatories to opponent. The party requesting a written deposition must submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and must be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

(d) Examination of witness. The deposition officer must swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness must be recorded on videotape, audiotape, or similar material or must be transcribed. When the testimony is transcribed, the deposition must, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition must be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officers must record the reason. The certificate of authentication must then be executed.

(3) How recorded. In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

h. Objections.

(1) In general. A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition waives such objection.

(2) Oral depositions. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection must be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

(3) Written depositions. Objections to any questions in written interrogatories are to be served on the party who proposed the question before the interrogatories are sent to the deposition officer of the objection is waived. Objections to answers in a written deposition may be made at trial.

i. Deposition by agreement not precluded.

(1) Taking deposition. Nothing in this rule precludes the taking of a deposition without cost to the State, orally or upon written questions, by agreement of the parties.

(2) Use of deposition. Subject to NYSML, Section 130.49(d), nothing in this rule precludes the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

Rule 703. Production of witnesses and evidence.

a. In general. The prosecution and defense and the court-martial are to have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process. Compulsory process runs to any part of the State and to any other state in which the court-martial may be sitting. (See NYSML, Section 130.46) Military courts are empowered to issue all process and mandates necessary and proper to carry into full force and effect the powers vested in them. (NYSML, Section 131.7(a))

b. Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under N.Y.R.C.M. 1001(e).

(3) Unavailable witness. Notwithstanding subsections b(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge must grant a continuance or other relief in order to attempt to secure the witness' presence or must abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

c. Determining which witness will be produced.

(1) Witnesses for the prosecution. The trial counsel must obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) Witnesses for the defense.

(a) Request. The defense must submit to the trial counsel a written list of witnesses whose production by the State the defense requests.

(b) Contents of request.

(i) Witnesses on merits or interlocutory questions. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question must include the name, telephone number, if known, an address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) Witnesses on sentencing. A list of witnesses wanted for pre-sentencing proceedings must include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in N.Y.R.C.M. 100(e).

(c) Time of request. A list of witnesses under this subsection must be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner permits denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(d) Determination. The trial counsel must arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel must produce the witness or the proceedings will be abated.

d. Employment of expert witnesses. When the employment at State expense of an expert is considered necessary by a party, the party must, in advance of employment of the expert, and with notice to the opposing part, submit a request to The Adjutant General of the State to authorize the employment and to fix the compensation for the expert. The request must include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by The Adjutant General of the State may be renewed before the military judge who must determine whether the testimony of the expert is relevant and necessary, and, if so, whether the State has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the State is required to provide a substitute, the proceedings will be abated if the State fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection e(2)(d) of this rule.

e. Procedures for production of witnesses.

(1) Military witnesses. The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the witness' presence is required and requesting the commander to issue any necessary orders to the witness.

(2) Civilian witnesses - subpoena.

(a) In general. The presence of witnesses not on active State duty or on a duty status other than active State duty may be obtained by subpoena.

(b) Contents. A subpoena must state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena must command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

(c) Who may issue. A subpoena may be issued by the SCM, provost courts, and the military judge or president of other military courts to secure witnesses or evidence for that court-martial.

(d) Service. A subpoena may be served by any person at least eighteen years of age, the marshals of the military court or any peace officer as defined in Section 2.10 of the Criminal Procedure Law, when acting pursuant to his/her special duties, or any police officer. Service is made by delivering a copy of the subpoena to the person named and by tendering to the person named the fees and mileage of a witness at the rates allowed to witnesses attending the Supreme Court of the State. (See CPLR 8001) (See Appendices 4 and 5 for format)

(e) Place of service.

(i) In general. A subpoena requiring the attendance of a witness at a deposition, court-martial, or court of inquiry may be served at any place with the State or within any other state in which the court-martial may be sitting.

(ii) Foreign territory. In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) Occupied territory. In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(f) Relief. If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.

(g) Neglect or refusal to appear.

(i) In general. A person not on active State duty or in a duty status other than active State duty who willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce any evidence which such person may have been subpoenaed to produce is guilty of an offense against the State and may be punished by the military court which issued the subpoena in the same manner and to the same extent as provided for the failure to appear, refusal to qualify as a witness or to testify or refusal or failure to produce any evidence which such person may have been duly subpoenaed to produce, as provided in action or proceedings in the Supreme Court of the State. (NYSML, Section 130.47(a)(3))

(ii) Issuance of warrant of attachment. The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents. (NYSML, Section 131.7(a))

(iii) Requirements. A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear.

(iv) Form. A warrant of attachment must be written. All documents in support of the warrant of attachment must be attached to the warrant, together with the charge sheet and convening orders.

(v) Execution. A warrant of attachment may be executed by a person authorized under subsection e(2)(d) of this rule as the authority issuing the warrant may direct. Only such non-deadly force as may be necessary to bring the witness before the court-martial or other proceeding may be used to execute the warrant. A witness attached under this rule must be brought before the court-martial or proceeding without delay and must testify as soon as practicable and be released.

(vi) Definition. For purposes of subsection e(2)(g) of this rule "military judge" does not include a SCM or the president of a SPCM without a military judge.

f. Right to evidence.

(1) In general. Each party is entitled to the production of evidence which is relevant and necessary.

(2) Unavailable evidence. Notwithstanding subsection f(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge must grant a continuance or other relief in order to attempt to produce the evidence or must abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

(3) Determining what evidence will be produced. The procedures in subsection c of this rule apply to a determination of what evidence will be produced, except that any defense request for the production of evidence must list the items of evidence to be produced and must include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained and, if known, the name, address, and telephone number of the custodian of the evidence.

(4) Procedures for production of evidence.

(a) Evidence under the control of the State. Evidence under the control of the State may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

(b) Evidence not under the control of the State. Evidence not under the control of the State may be obtained by subpoena issued in accordance with subsection e(2) of this rule.

(c) Relief. If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to Mil. R. Evid. 505 and 506, the military judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted.

Rule 704. Immunity.

a. Types of immunity. Two types of immunity may be granted under this rule.

(1) Transactional immunity. A person may be granted transactional immunity from trial by court-martial for one or more offenses under the code.

(2) Testimonial immunity. A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

b. Scope. Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify, or

(2) Use in a court-martial under subsection b(1) of this rule of testimony or statements derived from such testimony or statements.

c. Authority to grant immunity. On a GCM convening authority may grant immunity, and may do so only in accordance with this rule.

(1) Persons subject to the code. A GCM convening authority may grant immunity to any person subject to the code. However, a GCM convening authority may not grant immunity as to any prosecution in any court of the State having appropriate criminal or civil jurisdiction except when specifically authorized to do so by the person or authority empowered by law to prosecute such criminal or civil action in any such court.

(2) Persons not subject to the code. A GCM convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the person or authority empowered by law to prosecute in any court of the State having appropriate criminal or civil jurisdiction.

(3) Other limitations. The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority.

d. Procedure. A grant of immunity must be written and signed by the convening authority who issues it. The grant must include a statement of the authority under which it is made and must identify the matters to which it extends.

e. Decision to grant immunity. Unless limited by superior competent authority, the decision whether to grant immunity is a matter within the sole discretion of the appropriate GCM convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and

specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness' testimony would be of such central importance to the defense case that it is essential to a fair trial, and

(2) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify.

Rule 705. Pretrial agreements.

a. In general. Subject to such limitations as The Adjutant General may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

b. Nature of agreement. A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(a) Refer the charges to a certain type of court-martial,

(b) Refer a capital offense as non-capital,

(c) Withdraw one or more charges or specifications from the court-martial,

(d) Have the trial counsel present no evidence as to one or more specifications or portions thereof, and

(e) Take specified action on the sentence adjudged by the court-martial.

c. Terms and conditions.

(1) Prohibited terms or conditions.

(a) Not voluntary. A term or condition in a pretrial agreement cannot be enforced if the accused did not freely and voluntarily agree to it.

(b) Deprivation of certain rights. A term or condition in a pretrial agreement cannot be enforced if it deprives the accused of: the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, the complete and effective exercise of post-trial and appellate rights.

(2) Permissible terms or conditions. Subject to subsection c(1)(a) of this rule, subsection c(1)(b) of this rule does not prohibit an accused from offering the following additional conditions with an offer to plead guilty:

(a) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(b) A promise to testify as a witness in the trial of another person;

(c) A promise to provide restitution;

(d) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of N.Y.R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(e) A promise to waive procedural requirements such as under NYSML, Section 130.32, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

d. Procedure.

(1) Offer. An offer to plead guilty or to enter a confessional stipulation must originate with the accused and defense counsel, if any.

(2) Negotiation. Upon the initiation of the defense, the convening authority, the SJA, or the trial counsel may negotiate the terms and conditions of a pretrial agreement with the defense. All negotiations are to be with defense counsel unless the accused is not represented.

(3) Formal submission. After negotiation, if any, under subsection d(2) of this rule, if the accused elects to propose a pretrial agreement, the defense must submit a written offer. All terms, conditions, and promises between the parties must be written. The proposed agreement must be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action must be set forth on a page separate from the other portion of the agreement.

(4) Acceptance. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement. The decision is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement must be signed by the convening authority or by a person such as the SJA or trial counsel who has been authorized by the convening authority to sign.

(5) Withdrawal.

(a) By accused. The accused may withdraw from a pretrial agreement at any time, however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in N.Y.R.C.M. 910(h) or 811(d), respectively.

(b) By convening authority. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, or upon the failure by the accused to fulfill any material promise or condition in the agreement, or when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

e. Nondisclosure of existence of agreement. Except in a SPCM without a military judge, no member of a court-martial is to be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, must not be otherwise disclosed to the members.

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused.

a. Initial action. If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel,

military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation must be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

b. Ordering an inquiry.

(1) Before referral. Before referral of charges an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) After referral. After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any session under NYSML, Section 130.39(a), when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

c. Inquiry.

(1) By whom conducted. When a mental examination is ordered under subsection b of this rule, the matter must be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally at least one member of the board shall be either a psychiatrist or clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) Matters in inquiry. When a mental examination is ordered under this rule, the order must contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order must require the board to make separate and distinct findings as to each of the following questions:

(a) At the time of alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as non-psychotic behavior disorders and personality defects.)

(b) What is clinical psychiatric diagnosis?

(c) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(d) Did the accuse, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to conform the accused's conduct to the requirements of law?

(e) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) Directions to board. In addition to the requirements specified in subsection c(2) of this rule, the order of the board must specify:

(a) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order is to be submitted to the officer ordering the examination, the accused's commanding officer, the investigating officer, if any, appointed pursuant to NYSML, Section 130.32, and to all counsel in the case, the convening authority and, after referral, to the military judge;

(b) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report is to be furnished to the defense and, upon request, to the commanding officer of the accused; and

(c) That neither the contents of the full report nor any matter considered by the board during its investigation is to be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

(4) Additional examinations. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) Disclosure to trial counsel. No person, other than the defense counsel accused, or after referral of charges, the military judge, may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

Rule 707. Speedy trial.

a. In general. The accused shall be brought to trial within 120 days after notice to the accused of preferral of charges under N.Y.R.C.M. 308 or the imposition of restraint under N.Y.R.C.M. 304, whichever is earlier.

b. Accountability.

(1) In general. The date on which the accused is notified of the preferral of charges or the date on which pretrial restraint is imposed does not count for the purpose of computing the time under subsection a of this rule. The date on which the accused is brought to trial counts.

(2) Inception. If charges are dismissed, if a mistrial is granted, or - when no charges are pending - if the accused is released from pretrial restraint for a significant period, the time under this rule runs only from the date on which charges or restraint are reinstituted.

(3) Termination. An accused is brought to trial within the meaning of this rule when:

(a) A plea of guilty is entered to an offense, or

(b) Presentation to the fact finder of evidence on the merits begins.

(4) Multiple charges. When charges are preferred at different times, the inception for each is to be determined from the date on which the accused was notified or preferral or on which restraint was imposed on the basis of that offense.

c. Exclusions. The following periods are to be excluded when determining whether the period in subsection a of this rule has run

(1) Any periods of delay resulting from other proceedings in the case including:

(a) Any examination into the mental capacity or responsibility of the accused,

(b) Any hearing on the capacity of the accused to stand trial and any time during which the accused lacks capacity to stand trial,

(c) Any session on pretrial motions,

(d) Any petition for extraordinary relief by either party.

(2) Any period of delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances.

(3) Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

(4) Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this manual.

(5) Any period of delay resulting from a delay in the hearing under NYSML, Section 130.32, or a continuance in the court-martial at the request of the prosecution if:

(a) The delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the prosecution's case when the State has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time, or

(b) The continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

(6) Any period of delay resulting from the absence or unavailability of the accused.

(7) Any reasonable period of delay when the accused is joined for trial with a co-accused as to whom the time for trial has not yet run and there is no good cause for not granting a severance.

(8) Any other period of delay for good cause, including unusual operational requirements and military exigencies.

d. Arrest or confinement. When the accused is in pretrial arrest or confinement under N.Y.R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. (NYSML, Section 130.10) No accused is to be held in pretrial arrest of confinement in excess of 90 days for the same or related charges. Except for any periods under subsection c of this rule are to be excluded for the purpose of computing when 90 days has run. The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.

(e) Remedy. Failure to comply with this rule results in dismissal of the affected charges upon timely motion by the accused.

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PART II

CHAPTER 8

TRIAL PROCEDURE GENERALLY

Rule 801. Military judge's responsibilities - other matters.

a. Responsibilities of military judge. The military judge is the presiding officer in a court-martial. (NYSML, Section 130.26(a))

The military judge must:

(1) Determine the time and uniform for each session of a court-martial,

(2) Ensure that the dignity and decorum of the proceedings are maintained,

(3) Subject to the code and this manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this manual,

(4) Subject to subsection e of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial, and

(5) Instruct the members on questions of law and procedure which may arise.

b. Rules of court - contempt. The military judge may:

(1) Subject to N.Y.R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to N.Y.R.C.M. 809, exercise contempt power.

c. Obtaining evidence. The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

d. Uncharged offenses. If, during the trial, there is evidence that the accused may be guilty of an untried offense not alleged in any specifications before the court-martial, the court-martial must proceed with the trial of the offense charged.

e. Interlocutory questions and questions of law. For purposes of this subsection "military judge" does not include the president of a SPCM without a military judge.

(1) Rulings by the military judge.

(a) Finality of rulings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(b) Changing a ruling. The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(c) Sessions under NYSML, Section 130.39(a). When required by this manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law must be presented and decided at sessions held without members under N.Y.R.C.M. 803.

(2) Rulings by the president of a SPCM without a military judge.

(a) Questions of law. Any ruling by the president of a SPCM without a military judge on any question of law other than a motion for a finding of not guilty is final.

(b) Questions of fact. Any ruling by the president of a SPCM without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(c) Changing a ruling. The president of a SPCM without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty at any time during the trial.

(d) Presence of members. Except as provided in N.Y.R.C.M. 505 and 911, all members will be present at all sessions of a SPCM without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a SPCM without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) Procedures for rulings by the president of a SPCM without a military judge, which are subject to objection by a member.

(a) Determination. The president of a SPCM without a military judge determines whether a ruling is subject to objection.

(b) Instructions. When a ruling by the president of a SPCM without a military judge which is subject to objection, the president is to so advise the members and must give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(c) Voting. When a member objects to a ruling by the president of a SPCM without a military judge, which is subject to objection, the court-martial must be closed, and the members must vote orally, beginning with the junior in rank, and the question must be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(d) Consultation. The president of a SPCM without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) Standard of proof. Questions of fact in an interlocutory question are to be determined by a preponderance of the evidence, unless otherwise stated in this manual. In the absence of a rule in this manual assigning the burden of persuasion, the party making the motion or raising the objection bears the burden of persuasion.

(5) Scope. Subsection e of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

f. Rulings on record. All sessions involving rulings or instructions made or given by the military judge or the president of a SPCM without a military judge are to be made a part of the record. All rulings and instructions are to be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection, "military judge" does not include the president of a SPCM without a military judge.

g. Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this manual or by the military judge under authority or this manual, or prior to any extension thereof made by the military judge constitutes waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

Rule 802. Conferences.

a. In general. After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.

b. Matters on record. Conferences need not be made part of the record, but matters agreed upon at a conference are to be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection waives this requirement.

c. Rights of parties. A conference cannot proceed over the objection of any party. No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

d. Accused's presence. The presence of the accused is neither required nor prohibited at a conference.

e. Admission. No admission made by the accused or defense counsel at a conference are to be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.

f. Limitations. This rule cannot be invoked in the case of an accused who is not represented by counsel, or in SPCM without a military judge.

Rule 803. Court-martial sessions without members under NYSML, Section 130.39(a).

A military judge who has detailed to the court-martial may, under NYSML, Section 130.39(a), after service of charges, call the court-martial into session without the presence of members. Such sessions may be held before and after assembly of the court-martial, and when authorized in these rules, after adjournment and before action by the convening authority. All such sessions are a part of the trial and must be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with N.Y.R.C.M. 804 and 805, and must be made a part of the record. For purposes of this rule "military judge" does not include the president of a SPCM without a military judge.

Rule 804. Presence of the accused at trial proceedings.

a. Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under NYSML, Section 130.39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule.

b. Continued presence not required. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence cannot be prevented and the accused must be considered to have waived the right to be present whenever an accused, initially present:

(1) Is voluntarily absent after arraignment (where informed by the military judge of the obligation to remain during the trial); or

(2) After being warned by the military judge that disruptive conduct will cause the accused to be removed form the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

c. Persons charged with absence without leave under NYSML, Section 130.82. The presence of the accused at any time described in subsection a of this rule is not required at a SPCM empowered to adjudge a bad conduct discharge where, and the accused must be considered to have waived the right to be present at such court-martial if such court-martial obtains personal jurisdiction over him/her by any method of personal service described in NYSML, Section 130.3(d), provided that a warning accompanies the charge sheet in substantially the following format:

> "WARNING: You have a right to be present at your court-martial. In the event you fail to appear, the court-martial may proceed in your absence."

d. Appearance and security of accused.

(1) Appearance. The accused must be properly attired in the uniform or dress prescribed by the military judge. An accused service member must wear the insignia of grade and may wear any decorations, emblems, or ribbons to which entitled. The accused and defense counsel are responsible for ensuring that the accused is properly attired, however, upon request, the accused's commander is to render such assistance as may be reasonably necessary to ensure that the accused is properly attired.

(2) Custody. Responsibility for maintaining custody or control of an accused before and during trial may be assigned subject to N.Y.R.C.M. 304 and 305 and subsection d(3) of this rule.

(3) Restraint. Physical restraint cannot be imposed on the accused during open sessions of the court-martial unless prescribed by the military judge.

Rule 805. Presence of military judge, members, and counsel.

a. Military judge. No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge, if detailed. (NYSML, Section 130.26(a))

b. Members. Unless trial is by military judge alone pursuant to a request by the accused, no court-martial proceeding may take place in the absence of any detailed member except: sessions under NYSML, Section 130.39(a); under N.Y.R.C.M. 803; examination of members under N.Y.R.C.M. 910(d); when the member has been excused under N.Y.R.C.M. 505 or 910(f); or as otherwise provided in N.Y.R.C.M. 1102. (See NYSML, Section 130.29(a)) No GCM proceeding requiring the presence of members may be conducted unless at least five members are present and, except as provided in N.Y.R.C.M. 910(h), no SPCM proceeding requiring the presence of members may be conducted unless at least three members are present. (NYSML, Section 130.29(b) and (c)) Except as provided in N.Y.R.C.M. 503(b), when an enlisted accused has requested enlisted members, no proceeding requiring the presence of members may be conducted unless at lease one-third of the members actually sitting on the court-martial are enlisted persons. (NYSML, Section 130.25(c)(1))

c. Counsel. As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel.

d. Effect of replacement of member or military judge.

(1) Members. When after the presentation of evidence on the merits has begun, a new member is detailed under N.Y.R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member in the presence of the military judge, the accused, and counsel for both sides, or if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented. (NYSML, Section 130.29(b) and (c))

(2) Military judge. When, after the presentation of evidence on the merits has begun in trial before military judge alone, a new military judge is detailed under N.Y.R.C.M. 505(e)(2) trial may not proceed unless the accused requests, and the military judge approves, trial by military judge alone, and a verbatim record of the testimony and evidence or a stipulation thereof is read to the military judge in the presence of the new military judge, the accused, and counsel for both sides, or the trial proceeds as if no evidence has been presented. (NYSML, Section 130.29(d))

Rule 806. Public Trial.

a. In general. Except as otherwise provided in this rule, courts-martial are open to the public. For purposes of this rule, "public" includes members of both the military and civilian communities.

b. Control of spectators. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session. However, a session may be closed over the objection of the accused only when expressly authorized by another provision of this manual.

c. Photography and broadcasting prohibited. Video and audio recording and the taking of photographs - except for the purpose of preparing the record of trial - in the courtroom during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion, permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under N.Y.R.C.M. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

Rule 807. Oaths.

a. Definition. "Oath" includes "affirmation."

b. Oaths in court-martial.

(1) Who must be sworn.

(a) Court-martial personnel. The military judge, members of a GCM or SPCM, trial counsel, assistant trial counsel, defense counsel, associate defense counsel, assistant defense counsel, reporter, interpreter, and escort must take an oath to perform their duties faithfully. (NYSML, Section 130.42(a)) For purposes of this rule, "defense counsel," "associate defense counsel," and "assistant defense counsel," includes detailed and individual military and civilian counsel.

(b) Witnesses. Each witness before a court-martial must be examined on oath. (NYSML, Section 130.42(b))

(2) Procedure for administering oaths. Any procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth or, in the case of one other than a witness, properly to perform certain duties is sufficient.

Rule 808. Record of trial.

The trial counsel of a GCM or SPCM must take such action as may be necessary to ensure that a record which will meet the requirements of N.Y.R.C.M. 1103 can be prepared.

Rule 809. Contempt proceedings.

a. In general. Courts-martial may exercise contempt power under NYSML, Section 130.48.

b. Method of disposition.

(1) Summary disposition. When conduct constituting contempt is directly witnessed by the court-martial, the conduct may be punished summarily. In such cases, the regular proceedings must be suspended while the contempt is disposed of.

(2) Disposition upon notice and hearing. When the conduct apparently constituting contempt is not directly witnessed by the court-martial, the alleged offender must be brought before the court-martial and informed orally or in writing of the alleged contempt. The alleged offender must be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender must have the right to be represented by counsel and evidence, including calling witnesses. The alleged offender must have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.

c. Procedure - who may punish for contempt.

(1) Members not present. When the conduct allegedly constituting contempt occurs during a session when the members are not present, the military judge must determine whether to punish for contempt and, if so, what the punishment is to be. The military judge may punish summarily under subsection b(1) only if the military judge recited the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the court-martial.

(2) Members present. When the conduct allegedly constituting contempt occurs during a session when the members are present, contempt proceedings may be initiated by the military judge or upon motion of any member unless the military judge rules that as a matter of law, contempt has not been committed. If contempt proceedings are initiated the following procedures apply:

(a) Instructions. The military judge must instruct the members so that they can properly decide the questions presented.

(b) Findings. The members must decide in a closed session, upon vote by secret written ballot, whether to hold an alleged offender in contempt. At least two-thirds of the members must concur in a finding of contempt to convict unless that member directly witnessed the conduct in question in the presence of the court-martial and finds it to be contemptuous.

(c) Sentence. If the members find the offender in contempt they must, without reopening the court-martial, determine the punishment in accordance with the procedures in N.Y.R.C.M. 1006.

(d) Announcement. After reaching findings and, if necessary, a sentence, the court-martial must be reopened and the results announced by the president.

d. Record - review. A record of the contempt proceedings must be part of the record of the court-martial during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings must be prepared and forwarded to the convening authority for review. The convening authority may approve or disapprove all or part of the sentence. The action of the convening authority is not subject to further review or appeal.

e. Sentence. A sentence of confinement pursuant to a finding of contempt begins to run when it is adjudged unless deferred, suspended, or disapproved by the convening authority. The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement must be designated by the convening authority. A fine does not become effective until ordered executed by the convening authority. The military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings.

f. Informing person held in contempt. The person held in contempt must be informed by the convening authority in writing of the holding and sentence, if any, of the court-martial and of the action of the convening authority upon the sentence.

Rule 810. Procedures for rehearings, new trials and other trials.

a. In general.

(1) Rehearings in full and new or other trials. In rehearings which require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure is the same as in an original trial except as otherwise provided in this rule.

(2) Rehearings on sentence only. In a rehearing on sentence only, the procedure is the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule.

(a) Contents of the record. The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible under Mil. R. Evid. 804(b)(1) and whether or not it was given through an interpreter.

(b) Plea. The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based. However, if such a plea is found to be improvident, the rehearing must be suspended and the matter reported to the authority ordering the rehearing.

(3) Combined rehearings. When a rehearing on sentence is combined with a trial on the merits of one of more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After findings on the merits are announced, the members, if any, must be advised of the offenses on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure must be the same as at an original trial, except as otherwise provided in this rule. A single sentence must be adjudged for all offenses.

b. Composition.

(1) Members. No member of the court-martial which previously heard the case may sit as a member of the court-martial at any rehearing, new trial, or other trial of the same case. (NYSML, Section 130.62)

(2) Military judge. The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing has no effect on the composition of a court-martial on rehearing.

(3) Accused's election. The accused at a rehearing or new or other trial has the same right to request enlisted members or trial by military judge alone as the accused would have at an original trial.

c. Examination of record of former proceedings. No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except:

(1) When permitted to do so by the military judge after such matters have been received in evidence, or

(2) That the president of a SPCM without a military judge may examine that part of the record of former proceedings which relates to errors committed at the former proceedings when necessary to decide the admissibility of offered evidence or other questions of law, and such a part of the record may be read to the members when necessary for them to consider a matter subject to objection by any member.

d. Sentence limitations.

(1) In general. Except as otherwise provided in subsection d(2) of this rule, offenses on which a rehearing, new trial, or other trial has been ordered cannot be

the basis for punishment in excess of, or more severe than, the legal sentence adjudged at the previous trial or hearing, as ultimately reduced by the convening or higher authority unless the sentence prescribed for the offense is mandatory. (NYSML, Section 130.62) When a rehearing on sentencing is combined with trial on new charges, the maximum punishment is the maximum punishment for the offenses being reheard as limited above plus the total maximum punishment under N.Y.R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an "other trial," no sentence limitations apply if the original trial was invalid because a SCM or SPCM improperly tried an offense involving a mandatory punishment or one otherwise considered capital.

(2) Pretrial agreement. If, after the earlier court-martial, the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the sentence as to the affected charges and specifications may include any otherwise lawful punishment not in excess of, or more severe than, that lawfully adjudged at the earlier court-martial.

e. Definition. "Other trial" means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense.

Rule 811. Stipulations.

a. In general. The parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness.

b. Authority to reject. The military judge may, in the interest of justice, decline to accept a stipulation.

c. Requirements. Before accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission.

d. Withdrawal. A party may withdraw from an agreement to stipulate or from a stipulation at any time before a stipulation is accepted, the stipulation may not be accepted. After a stipulation has been accepted a party may withdraw from it only if permitted to do so in the discretion of the military judge.

e. Effect of stipulations. Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or

explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or document's contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Rules of Evidence apply to the contents of stipulation.

f. Procedure. When offered, a written stipulation must be presented to the military judge and must be included in the record whether accepted or not. Once accepted, a written stipulation of expected testimony must be read to the members, if any, but cannot be presented to them; a written stipulation of fact or of a document's contents may be read to the members, if any, presented to them, or both. Once accepted, an oral stipulation must be announced to the members, if any.

Rule 812. Joint and common trials.

In joint trials and in common trials, each accused must be accorded the rights and privileges as if tried separately.

Rule 813. Announcing personnel of the court-martial and accused.

a. Opening sessions. When the court-martial is called to order for the first time in a case, the military judge must ensure that the following is announced:

(1) The order, including any amendment, by which the court-martial is convened;

(2) The name, rank, and unit or address or the accused;

(3) The name and rank of the military judge, if one has been detailed;

(4) The names and ranks of the members, if any, who are present;

(5) The names and ranks of members who are absent, if presence of members is required;

(6) The names and ranks, if any, of counsel who are present; and

(7) The names and ranks, if any, of counsel who are absent;

(8) The name and rank, if any, of any detailed court reporter.

b. Later proceedings. When the court-martial is called to order after a recess or adjournment or after it has been closed for any reason, the military judge must ensure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present.

c. Additions, replacement, and absences of personnel. Whenever there is a replacement of the military judge, any member, or counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge must ensure the record reflects the change and the reason for it.

PART II

CHAPTER 9

TRIAL PROCEDURE THROUGH FINDINGS

Rule 901. Opening session.

a. Call to order. A court-martial is in session when the military judge so declares.

b. Announcement of parties. After the court-martial is called to order, the presence or absence of the parties, military judge, and members are announced.

c. Swearing reporter and interpreter. After the personnel have been accounted for as required in subsection b of this rule, the trial counsel announces whether the reporter and interpreter, if any is present, have been properly sworn. If not sworn, the reporter and interpreter, if any, are sworn.

d. Counsel.

(1) Trial counsel. The trial counsel must announce the legal qualifications and status as to oaths of the members of the prosecution and whether any member of the prosecution has acted in any manner which might tend to disqualify the counsel.

(2) Defense counsel. The detailed defense counsel must announce the legal qualifications and status as to oaths of the detailed members of the defense and whether any member of the defense has acted in any manner which might tend to disqualify that counsel. Any defense counsel not detailed must state that counsel's legal qualifications, and whether that counsel has acted in any manner which might tend to disqualify that counsel.

(3) Disqualification. If it appears that any counsel may be disqualified, the military judge must decide the matter and take appropriate action.

(4) Inquiry. The military judge must in open session:

(a) Inform the accused of the rights to be represented by military counsel detailed to the defense, or by individual military counsel requested by the

accused, if such military counsel is reasonably available, and by civilian counsel, either alone or in association with military counsel, if such civilian counsel is provided at no expense to the State;

(b) Inform the accused that, if afforded individual military counsel, the accused may request retention of detailed counsel as associate counsel;

(c) Ascertain from the accused whether the accused understands these rights;

(d) Promptly inquire, whenever two or more accused in a joint or common trial are represented by the same detailed or individual military or civilian counsel who are associated in the practice of law, with respect to such joint representation and must personally advise each accused of the right to effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the military judge must take appropriate measures to protect each accused's right to counsel; and

(e) Ascertain from the accused by whom the accused chooses to be represented.

(5) Unsworn counsel. The military judge must administer the oath to any counsel not sworn.

e. Presence of members. In cases in which a military judge has been detailed, the procedures described in N.Y.R.C.M. 901 through 910 must be conducted without members present in accordance with N.Y.R.C.M. 803.

Rule 902. Disqualification of military judge.

a. In general. Except as provided in subsection e of this rule, a military judge must disqualify himself/herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

b. Specific grounds. A military judge must also disqualify himself/herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, investigating officer, legal officer, SJA, or convening authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under N.Y.R.C.M. 502(c) or not detailed under N.Y.R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse of such person:

(a) Is a party to the proceeding;

(b) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(c) Is to the military judge's knowledge likely to be a material witness in the proceeding.

c. Definitions. For the purpose of this rule the following words or phrases have the meaning indicated:

(1) "Proceeding" includes pretrial, trial, post-trial, appellate review, or other stages of litigation.

(2) The "degree of relationship" is calculated according to the civil law system.

(3) "Military judge" does not include the president of a SPCM without a military judge.

d. Procedure.

(1) The military judge must, upon motion of any party or sua sponte, decide whether he is disqualified.

(2) Each party may question the military judge and present evidence regarding a possible ground for disqualification before the military judge decides the matter.

(3) Except as provided under subsection e of this rule, if the military judge rules that he is disqualified, he must excuse himself.

e. Waiver. No military judge is to accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection b of this rule. Where the ground for disqualification arises only under subsection a of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Rule 903. Accused's elections on composition of court-martial.

a. Time of elections.

(1) Request for enlisted members. Before the end of the initial session under NYSML, Section 130.39(a), or in the absence of such a session, before assembly, the military judge must ascertain, as applicable, whether an enlisted accused elects to be tried by a court-martial including enlisted members. (NYSML, Section 130.25(c(1)) The military judge may, as a matter of discretion, permit the accused to defer requesting enlisted members until any time before assembly, which time may be determined by the military judge.

(2) Request for trial by military judge alone. Before the end of the initial session under NYSML, Section 130.39(a), or, in the absence of such a session, before assembly, the military judge must ascertain, as applicable, whether in a non-capital case, the accused request trial by the military judge alone. (NYSML, Section 130.16(1)(B) and (2)(c)) The accused may defer requesting trial by military judge alone until any time before assembly.

b. Form of election.

(1) Request for enlisted members. A request for membership of the court-martial to include enlisted persons must be in writing and signed by the accused or shall be made orally on the record.

(2) Request for trial by military judge alone. A request for trial by military judge alone must either be in writing and signed by the accused or be made orally on the record.

c. Action on election.

(1) Request for enlisted members. Upon notice of a timely written request for enlisted members by an enlisted accused, the convening authority shall detail enlisted members to the court-martial in accordance with NY.R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exigencies prevented this. The trial of the general issue cannot proceed until this is done.

(2) Request for military judge alone. Upon receipt of a timely request for trial by military judge alone, the military judge must:

(a) Ascertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members; and

(b) Approve or disapprove the request, in the military judge's discretion.

(3) Other. In the absence of a request for enlisted members or a request for trial by military judge alone, trial must be by a court-martial composed of officers.

d. Right to withdraw request.

(1) Enlisted members. A request for enlisted members may be withdrawn by the accused as a matter of right any time before the end of the initial session under NYSML, Section 130.39(a), or in the absence of such a session before assembly.

(2) Military judge. A request for trial by military judge alone may be withdrawn by the accused as a matter of right any time before it is approved, or even after if there is a change of the military judge.

e. Untimely requests. Failure to request, or failure to withdraw a request for enlisted members or trial by military judge alone in a timely manner waives the right to submit or to withdraw such a request. However, the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, approve an untimely request or withdrawal of a request.

f. Scope. For purposes of this rule, "military judge" does not include the president of a SPCM without a military judge.

Rule 904. Arraignment.

Arraignment must be conducted in a court-martial session and consists of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

Rule 905. Motions generally.

a. Definitions and form. A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion must state the grounds upon which it is made and must set forth the ruling or relief sought. The substance of a motion, not its form or designation, controls.

b. Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections must be resolved by the military judge at any time during the pendency of the proceedings);

(3) Motions to suppress evidence;

(4) Motions for discovery under N.Y.R.C.M. 701 or for production of witnesses or evidence;

(5) Motions for severance of charges or accused; or

(6) Objections based on denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

c. Burden of proof.

(1) Standard. Unless otherwise provided in this manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion is by a preponderance of the evidence.

(2) Assignment.

(a) Except as otherwise provided in this manual, the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion is on the moving party.

(b) In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under N.Y.R.C.M. 707 or the running of the statute of limitations, the burden of persuasion is upon the State.

d. Ruling on motions. A motion made before pleas are entered must be determined before pleas are entered unless, if otherwise not prohibited by this manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge must state the essential findings on the record.

e. Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection b of this rule constitutes waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this manual, failure to do so constitutes waiver.

f. Reconsideration. On request of any party or sua sponte, the military judge may reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

g. Effect of final determinations. Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the State in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the State. This rule also applies to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the State were parties.

h. Written motions. Written motions may be submitted to the military judge after referral and, when appropriate, they may be supported by affidavits with service and opportunity to reply to the opposing party. Such motions may be disposed of before arraignment and without a session. Upon request, either party is entitled to a session under NYSML, Section 130.39(a), to present oral argument or have an evidentiary hearing concerning the disposition of written motions.

i. Service. Written motions are to be served on all other parties. Unless otherwise directed by the military judge, the service is to be made upon counsel for each party.

j. Applications to convening authority. Except as otherwise provided in this manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening authority is not, except as otherwise provided in this manual, required and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

k. Production of statements on motion to suppress. Except as provided in this subsection, N.Y.R.C.M. 914 applies at a hearing on a motion to suppress evidence under subsection b(3) of this rule. For purposes of this subsection, a law enforcement officer is deemed a witness called by the State, and upon a claim of privilege the military judge must excise portions of the statement containing privileged matter.

Rule 906. Motions for appropriate relief.

a. In general. A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.

b. Grounds for appropriate relief. The following may be requested by motion for appropriate relief. This list is not exclusive.

(1) Continuances. A continuance may be granted only by the military judge.

(2) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge must ensure that a record of the matter is included in the record of trial, and may

make a finding. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability results is in the process of review in administrative channels.

(3) Correction of defects in the investigation under NYSML, Section 130.32, or pretrial advice.

(4) Amendment of charges or specifications. A charge or specification may not be amended over the accused's objection unless the amendment is minor within the meaning of N.Y.R.C.M. 603(a).

(5) Severance of a duplicitous specification into two or more specifications.

(6) Bill of particulars. A bill of particulars may be amended at any time, subject to such conditions as justice permits.

(7) Discovery and production of evidence and witnesses.

(8) Relief from pretrial confinement in violation of N.Y.R.C.M. 305.

(9) Severance of multiple accused if it appears that an accused or the State is prejudiced by a joint or common trial. In a common trial, a severance must be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.

(10) Severance of offenses, but only to prevent manifest injustice.

(11) Change of place of trial. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the State if the rights of the accused are not prejudiced thereby.

(12) Determination of multiplicity of defenses for sentencing purposes.

(13) Preliminary ruling on admissibility of evidence.

(14) Motions relating to mental capacity or responsibility of the accused.

Rule 907. Motions to dismiss.

a. In general. A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

b. Grounds for dismissal. Grounds for dismissal include the following:

(1) Non-waivable grounds. A charge or specification must be dismissed at any stage of the proceedings if:

(a) The court-martial lacks jurisdiction to try the accused for the offense, or

(b) The specification fails to state an offense.

(2) Waivable grounds. A charge or specification must be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:

(a) Dismissal is required under N.Y.R.C.M. 707;

(b) The statute of limitations (NYSML, Section 130.43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right;

(c) The accused has previously been tried by court-martial under the code or State civilian court for the same offense, provided that:

(i) No court-martial proceeding is a trial in the sense of this rule unless presentation of evidence on the general issue of guilt has begun;

(ii) No court-martial proceeding which has been terminated under N.Y.R.C.M. 604(b) or 915 bars later prosecution for the same offense or offenses, if so provided in those rules;

(iii) No court-martial proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed; and

(iv) No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.

(d) Prosecution is barred by:

(i) A pardon issued by the Governor,

(ii) Immunity from prosecution granted by a person authorized to do so,

(iii) Constructive condo nation of desertion established by unconditional restoration to duty without trial of a deserter by a GCM convening authority who knew of the desertion, or

(iv) Prior punishment under NYSML, Section 130.13 or 130.15 for the same offense if that offense was minor.

(3) Permissible grounds. A specification may be dismissed upon timely motion by the accused if:

(a) The specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay; or

(b) The specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review and appellate action, and should be dismissed in the interest of justice.

Rule 908. Reserved for future use.

Rule 909. Capacity of the accused to stand trial by court-martial.

a. In general. No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case.

b. Presumption of capacity. A person is presumed to have the capacity to stand trial unless the contrary appears.

c. Determination at trial.

(1) Nature of issue. The mental capacity of the accused is an interlocutory question of fact.

(2) Standard. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against the accused or conduct or cooperate intelligently in the defense of the case.

Rule 910. Pleas.

a. Alternatives.

(1) In general. An accused may plead not guilty or guilty. (NYSML, Section 130.45) An accused may plead, by exceptions or by exceptions and substitutions, not guilty to an offense as charged, but guilty to an offense included in that offense. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

(2) Conditional pleas. With the approval of the military judge and the consent of the State, an accused may enter a conditional plea of guilty, reserving in writing the right, of further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused must be allowed to withdraw the plea of guilty. The trial counsel may consent on behalf of the State.

b. Refusal to plead, irregular plea. If an accused fails or refuses to plead, or makes an irregular plea, the military judge must enter a plea of not guilty for the accused.

c. Advice to accused. Before accepting a plea of guilty, the military judge must address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

(2) In a GCM or SPCM, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every state of the proceedings.

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waived the rights described in subsection c(3) of this rule, and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

d. Ensuring that the plea is voluntary. The military judge cannot accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under N.Y.R.C.M. 705. The military judge must also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

e. Determining accuracy of plea. The military judge cannot accept a plea of guilty without making such inquiry of the accused as will satisfy the military judge that there is a factual basis for the plea. The accused must be questioned under oath about the offenses.

f. Plea agreement inquiry.

(1) In general. A plea agreement may not be accepted if it does not comply with N.Y.R.C.M. 705.

(2) Notice. The parties must inform the military judge if a plea agreement exists.

(3) Disclosure. If a plea agreement exists, the military judge must require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily cannot examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) Inquiry. The military judge must inquire to ensure:

(a) That the accused understands the agreement, and

(b) That the parties agree to the terms of the agreement.

g. Findings. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at a session under NYSML, Section 130.39(a) unless:

(1) The plea is to a lesser included offense and the State intends to proceed to trial on the offense as charged, or

(2) Trial is by SPCM without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection g(2) of this rule applies.

h. Later action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge must inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty must be entered as to the affected charges and specification.

(3) Pretrial agreement inquiry. After sentence is announced the military judge must inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge must conform, with the consent of the State, the agreement to the accused's understanding or permit the accused to withdraw the plea.

i. Record of proceedings. A verbatim record of the guilty plea proceedings must be made in cases in which a verbatim record is required under N.Y.R.C.M. 1103. In other SPCM, a summary of the explanation and replies shall be included in the record of trial. As to SCM, see N.Y.R.C.M. 1305.

j. Waiver. Except as provided in subsection a(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule 911. Assembly of the court-martial. The military judge must announce the assembly of the court-martial.

Rule 912. Challenge of selection of members, examination and challenges of members.

a. Pretrial matters.

(1) Questionnaires. Before trial the trial counsel may and must upon requesting the following information:

(a) Date of birth.

(b) Sex.

(c) Race.

(d) Marital status and sex, age, and number of dependents.

(e) Home of record.

(f) Civilian and military education including, when available, major areas of study, name of school or institution, years of education, and degrees received.

(g) Current unit to which assigned.

(h) Past duty assignments.

(i) Awards and decorations received.

(j) Date of rank.

(k) Whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or SJA for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be required with the approval of the military judge. Each member's responses to the questions must be written and signed by the member.

(2) Other materials. A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial must be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

b. Challenge of selection of members.

(1) Motion. Before the examination of members under subsection d of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefore, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

(2) Procedure. Upon a motion under subsection b(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party is entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge must stay any proceedings requiring the presence of members until members are properly selected.

(3) Waiver. Failure to make a timely motion under this subsection waives the improper selection unless it constitutes a violation of N.Y.R.C.M. 501(a), 502(a)(1), or 503(a)(2).

c. Stating grounds for challenge. The trial counsel must state any ground for challenge for cause against any member of which the trial counsel is aware.

d. Examination of members. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge is to permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge must submit to the members such additional questions by the parties, as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

e. Evidence. Any party may present evidence relating to whether grounds for challenge exist against a member.

f. Challenge and removal for cause. (See NYSML, Section 130.42)

(1) Grounds. A member must be excused for cause whenever it appears that the member:

(a) Is not competent to serve as a member under NYSML, Section 130.25(a), (b), or (c).

(b) Has not been properly detailed as a member of the court-martial.

(c) Is an accuser as to any offense charged?

(d) Will be a witness in the court-martial.

(e) Has acted as counsel for any party as to any offense charged.

(f) Has been an investigating officer as to any offense charged.

(g) Has acted in the same case as convening authority or as the legal officer or SJA to the convening authority.

(h) Will act in the same case as reviewing authority or as the legal officer or SJA to the reviewing authority.

(i) Has forwarded charges in the case with a personal recommendation as to disposition.

(j) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before.

(k) Is junior to the accused in grade or rank unless it is established that this could not be avoided.

(l) Is in arrest or confinement.

(m) Has informed or expressed a definite opinion as to the guilty or innocence of the accused as to any offense charged.

(n) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

(2) When made.

(a) Upon completion of examination. Upon completion of any examination under subsection d of this rule and the presentation of evidence, if any, on the matter, each party must state any challenges for cause it elects to make.

(b) Other times. A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) Procedure. Each party may make challenges outside the presence of the members. The party making a challenge must state the grounds for it. Ordinarily the trial counsel enters any challenges for cause before the defense counsel. The military judge rules finally on each challenge. When a challenge for cause is granted, the member concerned is excused. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged must be excused.

(4) Waiver. The grounds for challenge in subsection f(1)(a) of this rule may not be waived except that membership of enlisted members in the same unit as the accused may be waived. Membership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner. Notwithstanding the absence of a challenge or waiver of challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member constitutes waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member preserves the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

g. Peremptory challenges.

(1) Procedure. Each party may challenge one member peremptorily. (NYSML, Section 130.41(b)) Any member so challenged must be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel enters any peremptory challenge before the defense.

(2) Waiver. Failure to exercise a peremptory challenge when properly called upon to do so waives the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members have begun. However, nothing in this subsection bars the exercise of a previously unexercised peremptory challenge against a member newly detailed under N.Y.R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

h. SPCM without a military judge. In SPCM without a military judge, the procedures in this rule apply, except that challenges must be made in the presence of the members and a ruling on any challenge for cause must be decided by a majority vote of the members upon secret written ballot in closed session. The challenged member cannot be present at the closed session at which the challenge is decided. A tie vote on a challenge disqualifies the member challenged. Before closing, the president must give such instructions as may be necessary to resolve the challenge. Each challenge must be decided separately, and all unexcused members except the challenged member must participate. When only three members are present and one is challenged, the remaining two may decide the challenge. When the president is challenged, the next senior member acts as president for purposes of deciding the challenge.

i. Definitions.

(1) Military judge. For purposes of this rule, "military judge" does not include the president of a SPCM without a military judge.

(2) Witness. For purposes of this rule, "witness" includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

(3) Investigating officer. For purposes of this rule, "investigating officer" includes any person who has investigated charges under N.Y.R.C.M. 405 and any person who as counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Rule 913. Presentation of the case on the merits.

a. Preliminary instructions. The military judge may give such preliminary instructions as may be appropriate.

b. Opening statements. Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times.

c. Presentation of evidence. Each party has full opportunity to present evidence.

(1) Order of presentation. Ordinarily the following sequence is followed:

(a) Presentation of evidence for the prosecution,

(b) Presentation of evidence for the defense,

(c) Presentation of prosecution evidence in rebuttal,

(d) Presentation of defense evidence in surrebuttal,

(e) Additional rebuttal evidence in the discretion of the military judge, and

(f) Presentation of evidence requested by the military judge or members.

(2) Taking testimony. The testimony of witnesses is taken orally in open session unless otherwise provided in this manual.

(3) Views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. Such a view or inspection may take place only in the presence of all parties, the members, if any, and the military judge. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person must perform the duties of escort under oath. The escort cannot testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member must be made part of the record.

(4) Evidence subject to exclusion. When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

(5) Reopening case. The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

Rule 914. Production of statements of witnesses.

a. Motion for production. After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, must order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by the trial counsel, in the possession of the State; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

b. Production of entire statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge must order that the statement be delivered to the moving party.

c. Production of excised statement. If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge must order that it be delivered to the military judge. Upon inspection, the military judge must excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and must order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection must be preserved by the trial counsel and, in the event of a conviction, must be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

d. Recess for examination of the statement. Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

e. Remedy for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge must order that the testimony of the witness be disregarded by the trier of fact and the trial proceed or, if it is the trial counsel who elects not to comply, must declare a mistrial if required in the interest of justice.

f. Definition. As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a State grand jury.

Rule 915. Mistrial.

a. In general. The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings, which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

b. Procedure. On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge must inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.

c. Effect of declaration of mistrial.

(1) Withdrawal of charges. A declaration of a mistrial has the effect of withdrawing the affected charges and specifications from the court-martial.

(2) Further proceedings. A declaration of a mistrial does not prevent trial by another court-martial on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was:

(a) An abuse of discretion and without the consent of the defense, or

(b) The direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

Rule 916. Defenses.

a. In general. As used in this rule, "defenses" includes any special defense, which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.

b. Burden of proof. Except for the defense of lack of mental responsibility, once a defense under this rule is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

c. Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

d. Obedience to orders. It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

e. Self-defense.

(1) Certain assaults. It is a defense to any assault punishable under NYSML, Section 130.86 or 130.87 that the accused:

(a) Apprehend, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused, and

(b) Believed that the force the accused used was necessary for protection against bodily harm.

(2) Loss of right to self-defense. The right to self-defense is lost and the defense described in subsection e(1) of this rule does not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

(3) Defense of another. The principle of self-defense under subsection e(1) and (2) of this rule apply to defense of another. It is a defense to any assault under NYSML, Section 130.86 or 130.87 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

f. Accident. A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

g. Entrapment. It is a defense that the criminal design or suggestion to commit the offense originated in the State and the accused had no predisposition to commit the offense.

h. Coercion or duress. It is a defense to any offense under the code that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense does not apply.

i. Inability. It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

j. Ignorance or mistake of fact. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

k. Lack of mental responsibility.

(1) Lack of mental responsibility. It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defects, was unable to appreciate the nature and quality of the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

(2) Partial mental responsibility. A mental condition not amounting to a general lack of mental responsibility under subsection k(1) of this rule but which produces a lack of mental ability at the time of the offense to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defense to an offense having one of these states of mind as an element.

(3) Procedure.

(a) Presumption. The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until some evidence to the contrary is admitted.

(b) Inquiry. If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under N.Y.R.C.M. 706. In a SPCM without a military judge, the president must rule finally except to the extent that the question is one of fact, in which case the president rules subject to objection by any member.

(c) Determination. The issue or mental responsibility is not an interlocutory question.

l. State civilian defenses. Where an appellate court of this State has made a final determination affecting the criminal law of this State with respect to matters of substantive law relating to any of the defenses contained in this section, that determination is, if applicable to the particular case, binding upon the court-martial.

m. Not defenses generally.

(1) Ignorance or mistake of law. Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.

(2) Voluntary intoxication. Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Rule 917. Motion for a finding of not guilty.

a. In general. The military judge, on motion by the accused or sua sponte, must enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected. If a motion for a finding of not guilty at the close of the State's case is denied, the defense may offer evidence on that offense without having reserved the right to do so.

b. Form of motion. The motion must specifically indicate wherein the evidence is insufficient.

c. Procedure. Before ruling on a motion for a finding of not guilty, whether made by counsel or sua sponte, the military judge must give each party an opportunity to be heard on the matter.

d. Standard. A motion for a finding of not guilty is granted only in the absence of some evidence, which, together with all reasonable inferences and applicable presumptions, could reasonably rend to establish every essential element of an offense, charged. The evidence must be viewed in the light most favorable to the State, without an evaluation of the credibility of witnesses.

e. Motion as to greater offense. A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge must announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge must instruct the members accordingly so that any findings later announced will not be inconsistent with the granting of the motion.

f. Effect of ruling. A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification or affected portion thereof and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time before findings on the general issue of guilt are announced.

g. Effect of denial on review. If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Rule 918. Findings.

a. General findings. The general findings of a court-martial state whether the accused is guilty of each offense charged. (NYSML, Section 130.53) If two or more accused are tried together, separate findings as to each must be made. (NYSML, Section 130.51)

(1) As to a specification. General findings as to a specification may be: guilty; guilty with exceptions, with or without substitutions, not guilty of the exceptions but guilty of any substitutions; not guilty only by reason of lack of mental responsibility; or not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

(2) As to a charge. General findings as to a charge may be: guilty; not guilty, but guilty of a violation of Section _____; not guilty only by reason of lack of mental responsibility; or not guilty.

b. Special findings. In a trial by court-martial composed of military judge alone, the military judge must make special findings upon request by any party. (NYSML, Section 130.51) Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. A party in a case may request only one set of special findings. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the court-martial or in writing during or after the court-martial, but in any event shall be made before authentication and included in the record of trial.

c. Basis of findings. Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the fact-finder is satisfied that guilt has been proved beyond a reasonable doubt.

Rule 919. Argument by counsel on findings.

a. In general. After the closing of evidence, trial counsel must be permitted to open the argument. The defense counsel must be permitted to reply. Trial counsel may reply in rebuttal.

b. Contents. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn there from, in support of a party's theory of the case.

c. Waiver of objection to improper argument. Failure to object to improper argument before the military judge begins to instruct the members on findings waives the objection.

Rule 920. Instructions on findings.

a. In general. The military judge must give the members appropriate instructions on findings. (NYSML, Section 130.51)

b. When given. Instructions on findings must be given after arguments by counsel and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

c. Requests for instructions. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party must be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge must inform the parties of the proposed action on such requests before their closing arguments.

d. How given. Instructions on findings must be given orally on the record in the presence of all parties and the members. Written copies of the instructions or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

e. Required instructions. Instructions on findings must include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue;

(3) A description of any special defense under N.Y.R.C.M. 915 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that --

(a) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

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

(c) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is no reasonable doubt; and

(d) The burden of proof to establish the guilt of the accused is upon the State. [When the issue of lack of mental responsibility is raised, at:] However, the burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused.

(6) Directions on the procedures under N.Y.R.C.M. 920 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.

f. Waiver. Failure to object to an instruction of to omission of an instruction before the members close to deliberate waives the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions given were improper. The parties must be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings.

a. In general. After the military judge instructs the members on findings, the members must deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank cannot be used in any manner in an attempt to control the independence of members in the exercise of their judgment. (NYSML, Sections 130.37, 130.51 and 130.52)

b. Deliberations. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.

c. Voting.

(1) Secret bills. Voting on the findings for each charge and specification must be made by secret written ballot. All members present must vote.

(2) Number of votes required to convict. A finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty.

(3) Acquittal. If less than two-thirds of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) Not guilty only by reason of lack of mental responsibility. When the defense of lack of mental responsibility is an issue under N.Y.R.C.M. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members present vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has to be rejected and the finding of guilty stands.

(5) Included offenses. Members cannot vote on a lesser-included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members must vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members must continue to vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) Procedure for voting.

(a) Order. Each specification must be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges is determined by the president unless a majority of the members object.

(b) Counting votes. The junior member collects the ballots and counts the votes. The president checks the count and informs the other members of the result.

d. Action after findings is reached. After the members have reached findings on each charge and specification before them, the court-martial must be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing, which the president intends to read to announce the sentence, and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it constitutes announcement of the findings.

Rule 922. Announcement of findings.

a. In general. Findings shall be announced in the presence of all parties promptly after they have been determined. (NYSML, Section 130.53)

b. Findings by members. The president must announce the findings by the members. If a finding is based on a plea of guilty, the president must so state.

c. Findings by military judge. The military judge must announce the findings when trial is by military judge alone or when findings may be entered under N.Y.R.C.M. 910(g).

d. Erroneous announcement. If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement in accordance with this rule. This error must be discovered and the new announcement made before the final adjournment of the court-martial in the case.

e. Polling prohibited. Except as provided in Mil. R. Evid. 606, members may not be questioned about their deliberation and voting.

Rule 923. Impeachment of findings.

Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member,

outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Rule 924. Reconsideration of findings.

a. Time for reconsideration. Members may reconsider any finding reached by them before such finding is announced in open session. Members may reconsider any finding of guilty reached by them at any time before announcement of the sentence.

b. Procedure. Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority votes for reconsideration. Any finding of guilty shall be reconsidered if more than one-third of the members votes for reconsideration. Any finding of not guilty only by reason of lack of mental responsibility shall be reconsidered on the issue of the finding of guilty of the elements if more than one-third of the members vote for reconsideration and on the issue of mental responsibility if a majority vote for reconsideration. If a vote to reconsider a finding succeeds, the procedures in N.Y.R.C.M. 920 shall apply.

c. Military judge sitting alone. In trial by military judge alone, the military judge may reconsider any finding of guilty at any time before announcement of sentence.

PART II

CHAPTER 10

SENTENCING

Rule 1001. Pre-sentencing procedure.

a. In general.

(1) Procedure. After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter is ordinarily presented in the following sequence:

(a) Presentation by trial counsel of:

(i) Service data relating to the accused taken from the charge sheet.

(ii) Personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused.

(iii) Evidence of prior convictions, military or civilian.

(iv) Evidence of aggravation

(v) Evidence of rehabilitative potential.

(b) Presentation by the defense of evidence in extenuation or mitigation or both.

(c) Rebuttal.

(d) Argument by the trial counsel on sentence.

(e) Argument by the defense counsel on sentence.

(f) Rebuttal arguments in the discretion of the military judge.

(2) Adjudging sentence. A sentence must be adjudged in all cases without unreasonable delay.

(3) Advice and inquiry. The military judge must personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and must ask whether the accused chooses to exercise those rights.

b. Matter to be presented by the prosecution.

(1) Service data from the charge sheet. Trial counsel must inform the court-martial of the data on the charge sheet relating to the age, pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge must determine the issue. Objections not asserted are waived.

(2) Personal data and character of prior service of the accused. Trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under NYSML, Section 130.15.

"Personnel records of the accused" includes all those records made or maintained in accordance with pertinent regulations that reflect the past military efficiency, conduct, performance and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter must be determined by the military judge. Objections not asserted are waived.

(3) Evidence of prior convictions of the accused.

(a) In general. The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

(b) Pendency of appeal. The pendency of an appeal there from does not render evidence of a conviction inadmissible except that a conviction by SCM or SPCM without a military judge may not be used for purposes of this rule until review has

been completed pursuant to NYSML, Section 130.63 or 130.65, if applicable. Evidence of the pendency of an appeal is admissible.

(c) Methods of proof. Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence

(4) Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. A written or oral deposition taken in accordance with N.Y.R.C.M. 702 is admissible in aggravation.

(5) Evidence of rehabilitative potential. The trial counsel may present, by testimony or oral deposition in accordance with N.Y.R.C.M. 702(g)(1), evidence, in the form of opinion, concerning the accused's previous performance as a service member and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.

c. Matter to be presented by the defense.

(1) In general. The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless of whether the defense offered evidence before findings.

(a) Matter in extenuation. Matter in extenuation of an offense serves to explain the circumstance surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(b) Matter in mitigation. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that NJP under NYSML, Section 130.15, has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery, and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) Statement by the accused.

(a) In general. The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, or to rebut matters presented by the trial counsel, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. The filing of an affidavit of the accused is not permitted.

(b) Testimony of the accused. The accused may give sworn oral testimony and is subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

(c) Unsworn statement. The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it by the court-martial. The trial counsel may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) Rules of evidence relaxed. The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

d. Rebuttal and surrebuttal. The trial counsel may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the trial counsel. Rebuttal and surrebuttal may continue, at the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection c(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

e. Production of witnesses.

(1) In general. During the pre-sentence proceedings, there is to be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness will be produced to testify during pre-sentence proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection e(2) of this rule.

(2) Limitations. A witness may be produced to testify during pre-sentence proceedings through a subpoena or travel orders at State expense only if:

(a) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination or an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(b) The weight of credibility of the testimony is substantial significance to the determination of an appropriate sentence;

(c) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(d) Other forms of evidence such as oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence;

(e) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the cost of producing the witness, the timing of the request for production of the witness, the potential delay in the pre-sentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

f. Additional matters to be considered. In addition to matters introduced under this rule, the court-martial may consider:

(1) That a plea of guilty is a mitigating factor, and

(2) Any evidence properly introduced on the merits before findings, including:

(a) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose, and

(b) Evidence relating to any mental impairment or deficiency of the accused.

g. Argument. After introduction of matters relating to sentence under this rule, trial counsel and defense counsel may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall waive the objection.

Rule 1002. Sentence determination.

Subject to limitations in NYSML, Sections 130.18, 130.19 and 130.20(b), as appropriate, the sentence to be adjudged is a matter within the discretion of the court-martial. To the extent that punishment is discretionary, the sentence must provide a legal, appropriate, and adequate punishment, including a sentence of no punishment.

Rule 1003. Punishments.

a. In general. Subject to the limitations in this manual, the punishments authorized in the code may be adjudged in the case of any person found guilty of an offense by a court-martial.

b. Authorized punishments. Subject to the limitations in NYSML, Sections 130.18, 130.19, and 130.20(b), a court-martial may adjudge only the following punishments:

(1) Reprimand. A court-martial cannot specify the terms or wording of a reprimand. A reprimand, if approved, must be issued, in writing, by the convening authority.

(2) Forfeiture of pay and allowances. A sentence of forfeiture must state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last. The maximum authorized amount of a partial forfeiture is determined by using the basic pay authorized by the cumulative years of service of the accused and, if no confinement is adjudged, any sea or foreign duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture is based on the grade to which the accused is reduced.

(3) Fine. Any court-martial may adjudge a fine instead of, or in addition to, forfeitures. SPCM and SCM may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in that case. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person confined for a period not exceeding one day for each dollar of fine imposed. The total period of confinement so adjudged cannot exceed the jurisdictional limitations of the court-martial. (NYSML, Section 131.8)

(4) Reduction in pay grade. Except as provided in N.Y.R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to an inferior pay grade.

(5) Confinement at hard labor. The place of confinement cannot be designated by the court-martial. A court-martial cannot adjudge a sentence to solitary confinement or to confinement without hard labor. (NYSML, Sections 130.57 and 130.58)

(6) Punitive separation. A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation:

(a) Dismissal. Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a GCM. A dismissal may be adjudged for any offense of which an officer, cadet, or midshipman has been found guilty.

(b) Dishonorable discharge. A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a GCM. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted to offenses requiring severe punishment.

(c) Bad conduct discharge. A bad conduct discharge applies only to enlisted persons and may be adjudged by a GCM and by a SPCM which has met the requirements of N.Y.R.C.M. 201(f)(2). A bad conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad conduct rather than as a punishment for serious offenses. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary.

c. Limits on punishments.

(1) Maximum punishment. The maximum limits for the authorized punishments of confinement, forfeitures, and punitive discharge (if any) are set forth in NYSML, Sections 130.18, 130.19 and 130.20(c), for respectively, GCM, SPCM and SCM. It is not mandatory that any or all of the maximum punishments be imposed. When a dishonorable discharge is authorized, a bad conduct discharge is also authorized. The types of punishments listed in subsection b of this rule may be imposed.

(2) Based on rank of accused.

(a) Commissioned or warrant officers.

(i) A commissioned or warrant officer may not be reduced in grade by any court-martial.

(ii) Only a GCM may sentence a commissioned or warrant officer, or a cadet, or midshipman to confinement.

(iii) Only a GCM, upon conviction of any offense in violation of the code, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of officers, cadets, and midshipman, the separation is by dismissal. In the case of noncommissioned warrant officers, the separation is by dishonorable discharge.

(b) Enlisted persons. (See N.Y.R.C.M. 1301(d))

Rule 1004. Instructions on sentence.

a. In general. The military judge must give the members appropriate instructions on sentence.

b. When given. Instructions on sentence must be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may upon request of the members, any party, or sua sponte, give additional instructions at a later time.

c. Requests for instructions. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The

military judge may require the requested instruction to be written. Each party has the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge must inform the parties of the proposed action on such requests before their closing arguments on sentence.

d. How given. Instructions on sentence must be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

e. Required instructions. Instructions on sentence must include:

(1) A statement of the maximum authorized punishment which may be adjudged.

(2) A statement of the procedures for deliberation and voting on the sentence set out in N.Y.R.C.M. 1006.

(3) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority.

(4) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under N.Y.R.C.M. 1006(b)(1), (2), (3) and (5).

f. Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence waives the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties have the opportunity to be heard on any objection outside the presence of the members.

Rule 1005. Deliberations and voting on sentence.

a. In general. The members must deliberate and vote after the military judge instructs the members on sentence. Only the members are to be present during deliberations and voting. Superiority in rank cannot be used in any manner to control the independence of members in the exercise of their judgment. (See NYSML, Section 130.37)

b. Deliberations. Deliberations may properly include full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

c. Proposal of sentences. Any member may propose a sentence. Each proposal must be in writing and must contain the complete sentence proposed. The junior member collects the proposed sentences and submits them to the president.

d. Voting. (See NYSML, Section 130.51)

(1) Duty of members. Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty regardless of the member's vote or opinion as to the guilt of the accused.

(2) Secret ballot. Proposed sentences must be voted on by secret written ballot.

(3) Procedure.

(a) Order. A member must vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection d(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(b) Counting votes. The junior member collects the ballots and counts the votes. The president checks the count and informs the other members of the result.

(4) Number of votes required. A sentence may be adjudged only if at least two-thirds of the members present vote for that sentence.

(5) Effect of failure to agree. If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial be declared as to the sentence and the case must be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

e. Action after a sentence is reached. After the members have agreed upon a sentence, the court-martial must be opened and the president must inform the military judge that a sentence has been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the sentence in proper form. Neither that writing nor any oral or written clarification or discussion concerning it constitutes announcement of the sentence.

Rule 1006. Announcement of sentence.

a. In general. The sentence is announced by the president or, in a court-martial composed of a military judge alone, by the military judge, in the presence of all parties promptly after it has been determined. (See NYSML, Section 130.53)

b. Erroneous announcement. If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. This action is not a reconsideration of the sentence. If the court-martial has been adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

c. Polling prohibited. Except as provided in Military Rules of Evidence 606, members may not otherwise be questioned about their deliberations and voting.

Rule 1007. Impeachment of sentence.

A sentence which is proper on its fact may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Rule 1008. Reconsideration of sentence.

a. Time for reconsideration. Subject to this rule, a sentence may be reconsidered by the members or the military judge who reached it at any time before the record of trial is authenticated.

b. Limitations. After a sentence has been announced, it may not be increased upon reconsideration unless the sentence announced was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty.

c. Initiation of reconsideration.

(1) By members. Any member may propose that a sentence reached by the members be reconsidered.

(2) By military judge.

(a) Adjudged by military judge. The military judge may initiate reconsideration of a sentence adjudged by that military judge.

(b) Reached by members. When a sentence reached by members is ambiguous or apparently illegal, the military judge must bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for reconsideration and proceed in accordance with subsection d of this rule, or may bring the matter to the attention of the convening authority.

(3) By convening authority. When a sentence adjudged by the court-martial is ambiguous or apparently illegal, the convening authority may return the matter to the court-martial for clarification or may approve a sentence no more severe that the legal, unambiguous portions of the adjudged sentence.

d. Procedure with members.

(1) Instructions. When a sentence has been reached by members and reconsideration has been initiated under subsection c of this rule, the military judge must instruct the members on the procedure for reconsideration.

(2) Voting. The members must vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

(3) Number of votes required.

(a) With a view to increasing. Subject to subsection b of this rule, members may reconsider a sentence with a view of increasing it only if at least a majority vote to reconsider.

(b) With a view to decreasing. Members may reconsider a sentence with a view to decreasing it only if more than one-third of the members vote to reconsider.

(4) Successful vote. If a vote to reconsider a sentence succeeds, the procedure in N.Y.R.C.M. 1005 shall apply.

Rule 1009. Advice concerning post-trial and appellate rights.

a. Advice. In each GCM and SPCM, after the sentence is announced and before the court-martial is adjourned, the military judge must inform the accused of:

(1) The right to submit matters to the convening authority to consider before taking action.

(2) The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights.

(3) The right to apply for relief from the SJA if the case is not reviewed by the Board of Military Review.

(4) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

b. Inquiry. After compliance with subsection a of this rule, the military judge must inquire of the accused to ensure that the accused understands the advice.

Rule 1010. Adjournment.

The military judge may adjourn the court-martial at the end of the trial of an accused or proceed to trial of other cases referred to that court-martial. Such an adjournment may be for a definite or indefinite period.

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PART II

CHAPTER 11

POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial, post-trial, deferment of confinement.

a. Report of the result of trial. After final adjournment of the court-martial in a case, the trial counsel must promptly notify the accused's immediate commander, the convening authority or the convening authority's designee and, if appropriate, the officer in charge of the confinement facility of the findings and sentence. (See NYSML, Section 130.60(a))

b. Post-trial confinement.

(1) In general. An accused may be placed in post-trial confinement if the sentence adjudged by the court-martial includes confinement. (See NYSML, Section 130.57(b))

(2) Who may order confinement. Unless limited by superior authority, a commander of the accused may order the accused into post-trial confinement when post-trial confinement is authorized under subsection b(1) of this rule. A commander authorized to order post-trial confinement under this subsection may delegate this authority to the trial authority.

(3) Confinement on other grounds. Nothing in this rule prohibits confinement of a person after a court-martial on proper grounds other than the offenses for which the accused was tried at that court-martial.

c. Deferment of confinement.

(1) In general. Deferment of a sentence to confinement is a postponement of the service and of the running of the sentence. (NYSML, Section 130.57(d))

(2) Who may defer. The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising GCM jurisdiction over the command to which the accused is assigned, may, upon written application of the accused, at any time after the adjournment of the court-martial, defer the accused's service of a sentence to confinement, which has not been ordered executed.

(3) Action on deferment request. The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement. The accused has the burden to show that the interests of the accused and the community in release outweigh the community's interests in confinement. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; and the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment shall be subject to judicial review only for abuse of discretion. The action of the convening authority shall be written and a copy shall be provided to the accused.

(4) Orders. The action granting deferment must be reported in the convening authority's action under N.Y.R.C.M. 1107(f)(4)(E) and must include the date of the action on the request when it occurs prior to or concurrently with the action. Action granting deferment after the convening authority's action under N.Y.R.C.M. 1107 must be reported in orders under N.Y.R.C.M. 1114 and included in the record of trial.

(5) Restraint when deferment is granted. When deferment of confinement is granted no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment.

(6) End of deferment. Deferment of a sentence to confinement ends when:

(a) The convening authority takes action under N.Y.R.C.M. 1107, unless the convening authority specifies in the action that service of confinement after the action is deferred;

(b) The confinement is suspended;

(c) The deferment expires by its own terms; or

(d) The deferment is otherwise rescinded in accordance with subsection c(7) of this rule.

Deferment of confinement may not continue after the conviction is final under N.Y.R.C.M. 1209.

(7) Rescission of deferment.

(a) Who may rescind. The authority who granted the deferment, or if the accused is no longer within that authority's jurisdiction, the officer exercising GCM jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(b) Action. Deferment of confinement may be rescinded when additional information presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under subsection c(3) of this rule. The accused must promptly be informed of the basis for the rescission and of the right to submit written matters in the accused's behalf and to request that the rescission be reconsidered. However, the accused may be required to serve the sentence to confinement pending this action.

(c) Execution. When deferment is rescinded after the convening authority's action under N.Y.R.C.M. 1107, the confinement may be ordered executed. However, no such order may be issued within seven days of notice of the rescission to the accused under subsection c(7)(b) of this rule, to afford the accused an opportunity to respond. The authority rescinding the deferment may extend this period for good cause shown. The accused must be credited with any confinement actually served during this period.

(d) Orders. Rescission of a deferment before or concurrently with the initial action in the case must be reported in the action under N.Y.R.C.M. 1107(f)(4)(E), which action includes the dates of the granting of the deferment and the rescission. Rescission of a deferment after the convening authority's action must be reported in supplementary orders in accordance with N.Y.R.C.M. 1114 and must state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended.

Rule 1102. Post-trial sessions.

a. In general. Post-trial sessions may be proceedings in revision or sessions under NYSML, Section 130.39(a). Such sessions may be directed by the military judge or the convening authority in accordance with this rule. (See NYSML, Section 130.60(e))

b. Purpose.

(1) Proceedings in revision. Proceedings in revision may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused.

(2) Sessions under NYSML, Section 130.39(a). A session under NYSML, Section 130.39(a), under this rule may be called for the purpose of inquiring into and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence.

c. Matters not subject to post-trial sessions. Post-trial sessions may not be directed:

(1) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty.

(2) For reconsideration of a finding of not guilty of any charge unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code.

(3) For increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

d. When directed. The military judge may direct a post-trial session any time before the record is authenticated. The convening authority may direct a post-trial session any time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed.

e. Procedure.

(1) Personnel. The requirements of N.Y.R.C.M. 505 and 805 apply at post-trial sessions except that:

(a) For a proceeding in revision, if trial was before members and the matter subject to the proceeding in revision requires the presence of members.

(i) The absence of any member does not invalidate the proceedings if, in the case of a GCM, at least five members are present or, in the case of a SPCM, at least three members are present.

(ii) A different military judge may be detailed, subject to N.Y.R.C.M. 502(c) and 902, if the military judge who presided at the earlier proceedings is not reasonably available.

(b) For a session under NYSML, Section 130.39(a), a different military judge may be detailed, subject to N.Y.R.C.M. 502(c) and 902, for good cause.

(2) Action. The military judge must take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take.

(3) Record. All post-trial sessions, except any deliberations by the members, must be held in open session. The record of the post-trial sessions must be prepared, authenticated, and served in accordance with N.Y.R.C.M. 1103 and 1104 and must be included in the record of the prior proceedings.

Rule 1103. Preparation of record of trial.

a. In general. Each GCM, SPCM and SCM must keep a separate record of the proceedings in each case brought before it. (See NYSML, Section 130.54)

b. GCM.

(1) Responsibility for preparation. The trial counsel must:

(a) Under the direction of the military judge, cause the record of trial to be prepared.

(b) Cause to be retained stenographic or other notes or mechanical or electronic recordings from which the record of trial was prepared.

(2) Contents.

(a) In general. The record of trial in each GCM must be separate, complete and independent of any other document.

(b) Verbatim transcript required. The record of trial must include a verbatim written transcript of all sessions except sessions closed for deliberations and voting when:

(i) Any part of the sentence adjudged exceeds that which may be adjudged by a SPCM.

(ii) A bad conduct discharge has been adjudged.

(c) Verbatim transcript not required. If a verbatim transcript is not required under subsection b(2)(B) of this rule, a summarized report of the proceedings may be prepared instead of a verbatim transcript.

(d) Other matters. In addition to the matter required under subsection b(2)(b) of this rule, a complete record must include:

(i) The original charge sheet or a duplicate.

(ii) A copy of the convening order and any amending order(s).

(iii) The request, if any, for trial by military judge alone, or that the membership of the court-martial include enlisted persons and, when applicable, any statement by the convening authority required under N.Y.R.C.M. 503(a)(2).

(iv) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

(3) Matters attached to the record. The following matters must be attached to the record:

(a) If not used as exhibits -

(i) The report of investigation under NYSML, Section 130.32, if any.

(ii) The SJA's pretrial advice under NYSML, Section 130.34, if any.

(iii) If the trial was a rehearing or new or other trial of the case, the record of the former hearing(s).

(iv) Written special findings, if any, by the military judge.

(b) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence.

(c) Any matter filed by the accused under N.Y.R.C.M. 1105, or any written waiver of the right to submit such matter.

(d) Any deferment request and the action on it.

(e) Explanation for any substitute authentication under N.Y.R.C.M. 1104(a)(2)(B).

(f) Explanation for any failure to serve the record of trial on the accused under N.Y.R.C.M. 1104(b).

(g) The post-trial recommendation of the SJA or legal officer and proof of service on defense counsel in accordance with N.Y.R.C.M. 1106(f)(1).

(h) Any response by defense counsel to the post-trial review.

(i) Recommendations and other papers relative to clemency.

(j) Any statement why it is impracticable to the convening authority to act.

(k) Conditions of suspension, if any, and proof of service on probationer under N.Y.R.C.M. 1108.

(l) Any waiver or withdrawal of appellate review under N.Y.R.C.M. 1110.

(m) Records of any proceedings in connection with vacation of suspension under N.Y.R.C.M. 1109.

c. SPCM.

(1) Involving a bad conduct discharge. The requirements of subsections b(1), b(2)(a), b(2)(b), b(2)(d) and b(3) of this rule apply in a SPCM in which a bad conduct discharge has been adjudged.

(2) Not involving a bad conduct discharge. If the SPCM resulted in findings of guilty but a bad conduct discharge was not adjudged, the requirements of subsections b(1), b(2)(c), b(2)(d), and b(3)(a)-(f) and (I) -(m) of this rule apply.

d. SCM. The SCM record of trial must be prepared as prescribed in N.Y.R.C.M. 1305.

e. Acquittal, termination prior to findings. Notwithstanding subsections b, c, d of this rule, if the proceedings resulted in an acquittal of all charges and specifications or the proceedings were terminated by withdrawal, mistrial, or dismissal before findings, the record may consist of the original charge sheet, a copy of the convening order and amending orders, if any, and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet).

f. Loss of notes or recordings of the proceedings. If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection b(2)(b) of c(1) of this rule, a record which meets the requirements of subsection b(20)(c) of this rule must be prepared, and the convening authority may:

(1) Approve only so much of the sentence which could be adjudged by a SPCM, except that no bad conduct discharge may be approved, or

(2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the court-martial in a rehearing may not adjudge any sentence in excess of that adjudged by the earlier court-martial.

g. Copies of the record of trial.

(1) GCM and SPCM.

(a) In general. In a GCM and a SPCM which require a verbatim transcript under subsections b or c of this rule, the trial counsel must cause to be prepared an original and four copies of the record of trial. In all other GCMs and SPCMs, the trial counsel cause to be prepared an original and one copy of the record of trial.

(b) Additional copies. The convening or higher authority may direct that additional copies of the record of trial of any GCM or SPCM be prepared.

(2) SCM. Copies of the SCM record of trial must be prepared as prescribed in N.Y.R.C.M. 1305(b).

h. Security classification. If the record of trial contains matter which must be classified under applicable security regulations, the trial counsel must cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

i. Examination and correction before authentication.

(1) GCM and SPCM.

(a) Examination and correction by trial counsel. In GCM and SPCM, the trial counsel must examine the record of trial before authentication and cause those changes to be made which are necessary to report the proceedings accurately. The trial counsel cannot change the record after authentication.

(b) Examination by defense counsel. Except when unreasonable delay will result, the trial counsel must permit the defense counsel to examine the record before authentication.

(2) SCM. The SCM must examine and correct the SCM record of trial as prescribed in N.Y.R.C.M. 1305(a).

Rule 1104. Records of trial: Authentication, service, loss, correction, forwarding.

a. Authentication.

(1) In general. A record is authenticated by the signature of a person specified in this rule who thereby declares that the record accurately reports the proceedings. No person may be required to authenticate a record of trial if that person is not satisfied that it accurately reports the proceedings.

(2) GCM and SPCM.

(a) Authentication by the military judge. In a SCM in which a bad conduct discharge has been adjudged and in a GCM, except as provided in subsection a(2)(b) of this rule, the military judge present at the end of the proceedings authenticates the record of trial, or that portion over which the military judge presided. If more than one military judge presided over the proceedings, each military judge

authenticates the record of the proceedings over which that military judge presided, except as provided in subsection a(2)(b) of this rule. The record of trial of SPCM in which no bad conduct discharge was adjudged is also authenticated by the military judge as set forth above.

(b) Substitute authentication. If the military judge cannot authenticate the record of trial because of the military judge's death, disability, or absence, the trial counsel present at the end of the proceedings authenticates the record of trial. If the trial counsel cannot authenticate the record of trial because of the trial counsel's death, disability, or absence, a member authenticates the record of trial. In a court-martial composed of a military judge alone, or as to sessions without members, the court reporter authenticates the record of trial when this duty would fall upon a member under this subsection. A person authorized to authenticate a record under this subsection may authenticate the record only as to those proceedings at which that person was present.

(3) SCM. The SCM authenticates the SCM record of trial as prescribed in N.Y.R.C.M. 1305(a).

b. Service.

(1) Service of record of trial on accused. In each GCM and SPCM, except as provided in subsection b(1)(c) or (d) of this rule, the trial counsel must cause a copy of the record of trial to be served on the accused as soon as the record of trial is authenticated.

(2) Proof of service of record of trial on accused. The trial counsel must cause the accused's receipt for the copy of the record of trial to be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record of trial is forwarded to the convening authority, the trial counsel must prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused, including the means of transmission and the address, and cause the certificate to be attached to the original record of trial. In such a case the accused's receipt must be forwarded to the convening authority as soon as it is obtained.

(3) Substitute service. If it is impracticable to serve the record of trial on the accused because of the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy of the record must be forwarded to the accused's defense counsel, if any. Trial counsel must attach a statement to the record explaining why the accused was not served personally. If the accused has more than one counsel, N.Y.R.C.M. 1106(f)(2) applies. If the accused has no counsel and if the accused is absent without authority, the trial counsel must prepare an explanation for the failure to serve the record. The explanation and the accused's copy of the record must be forwarded with the original record. The accused must be provided with a copy of the record as soon as practicable.

(4) Classified information.

(a) Forwarding to convening authority. If the copy of the record of trial prepared for the accused contains classified information, the trial counsel, unless directed otherwise by the convening authority, must forward the accused's copy to the convening authority, before it is served on the accused.

(b) Responsibility of the convening authority. The convening authority must:

(i) Cause any classified information to be deleted or withdrawn from the accused's copy or the record of trial.

(ii) Cause a certificate indicating that classified information has been deleted or withdrawn to be attached to the record of trial.

(iii) Cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be served on the accused as provided in subsection b(1)(a) and (b) of this rule except that the accused's receipt must show that the accused has received an expurgated copy of the record of trial.

(c) Contents of certificate. The certificate regarding deleted or withdrawn classified information must indicate:

(i) That the original record of trial may be inspected in the files of The Adjutant General under such conditions as may be directed by The Adjutant General.

(ii) The pages of the record of trial from which matter has been deleted.

(iii) The pages of the record of trial which have been entirely deleted.

(iv) The exhibits which have been withdrawn.

(5) SCM. The SCM record of trial are disposed of as provided in N.Y.R.C.M. 1305(e). Subsection b(1)(d) of this rule applies if classified information is included in the record of trial of a SCM.

c. Loss of record. If the authenticated record of trial is lost or destroyed, the trial counsel must, if practicable, cause another record of trial to be prepared for authentication. The new record of trial becomes the record of trial in the case if the requirements of N.Y.R.C.M. 1103 and this rule are met.

d. Correction of record after authentication, certificate of correction.

(1) In general. A record of trial found to be incomplete or defective after authentication may be corrected to make it accurate. A record of trial may be returned to the convening authority by superior competent authority for correction under this rule.

(2) Procedure. An authenticated record of trial believed to be incomplete or defective may be returned to the military judge or SCM for a certificate of correction. The military judge or SCM must give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties must be given reasonable access to any original reporter's notes or tapes of the proceedings.

(3) Authentication of certificate of correction, service on the accused. The certificate of correction must be authenticated as provided in subsection a of this rule and a copy served on the accused as provided in subsection b of this rule. The certificate of correction and the accused's receipt for the certificate of correction must be attached to each copy of the record of trial required to be prepared under N.Y.R.C.M. 1103(g).

e. Forwarding. After every court-martial, including a rehearing and new and other trials, the authenticated record must be forwarded to the convening authority for initial review and action, provided that in case of a SPCM in which a bad conduct discharge was adjudged or any court-martial in which confinement at hard labor was adjudged or a GCM, the convening authority must refer the record to the SJA or legal officer for a recommendation under N.Y.R.C.M. 1106 before the convening authority takes action. (See NYSML, Section 130.60(d))

Rule 1105. Matters submitted by the accused.

a. In general. After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule. (See NYSML, Section 130.60)

b. Matters which may be submitted. The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Such matters are not subject to the Military Rules of Evidence and may include:

(1) Allegations of errors affecting the legality of the findings or sentence.

(2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial.

(3) Matters in mitigation which were not available for consideration at the court-martial.

(4) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

c. Time periods.

(1) A GCM and SPCM in which a bad conduct discharge was adjudged. After a GCM or after a SPCM in which a bad conduct discharge was adjudged, the accused may submit matters under this rule within 30 days after the sentence was announced or within 7 days after a copy of the record of trial is served on the accused under N.Y.R.C.M. 1104(b)(1), whichever is later. The convening authority may, for good cause, extend the 30-day period for not more than 20 additional days or the 7-day period for not more than 10 additional days.

(2) Other SPCM. After a SPCM in which a bad conduct discharge was not adjudged, the accused may submit matters under this rule within 20 days after the sentence is announced or within 7 days after a copy of the record of trial is served on the accused under N.Y.R.C.M. 1104(b)(1), whichever is later. The convening authority may, for good cause, extend either period for not ore than 10 additional days.

(3) SCM. After a SCM the accused may submit matters under this rule within 7 days after the sentence is announced. The convening authority, for good cause, may extend this period for not more than 10 additional days.

(4) Post-trial sessions. A post-trial session under N.Y.R.C.M. 1102 has no effect on the running of any time period in this rule, except when such session results in the announcement of a new sentence, in which case the period runs from that announcement.

(5) Good cause. For purposes of this rule, good cause for an extension ordinarily does not include the need for securing matters which could reasonably have been presented at the court-martial.

d. Waiver.

(1) Failure to submit matters. Failure to submit matters with the time prescribed by this rule is a waiver of the right to submit such matters.

(2) Submission of matters. Submission of any matters under this rule is a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing.

(3) Written waiver. The accused may expressly waive, in writing, the right to submit matters under this rule. Once filed, such waiver may not be revoked. (See NYSML, Section 130.60(b)(4))

(4) Absence of accused. If, as a result of the unauthorized absence of the accused, the record cannot be served on the accused in accordance with N.Y.R.C.M. 1104(b)(1) and if the accused has no counsel to receive the record, the accused is deemed to have waived the right to submit matters under this rule within the time limit which begins upon service on the accused of the record of trial.

Rule 1106. Recommendation of the SJA or legal officer.

a. In general. Before the convening authority takes action under N.Y.R.C.M. 1107 on a record of trial by a GCM or a record of trial by a SPCM which includes a sentence to a bad conduct discharge or any court-martial in which confinement of hard labor, that convening authority's SJA or legal officer must, except as provided in subsection c of this rule, forward to the convening authority a recommendation under this rule. (See NYSML, Section 130.60(d))

b. Disqualification. No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a SJA or legal officer or any reviewing or convening authority in the same case.

c. When the convening authority has no SJA.

(1) When the convening authority does not have a SJA or legal officer or that person is disqualified. If the convening authority does not have a SJA or legal officer, or if the person serving in that capacity is disqualified under subsection b of this rule or otherwise, the convening authority must:

(a) Request the assignment of another SJA or legal officer to prepare a recommendation under this rule, or

(b) Forward the record for action to any officer exercising GCM jurisdiction as provided in N.Y.R.C.M. 1107(a).

(2) When the convening authority has a legal officer but wants the recommendation of a SJA. If the convening authority has a legal officer but no SJA, the convening authority may, as a matter of discretion, request designation of a SJA to prepare the recommendation.

d. Form and content of recommendation.

(1) In general. The purpose of the recommendation of the SJA or legal officer is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The SJA or legal officer must use the record of trial in the preparation of the recommendation.

(2) Form. The recommendation of the SJA or legal officer must be a concise written communication.

(3) Required contents. Except as provided in subsection e of this rule, the recommendation of the SJA or legal officer must include concise information as to:

(a) The findings and sentence adjudged by the court-martial.

(b) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of NJP and previous convictions.

(c) A statement of the nature and duration of any pretrial restraint.

(d) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement.

(e) A specific recommendation as to the action to be taken by the convening authority on the sentence.

(4) Legal errors. The SJA or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a SJA, the SJA must state whether, in the SJA's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under N.Y.R.C.M. 1105 or when otherwise deemed appropriate by the SJA. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the SJA's statement, if any, concerning legal errors is not required.

(5) Optional matters. The recommendation of the SJA or legal officer may include, in addition to matters included under subsections d(3) and (4) of this rule, any additional matters deemed appropriate by the SJA or legal officer. Such matters may include matters outside the record.

(6) Effect of error. In case of error in the recommendation not otherwise waived under subsection f(6) of this rule, appropriate corrective action must be taken by appellate authorities without returning the case for further action by a convening authority.

e. No findings of guilty. If the proceedings resulted in an acquittal of all charges and specifications or if, after the trial began, the proceedings were terminated without findings and no further action is contemplated, a recommendation under this rule is not required.

f. Service of recommendation on defense counsel, defense response.

(1) Service of recommendation on defense counsel. Before forwarding the recommendation and the record of trial to the convening authority for action under N.Y.R.C.M. 1107, the SJA or legal officer must cause a copy of the recommendation to be served on counsel for the accused. (See NYSML, Section 130.60(d))

(2) Counsel for the accused. The accused may, at trial or in writing to the SJA or legal officer before the recommendation has been served under this rule, designate which counsel (detailed, individual military, or civilian) will be served with the recommendation. In the absence of such designation, the SJA or legal officer must cause the recommendation to be served in the following order of precedence, as applicable, on civilian counsel, individual military counsel, or detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel and individual military counsel, if any, have been relieved or are not reasonably available to represent the accused, substitute military counsel to represent the accused must be detailed by an appropriate authority. Substitute counsel must enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response.

(3) Record of trial. The SJA or legal officer must, upon request of counsel for the accused served with the recommendation, provide that counsel with a copy of the record of trial for use while preparing the response to the recommendation.

(4) Response. Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter.

(5) Time period. Counsel for the accused has five days from receipt in which to submit comments on the recommendation. The convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days. (See NYSML, Section 130.60(d))

(6) Waiver. Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner waives later claim of error with regard to such matter in the absence of plain error.

(7) New matter in addendum to recommendation. The SJA or legal officer may supplement the recommendation after counsel for the accused has been served with the recommendation and given an opportunity to comment when new matter is introduced after counsel for the accused has examined the recommendation, however, counsel for the accused must be served with the new matter and given a further opportunity to comment.

Rule 1107. Action by convening authority.

a. Who may take action? The convening authority must take action on the sentence and, at the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority must forward the case to an officer exercising GCM jurisdiction who may take action under this rule.

b. General considerations.

(1) Discretion of convening authority. The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency. (See NYSML, Section 130.60(c))

(2) When action may be taken. The convening authority may take action only after the applicable time periods under N.Y.R.C.M. 1105(c) have expired or the accused has waived the right to present matters under N.Y.R.C.M. 1105(d), whichever is earlier.

(3) Matters considered.

(a) Required matters. Before taking action, the convening authority must consider:

(i) The result of trial.

(ii) The recommendation of the SJA or legal officer under N.Y.R.C.M. 1106, if applicable.

(iii) Any matters submitted by the accused under N.Y.R.C.M. 1105 or, if applicable, N.Y.R.C.M. 1106(f).

(b) Additional matters. Before taking action the convening authority may consider:

(i) The record of trial.

(ii) The personnel records of the accused.

(iii) Such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused must be notified and given an opportunity to rebut.

(4) When proceedings resulted in a finding of not guilty or there was a ruling amounting to a finding of not guilty. The convening authority cannot take any action approving or disapproving a finding of not guilty or a ruling amounting to a finding of not guilty.

(5) Action when accused lacks mental capacity. The convening authority may not approve a sentence while the accused lacks mental capacity to understand and conduct or cooperate intelligently in the post-trial proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the convening authority may direct an examination of the accused in accordance with N.Y.R.C.M. 706 before deciding whether the accused lacks mental capacity, the examination may be limited to determining the accused's present capacity to understand and cooperate in the post-trial proceedings. The convening authority may approve the sentence unless it is established, by a preponderance of the evidence, including matters outside the record of trial, that the accused does not have the requisite mental capacity. Nothing in this subsection prohibits the convening authority from disapproving the findings of guilty and sentence.

c. Action on findings. Action on the findings is not required. However, the convening authority may, in the convening authority's sole discretion:

(1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification, or

(2) Set aside any finding of guilty and

(a) Dismiss the specification and, if appropriate, the charge, or

(b) Direct a rehearing in accordance with subsection e of this rule.

d. Action on the sentence.

(1) In general. The convening authority may for any or no reason disapprove a legal sentence in whole of or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial. The approval or disapproval must be explicitly stated.

(2) Determining what sentence should be approved. The convening authority must approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. When the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence.

(3) Limitations on sentence based on record of trial. If the record of trial does not meet the requirements of N.Y.R.C.M. 1103(b)(2)(B) or (c)(1), the convening authority may not approve a sentence in excess of that which may be adjudged by a SPCM, or one which includes a bad conduct discharge.

e. Ordering rehearing or other trial.

(1) Rehearing.

(a) In general. Subject to subsection e(1)(b) through e(1)(e) of this rule, the convening authority may, in the convening authority's discretion, order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only. (See NYSML, Section 130.60(e))

(b) When the convening authority may order a rehearing. The convening authority may order a rehearing:

(i) When taking action on the court-martial under this rule;

(ii) In cases subject to review by the Board of Military Review, before the case is forwarded under N.Y.R.C.M. 1111(a)(1) or (b)(1), but only as to any sentence which was approved or findings of guilty which were not disapproved in any earlier action. In such a case, a supplemental action disapproving the sentence and some or all of the findings, as appropriate, must be taken; or

(iii) When authorized to do so by superior competent authority. If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.

(c) Limitations.

(i) Sentence approved. A rehearing cannot be ordered if, in the same action, a sentence is approved.

(ii) Lack of sufficient evidence. A rehearing cannot be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(iii) Rehearing on sentence only. A rehearing on sentence only cannot be referred to a different kind of court-martial from that which made the original findings.

(d) Additional charges. Additional charges may be referred for trial together with charges as to which a rehearing has been directed.

(e) Lesser included offenses. If at a previous trial the accused was convicted of a lesser included offense, a rehearing may be ordered only as to that included offense or as to an offense included in that found. If, however, a rehearing is ordered improperly on the original offense charged and the accused is convicted of that offense at the rehearing, the finding as to the lesser included offense of which the accused was convicted at the original trial may nevertheless be approved.

(2) "Other" trial. The convening or higher authority may order an "other" trial if the original proceedings were invalid because of lack of jurisdiction or failure of a specification to state an offense. The authority ordering an "other" trial must state in the action the basis for declaring the proceedings invalid.

f. Contents of action and related matters.

(1) In general. The convening authority must state in writing the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action must be signed personally by the convening authority. The convening authority's authority to sign must appear below the signature.

(2) Modification of initial action. The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. In addition, in any SPCM not involving a bad conduct discharge or any SCM, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under N.Y.R.C.M. 1112, as long as the correction does not result in action less favorable to the accused then the earlier action. When so directed by a higher reviewing authority or the State JA, the convening authority must modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under NYSML, Section 130.63, 130.65 or 130.66, or examination of the record of trial under NYSML, Section 130.68. The convening authority must personally sign any supplementary or corrective action.

(3) Findings of guilty. If any findings of guilty are disapproved, the action must so state. If a rehearing is not ordered, the affected charges and specifications must be dismissed by the convening authority in the action. If a rehearing or other trial is directed, the reasons for the disapproval must be set forth in the action.

(4) Action on sentence.

(a) In general. The action must state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action must state which parts are approved. A rehearing may not be directed if any sentence is approved.

(b) Execution, suspension. The action must indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(c) Place of confinement. If the accused waives his/her right to appellate review or withdraws an appeal under N.Y.R.C.M. 1110 and if the convening authority orders a sentence of confinement at hard labor into execution, the convening authority must designate the place of confinement in the action. If the accused does not so waive or withdraw and if a sentence of confinement is ordered into execution after the initial action of the convening authority, the authority ordering the execution must designate the place of confinement. (See NYSML, Section 130.69)

(d) Deferment of service of sentence to confinement. Whenever the service of the sentence to confinement is deferred by the convening authority under N.Y.R.C.M. 1101(c) before or concurrently with the initial action in the case, the action must include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

(e) Credit for illegal pretrial confinement. When the military judge has directed that the accused receive credit under N.Y.R.C.M. 305(k), the convening authority must so direct in the action.

(f) Reprimand. The convening authority must include in the action any reprimand, which the convening authority has ordered executed.

(5) Action on rehearing or new or other trial.

(a) Rehearing or other trial. In acting on a rehearing or other trial the convening authority is subject to the sentence limitations prescribed in N.Y.R.C.M. 810(d). Except when a rehearing or other trial is combined with a trial on additional offenses and except as otherwise provided in N.Y.R.C.M. 810(d), if any part of the original sentence was suspended and the suspension was not properly vacated before the order directing the rehearing, the convening authority must take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended. The convening authority may approve a sentence adjudged upon a rehearing or other trial regardless of whether any kind or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount or punishment to be actually served or executed under the new sentence, the accused must be credited with any kind or amount of the former sentence included within the new sentence that was served or executed before the time it was disapproved or set aside. The convening authority must, if any part of a sentence adjudged upon a rehearing or other trial is approved, direct in the action that any part or amount of the former sentence served or executed between the dates it was adjudged and the date it was disapproved or set aside must be credited to the accused. If, in the action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specification, which were tried at the former hearing and that part of the sentence, which was based on these findings, the convening authority must, unless a further rehearing is ordered, provide in the action that all rights, privileges and property affected by any executed portion of the sentence adjudged at the former hearing must be restored. The convening authority must take the same restorative action if a court-martial at a rehearing acquits the accused of all charges and specifications, which were tried at the former hearing.

(b) New trial. The action of the convening authority on a new trial must insofar as practicable, conform to the rules prescribed for rehearing and other trials in subsection f(5)(a) of this rule.

g. Incomplete, ambiguous, or erroneous action. When the action of the convening or of a higher authority is incomplete, ambiguous, or contains clerical error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by an authority acting under NYSML, Sections 130.63, 130.65 and 130.68 to withdraw the original action and substitute a corrected action.

h. Service on accused. A copy of the convening authority's action must be served on the accused or on defense counsel. If the action is served on defense counsel, defense counsel must, by expeditious means, provide the accused with a copy.

Rule 1108. Suspension of execution of sentence, remission.

a. In general. Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence is remitted. Remission cancels the unexecuted part of a sentence to which it applies.

b. Who may suspend and remit. The Adjutant General and when designed by him, the Deputy Adjutant General, Adjutant General, State JA, or commanding officer may remit or suspend any part or amount of the unexpired part of any sentence, including all uncollected forfeitures other than a sentence approved by the Governor. (See NYSML, Section 130.72(a))

c. Conditions of suspension. The authority that suspends the execution of the sentence of a court-martial must:

(1) Specify in writing the conditions of the suspension.

(2) Cause a copy of the conditions of the suspension to be served on the probationer.

(3) Cause a receipt to be secured from the probationer for service of the conditions of the suspension.

Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code.

d. Limitation on suspension.

(1) In general. Suspension must be for a stated period of time until the occurrence of an anticipated future event. The period cannot be reasonably long. The convening authority must provide in the action that unless the suspension is sooner vacated, the expiration of the period of suspension remits the suspended portion of the sentence. An appropriate may, before the expiration of the period of suspension, remit any part of the sentence, including a part which has been suspended; reduce the period of suspension; or, subject to N.Y.R.C.M. 1109, vacate the suspension in whole or in part.

(2) Suspending the execution of forfeiture. If a sentence includes a forfeiture in addition to confinement not suspended, such forfeiture may apply to pay or allowances accruing to the accused on and after the date the convening authority approves such a sentence and to any pay or allowances accrued before such date unless the convening authority, at the time he/she approves the sentence, suspends the execution of that portion of the sentence pertaining to forfeitures. (See NYSML, Section 130.57(a)) However, in a case involving an approved sentence of confinement and forfeiture, if the convening authority does not desire to suspend the execution of the confinement or the forfeiture, but determines that the circumstances of the case warrant continuation of the accused in a pay status pending completion of appellate review, he/she may provide in his/her action that the application of the forfeiture shall be deferred until such time as the sentence as a whole is carried into execution. When the approved sentence includes a forfeiture in addition to confinement not suspended, the convening authority, unless he/she orders the execution, suspends the execution, or defers the applicability of the forfeitures, should include in his/her action on the case a statement that the approved forfeiture will apply to pay or allowances accruing to the accused on and after a certain date (naming the date) see Appendix 11 modified as above set forth. This statement will aid disbursing and personnel officers in determining the effect of the approval by the convening authority of a sentence, which includes forfeiture.

e. Termination of suspension by remission. Expiration of the period provided in the action suspending a sentence of part of a sentence remits the suspended portion unless the suspension is sooner vacated. Death or separation, which terminates status as a person subject to the code results in remission of the suspended portion of the sentence.

Rule 1109. Vacation of suspension of sentence.

a. In general. Suspension of execution of the sentence of a court-martial may be vacated for violation of the conditions of the suspension provided in this rule. (See NYSML, Section 130.70)

b. Timeliness.

(1) Violation of conditions. Vacation must be based on a violation of the conditions of suspension, which occurs within the period of suspension.

(2) Vacation proceedings. Vacation proceedings under this rule must be completed within a reasonable time.

(3) Order vacating the suspension. The order vacating the suspension must be issued before the expiration of the period of suspension.

(4) Interruptions to the period of suspension. Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts the running of the period of suspension.

c. Confinement of probationer pending vacation proceedings.

(1) In general. A probationer under a suspended sentence to confinement may be confined pending action under subsection c of this rule.

(2) Who may order confinement? Any person who may order confinement under N.Y.R.C.M. 304(b) may order confinement of a probationer under a suspended sentence to confinement.

(3) Basis for confinement. A probationer under a suspended sentence to confinement may be ordered into confinement upon probable cause to believe the probationer violated any conditions of the suspension.

(4) Review and confinement. Unless proceedings under subsection d(1) or e of this rule are completed within seven days of imposition of confinement of the probationer (not including any delays requested by probationer), a preliminary hearing must be conducted by a neutral and detached officer appointed in accordance with these regulations.

(a) Rights of accused. Before the preliminary hearing, the accused shall be notified in writing of:

(i) The time, place and purpose of the hearing, including the alleged violation(s) of the conditions of suspension.

(ii) The right to be represented at the hearing.

(iii) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose.

(iv) The opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that this would subject these witnesses to risk or harm. For purposes of this subsection, a witness is not reasonably available if the witness requires reimbursement by the State for any cost incurred in appearing, cannot appear without unduly delaying the proceedings or, if a military witness cannot be excused from other important duties.

(b) Rules of evidence. Except for Military Rules of Evidence, Section V (Privileges) and Military Rules of Evidence 302 and 305, the Military Rules of Evidence do not apply to matters considered at the preliminary hearing under this rule.

(c) Decision. The hearing officer must determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the hearing officer determines that probable cause is lacking, the hearing officer must, in writing, order the probationer released from confinement. If the hearing officer determines that there is probable cause to believe that the probationer violated the conditions of suspension, the hearing officer must set forth in a written memorandum the decision, the reasons for the decision, and the information relied on. The hearing officer must forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

d. Vacation of suspended GCM sentence or of a suspended SPCM sentence including a bad conduct discharge or of any court-martial, which, as approved, includes confinement at hard labor.

(1) Action by officer having SPCM jurisdiction over probationer.

(a) In general. Before vacation of the suspension of any GCM sentence, or of a SPCM sentence which, as approved, includes a bad conduct discharge, or of any court-martial which, as approved, includes confinement at hard labor, the officer having SPCM jurisdiction over the probationer must personally hold a hearing on the alleged violation of the conditions of probation. If there is no officer having SPCM jurisdiction over the accused whom is subordinate to the officer having

GCM jurisdiction over the accused, the officer exercising GCM jurisdiction over the accused must personally hold the hearing under subsection d(1) of this rule. In such cases subsection d(1)(d) of this rule shall not apply.

(b) Notice to probationer. Before the hearing, the authority conducting the hearing must cause the probationer to be notified of:

(i) The time, place and purpose of the hearing.

(ii) The right to be present at the hearing.

(iii) The alleged violations of the conditions of probation and the evidence expected to be relied on.

(iv) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose.

(v) The opportunity to be heard, to present witnesses and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that there is good cause for not allowing confrontation and cross-examination.

(c) Hearing. The procedure for the vacation hearing must follow that prescribed in N.Y.R.C.M. 405(g), (h)(1) and (I).

(d) Record, recommendation. The officer who conducts the vacation proceeding must make a summarized record of the proceeding and forward the record and that officer's recommendation concerning vacation to the officer exercising GCM jurisdiction over the probationer.

(e) Release from confinement. If the SPCM convening authority finds there is not probable cause to believe that the probationer violated the conditions of the suspension, the SPCM convening authority must order the release of the probationer from any confinement ordered under subsection c of this rule. The SPCM convening authority must, in any event, forward the record and recommendation under subsection d(1)(d) of this rule.

(2) Action by officer exercising GCM jurisdiction over probationer.

(a) In general. The officer exercising GCM jurisdiction over the probationer must, based upon the record produced by and the recommendation of the officer exercising SPCM jurisdiction over the probationer, decide whether the probationer violated a condition of suspension and, if so, whether to vacate the suspended sentence. If the officer exercising GCM jurisdiction decides to vacate, that officer must prepare a written statement of the evidence relied on and the reasons for vacating.

(b) Execution. Any unexecuted part of a suspended sentence ordered vacated under this rule must, subject to N.Y.R.C.M. 1113(c), be ordered executed.

e. Vacation of a suspended SPCM sentence not including a bad conduct discharge or confinement at hard labor, or of a suspended SCM sentence not including confinement at hard labor.

(1) In general. Before vacation of the suspension of a SPCM sentence not including a bad conduct discharge, confinement at hard labor or of a SCM sentence not including confinement at hard labor, the officer having authority to convene for the command in which the probationer is serving or assigned the same kind of court-martial which imposed the sentence must cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) Notice to probationer. The person conducting the hearing must notify the probationer before the hearing of the right specified in subsections d(1)(b)(I), (ii), (iii) and (v) of this rule. The authority conducting the hearing must also notify the probationer that the probationer has the right to civilian counsel provided by the probationer or, upon request, counsel detailed for that purpose, if the probationer was entitled to such counsel under N.Y.R.C.M. 506(a) at the court-martial, which imposed the sentence.

(3) Hearing. The procedure for the vacation hearing must follow that prescribed in N.Y.R.C.M. 405(g), (h)(1), and (I).

(4) Record, recommendation. If the hearing is not held by the commander with authority to vacate the suspension, the person who conducts the vacation proceeding must make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the commander with authority to vacate the suspension.

(5) Decision. If the appropriate authority decides that the probationer violated a condition of suspension, and to vacate, that person must prepare a record of the hearing and a written statement indicating the decision, the reasons for the decision and the evidence relied on.

Rule 1110. Waiver or withdrawal of appellate review.

a. In general. After a GCM or a SPCM in which the approved sentence includes a bad conduct discharge or any court-martial in which the approved sentence includes confinement at hard labor, the accused may waive or withdraw appellate review.

b. Right to counsel.

(1) In general. The accused has the right to consult with counsel qualified under N.Y.R.C.M. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

(2) Waiver.

(a) Counsel who represented the accused at the court-martial. The accused has the right to consult with any civilian, individual military, or detailed counsel who represented the accused at the court-martial concerning whether to waive appellate review unless such counsel has been excused under N.Y.R.C.M. 505(d)(2)(B).

(b) Associate counsel. If counsel who represented the accused at the court-martial has not been excused but is not immediately available to consult with the accused, because of physical separation or other reasons, associate defense counsel must be detailed to the accused upon request by the accused. Such counsel must communicate with counsel who represented the accused at the court-martial, and must advise the accused concerning whether to waive appellate review.

(c) Substitute counsel. If counsel who represented the accused at the court-martial has been excused under N.Y.R.C.M. 505(d)(2)(b), substitute defense counsel must be detailed to advise the accused concerning waiver of appellate rights.

(3) Withdrawal.

(a) Appellate defense counsel. If the accused is represented by appellate defense counsel, the accused has the right to consult with such counsel concerning whether to withdraw the appeal.

(b) Associate defense counsel. If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused, because of physical separation of other reasons, associate defense

counsel must be detailed to the accused, upon request by the accused. Such counsel must communicate with appellate defense counsel and must advise the accused whether to withdraw the appeal.

(c) No counsel. If appellate defense counsel has not been assigned to the accused, defense counsel must be detailed for the accused. Such counsel must advise the accused concerning whether to withdraw the appeal. If practicable, counsel who represented the accused at the court-martial is to be detailed.

(4) Civilian counsel. Whether or not the accused was represented by civilian counsel at the court-martial, the accused may consult with civilian counsel, at no expense to the State, concerning whether to waive or withdraw appellate review.

(5) Record of trial. Any defense counsel with whom the accused consults under this rule must be given reasonable opportunity to examine the record of trial.

(6) Consult. The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

c. Compulsion, coercion, inducement prohibited. No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

d. Form of waiver or withdrawal. (See Appendix 8) A waiver or withdrawal of appellate review must:

(1) Be written.

(2) State that the accused and defense counsel have discussed the accused's right to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters.

(3) State that the waiver or withdrawal is submitted voluntarily.

(4) Be signed by the accused and by defense counsel.

e. To whom submitted.

(1) Waiver. A waiver of appellate review must be filed with the convening authority. The waiver must be attached to the record of trial.

(2) Withdrawal. A withdrawal of appellate review may be filed with the authority exercising GCM jurisdiction over the accused, which shall promptly forward it to the State JA, or directly with the State JA.

f. Time limit.

(1) Waiver. The accused may file a waiver of appellate review only within 10 days after the accused or defense counsel is served with a copy of the action under N.Y.R.C.M. 11078(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days.

(2) Withdrawal. The accused may file withdrawal from appellate review at any time before such review is completed.

g. Effect of waiver or withdrawal, substantial compliance required.

(1) In general. A waiver or withdrawal of appellate review under this rule bars review by the State JA under N.Y.R.C.M. 1201(b)(1) and by the Board of Military Review. Once submitted, a waiver or withdrawal in compliance with this rule cannot be revoked.

(2) Waiver. If the accused files a timely waiver of appellate review in accordance with this rule, the record must be forwarded for review by a JA under N.Y.R.C.M. 1112.

(3) Withdrawal. Action on a withdrawal of appellate review must be carried out in accordance with procedures established by the State JA, or if the case is pending before a Board of Military Review, in accordance with the rules of such board. If the appeal is withdrawn, the State JA must forward the record to an appropriate authority for compliance with N.Y.R.C.M. 1112.

(4) Substantial compliance required. A purported waiver or withdrawal of an appeal, which does not substantially comply with this rule, shall have no effect.

Rule 1111. Disposition of the record of trial after action (NYSML, Section 130.64)

a. GCM.

(1) Cases forwarded to the State JA. A record of trial by a GCM and the convening authority's action shall be sent directly to the State JA if the accused has not waived review under N.Y.R.C.M. 1110 and the sentence does not include dismissal,

dishonorable or bad conduct discharge or confinement, since such cases must be forwarded to the Board of Military Review. Three copies of the order promulgating the result of trial as to each accused must be forwarded with the original record of trial. Two additional copies of the record of trial must accompany the original record if it includes dismissal of an officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement at hard labor and the accused has not waived appellate review.

(2) Cases forwarded to a JA. A record of trial by a GCM and the convening authority's action must be sent directly to a JA for review under N.Y.R.C.M. 1112 if the accused has waived appellate review under N.Y.R.C.M. 1110, or the sentence does not include dismissal, dishonorable or bad conduct discharge, or confinement. Four copies of the order promulgating the result of trial must be forwarded with the original record of trial.

b. SPCM.

(1) Cases including an approved bad conduct discharge or confinement. If the approved sentence of a SPCM includes a bad conduct discharge or confinement, the record must be disposed of as provided in subsection a of this rule for records of trial by a GCM.

(2) Other cases. The record of trial by a SPCM in which the approved sentence includes neither a bad conduct discharge nor confinement must be forwarded directly to a JA for review under N.Y.R.C.M. 1112. Three copies of the order promulgating the result of trial must be forwarded with the record of trial.

c. SCM. The convening authority must dispose of a record of trial by a SCM as provided in N.Y.R.C.M. 1306.

Rule 1112. Review by a JA.

a. In general. Except as provided in subsection b of this rule, a JA must review:

(1) Each GCM in which the accused has waived or withdrawn appellate review under N.Y.R.C.M. 1110, or the sentence does not include dismissal, dishonorable or bad conduct discharge or confinement.

(2) Each SPCM in which the accused has waived or withdrawn appellate review under N.Y.R.C.M. 1110, or in which the approved sentence does not include a bad conduct discharge or confinement.

(3) Each SCM. (See NYSML, Section 130.63)

b. Exception. If the accused was not found guilty of any offense or if the convening authority disapproved all findings of guilty, no review under this rule is required.

c. Disqualification. No person may review a case under this rule if that person has acted in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense.

d. Form and content of review. The JA's review must be in writing and must contain the following:

(1) Conclusions as to whether:

(a) The court-martial had jurisdiction over the accused and each offense as to which there is a finding of guilty, which has not been disapproved.

(b) Each specification as to which there is a finding of guilty, which has not been disapproved.

(c) The sentence was legal.

(2) A response to each allegation of error made in writing by the accused. Such allegations may be filed under N.Y.R.C.M. 1105, 1106(f), or directly with the JA who reviews the case.

(3) If the case is sent for action to the officer exercising a GCM jurisdiction under subsection e of this rule, a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

Copies of the JA's review under this rule shall be attached to the original and all copies of the record of trial. A copy of the review shall be forwarded to the accused.

e. Forwarding to officer exercising GCM jurisdiction. In cases reviewed under subsection a of this rule, the record of trial must be sent for action to the officer exercising GCM convening authority over the accused at the time the court-martial was held (or to that officer's successor) when:

(1) The JA who reviewed the case recommends corrective action;

(2) The sentence approved by the convening authority includes dismissal, a dishonorable or bad conduct discharge, or any confinement; or

(3) Such action is otherwise required by regulation.

If the JA's review is not forwarded under this subsection, it must be attached to the original record of trial and a copy forwarded to the accused.

f. Action by officer exercising GCM Jurisdiction.

(1) Action. The officer exercising GCM jurisdiction that receives a record under subsection e of this rule may:

(a) Disapprove or approve the findings or sentence in whole or in part;

(b) Remit, commute, or suspend the sentence in whole or in part;

(c) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(d) Dismiss the charges.

(2) Rehearing. If the officer exercising GCM jurisdiction orders a rehearing, but the convening authority finds a rehearing impracticable, the convening authority must dismiss the charges.

(3) Notification. After the officer exercising GCM jurisdiction has taken action, the accused must be notified of that action and the accused must be provided with a copy of the JA's review.

g. Forwarding following review under this rule.

(1) Records forwarded to the State JA. If the JA who reviews the case under this rule states that corrective action is required as a matter of law, and the officer exercising GCM jurisdiction does not take action that is at least as favorable to the accused as that recommended by the JA, the record of trial and the action thereon must be forwarded to the State JA for review under N.Y.R.C.M. 1201(b)(2).

(2) Sentence including dismissal. If the approved sentence includes dismissal, the record must be forwarded to The Adjutant General. (See NYSML, Section 130.69(a))

(3) Other records. Records reviewed under this rule which are not forwarded under subsection g(1) of this rule be disposed of as prescribed by regulations.

Rule 1113. Execution of sentences.

a. In general. No sentence of a court-martial may be executed unless the convening authority has approved it.

b. Punishments, which the convening authority may order, executed in the initial action. Except as provided in subsection c of this rule, the convening authority may order all or part of the sentence of a court-martial executed when the convening authority takes initial action under N.Y.R.C.M. 1107. (See NYSML, Section 130.69(b)(2))

c. Punishments, which the convening authority may not order, executed in the initial action. A dishonorable or bad conduct discharge may be ordered executed only by:

(1) The officer who reviews the case under N.Y.R.C.M. 1112(f), as part of the action approving the sentence, except when that action must be forwarded under N.Y.R.C.M. 1112(g)(1), or

(2) The officer then exercising GCM jurisdiction over the accused.

A dishonorable or a bad conduct discharge may be ordered executed only after a final judgment within the meaning of N.Y.R.C.M. 1207 has been rendered in the case. If more than six months have elapsed since approval of the sentence by the convening authority, before a dishonorable or a bad conduct discharge may be executed, the officer exercising GCM Jurisdiction over the accused must consider the advice of that officer's Staff JA as to whether retention of the service member would be in the best interest of the service. Such advice must include: the findings and sentence as finally approved, whether the service member has been on active state duty since the court-martial and, if so, the nature and character of that duty, and a recommendation whether the discharge should be executed.

d. Other considerations concerning the execution of certain sentences.

(1) Confinement.

(a) Effective date of confinement. Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but the following are excluded in computing the service of the term of confinement.

(i) Periods during which the sentence to confinement is suspended or deferred.

(ii) Periods during which the accused is in custody of civilian authorities under NYSML, Section 130.15, from the time of the delivery to the return to military custody, if the accused was convicted in the civilian court.

(iii) Periods during which the accused has escaped or is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon the prisoner's petition for a writ of habeas corpus under a court order which is later reversed.

(iv) Periods during which another sentence by court-martial to confinement is being served. When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitted remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(b) Nature of the confinement. The omission of "hard labor" from any sentence of a court-martial, which has adjudged confinement does not prohibit the authority that orders the sentence, executed from requiring hard labor as part of the punishment. (See NYSML, Section 130.58(b))

(c) Place of confinement. The authority that orders a sentence to confinement into execution must designate the place of confinement. A sentence or confinement is adjudged by a court-martial or other military tribunal, regardless of whether the sentence includes a punitive discharge or dismissal has been executed, may be ordered to be served in any place of confinement under the control of any of the forces of the Organized militia or in any jail, penitentiary, or prison designated for that purpose as prescribed in NYSML, Section 130.11. Persons so confined in such a jail, penitentiary, or prison are subject to the same discipline and treatment as persons confined or committed by the courts of the State or of any political subdivision thereof. (See NYSML, Section 130.58(a)) When the service of a sentence to confinement has been deferred and the deferment is later rescinded, the convening authority must

designate the place of confinement in the initial action on the sentence or in the order rescinding the deferment. No member of the Organized militia may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the Organized militia.

(2) Confinement in lieu of fine. Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigence, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

Rule 1114. Promulgating order.

a. In general.

(1) Scope of rule. Orders promulgating the result of trial and the actions of the convening or higher authorities on the record shall be prepared, issued, and distributed as prescribed in this rule.

(2) Purpose. A promulgating order publishes the result of the court-martial and the convening authority's action and any later action taken on the case.

(3) SCM. An order promulgating the result of a trial by SCM need not be issued.

b. By who issued.

(1) Initial orders. The order promulgating the result of trial and the initial action of the convening authority is issued by the convening authority.

(2) Orders issued after the initial action. Any action taken on the case subsequent to the initial action shall be promulgated in supplementary orders. The subsequent action and the supplementary order may be the same document signed personally by the appropriate convening or higher authority.

(a) When the Governor or The Adjutant General has taken final action. GCM orders publishing the final result in cases in which the Governor or The Adjutant General has taken final action shall be promulgated as prescribed by these regulations.

(b) Other cases. In cases other than those in subsection b(2)(a) of this rule, the final action may be promulgated by an appropriate convening authority.

c. Contents.

(1) In general. The order promulgating the initial action must set forth: the type of court-martial and the command by which it was convened; the charges and specifications, or a summary thereof, on which the accused was arraigned; the accused's pleas; the findings or other disposition of each charge and specification; the sentence, if any; and verbatim the action of the convening authority, or a summary thereof. Subsequent actions must recite, verbatim, the action or order of the appropriate authority,

(2) Dates. A promulgating order must bear the date of the initial action, if any, of the convening authority. An order promulgating an acquittal, a court-martial terminated before findings, or action on the findings or sentence taken after the initial action of the convening authority must bear the date of its publication. A promulgating order must state the date the sentence was adjudged, the date on which the acquittal was announced, or the date on which the proceeding were otherwise terminated.

(3) Order promulgated regardless of the result of trial or nature of the action. An order promulgating the result of trial by a GCM or a SPCM must be issued regardless of the result and regardless of the action of the convening or higher authority.

d. Orders containing classified information. When an order contains information, which must be classified, only the order retained in the unit file and those copies, which accompany the record of trial, are to be complete and contain the classified information. The order must be assigned the appropriate security classification. Asterisks are to be substituted for the classified information in the other copies of the order.

e. Authentication. The promulgating order must be authenticated by the signature of the convening or other competent authority acting on the case, or a person acting under the direction of such authority. A promulgating order prepared in compliance with this rule is presumed authentic.

f. Distribution. Promulgating orders are to be distributed as follows:

Original to be filed in member's MPRJ by forwarding to DMNA, ATTN: MNP-ARB.

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PART II

CHAPTER 12

APPEALS AND REVIEW

Rule 1201. Action by the State JA.

a. Cases required to be referred to a Board of Military Review. The State JA must refer to the Board of Military Review the record in each trial by court-martial which:

(1) The sentence, as approved, extends to dismissal of an officer or cadet, dishonorable or bad conduct discharge, or confinement, and

(2) The accused has not waived or withdrawn appellate review.

b. Cases reviewed by the State JA.

(1) Mandatory examination of certain GCMs. Except when the accused has waived the right to appellate review or withdrawn such review, the record of trial by a GCM in which there has been a finding of guilty, the appellate review of which is not provided for in subsection a of this rule, must be examined in the office of the SJA. If any part of the findings or sentence is found unsupported in law, or if reassessment of the sentence is appropriate, the State JA may modify or set aside the findings or sentence or both. If the State JA so directs, the record must be reviewed by the Board of Military Review in accordance with N.Y.R.C.M. 1203. If the case is forwarded to the Board of Military Review, the accused must be informed and has the rights under N.Y.R.C.M. 1201(b)(2).

(2) Mandatory review of cases forwarded under N.Y.R.C.M. 1112(g)(1). The State JA must review each case forwarded under N.Y.R.C.M. 1112(g)(1). On such review, the State JA may vacate or modify, in whole or in part, the findings or sentence, or both, of a court-martial on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(3) Review by the State JA after final review.

(a) In general. Notwithstanding N.Y.R.C.M. 1209, the State JA may, sua sponte or upon application of the accused or a person with authority to act for the accused, vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial which has been finally reviewed, but has not been reviewed by the Board of Military Review or by the State JA under subsection b(1) of this rule, on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or appropriateness of the sentence. (See NYSML, Section 130.68(b))

(b) Procedure. The State JA must provide procedures for considering all cases properly submitted under subsection (3) of this rule and may prescribe the manner by which an application for relief under subsection b(3) of this rule may be made and, if submitted by a person other than the accused, may require that the applicant show authority to act on behalf of the accused.

(c) Time limits on applications. Any application for review by the State JA under NYSML, Section 130.68, must be made on or before the last day of the two-year period beginning on the date the sentence is approved by the convening authority, unless the accused establishes good cause for failure to file within that time.

(4) Rehearing. If the State JA sets aside the findings or sentence, the State JA may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the State JA sets aside the findings and sentence and does not order a rehearing, the State JA shall order that the charges be dismissed. If the State JA orders a rehearing but the convening authority finds a rehearing impractical, the convening authority must dismiss the charges.

c. Remission and suspension. The State JA may, when so authorized by The Adjutant General under NYSML, Section 130.72, at any time remit or suspend the unexecuted part of any sentence, other than a sentence approved by the Governor.

Rule 1202. Appellate counsel.

a. In general. The State JA may detail one or more officers as appellate counsel and must detail one or more officers as appellate defense counsel.

b. Duties.

(1) Appellate State counsel. Appellate State counsel represents the State before the reviewing authority when directed to do so by the State JA.

(2) Appellate defense counsel. Appellate defense counsel represents the accused before the reviewing authority, the SJA and the State JA, when the accused is a party in the case before such and requests to be represented by appellate defense counsel.

Appellate defense counsel is authorized to communicate directly with the accused. The accused is a party in the case when named as a party in pleadings before the reviewing authority or SJA or before the State JA or, even if not so named, when the military judge is named as respondent in a petition by the Government for extraordinary relief from a ruling in favor of the accused at trial.

Rule 1203. Review by the Board of Military Review.

a. In general. The State JA must establish a Board of Military Review composed of not less than three officers of the Organized militia or on the State Reserve List or State Retired List, each of whom must be a member of the Board of the State. (See NYSML, Section 130.65(a)) No member of the Board of Military Review can review the record of any trial member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer. (See NYSML, Section 130.65(g))

b. Cases reviewed by a Board of Military Review. A Board of Military Review must review cases referred to it by the State JA under N.Y.R.C.M. 1201(a) or (b)(1).

c. Action on cases considered by the Board of Military Review.

(1) In general. In a case referred to it, the Board of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. (See NYSML, Section 130.65(c))

(2) Action when sentence is set aside. If the Board of Military Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it must order that the charges be dismissed. (See NYSML, Section 130.65(d))

(3) Action subject to approval by The Adjutant General. The action taken by the Board of Military Review is subject to the approval of The Adjutant General. If The Adjutant General disapproves the action taken by the Board of Military Review, he may take action on the sentence or findings that could be taken by the convening authority under NYSML, Section 130.60. (See NYSML, Section 130.65(e))

(4) Action by the State JA. The State JA shall, unless there is to be further action by the Governor, instruct the convening authority to take action in accordance with the decision of the Board of Military Review as approved by The Adjutant General. If the Board of Military Review has ordered a rehearing but the convening authority finds a rehearing impracticable, the convening authority may dismiss the charges. (See NYSML, Section 130.65(f))

(5) An action when accused lacks mental capacity. An appellate authority may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate hearings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the appellate authority may direct that the record be forwarded to an appropriate authority for an examination of the accused in accordance with N.Y.R.C.M. 706, that the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The order of the appellate authority will instruct the appropriate authority as to permissible actions that may be taken to dispose of the matter. If the record is thereafter returned to the appellate authority, the appellate authority may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence, including matters outside the record trial, that the accused does not have the requisite mental capacity. If the accused does not have the requisite mental capacity, the appellate authority shall stay the proceedings until the accused regains appropriate capacity, or take other appropriate action. Nothing in this subsection shall prohibit the appellate authority from making a determination in favor of the accused which will result in the setting aside of a conviction.

d. Notification to accused.

(1) Notification of decision. The accused must be notified of the decision of the Board of Military Review.

(2) Notification of right to petition the Governor for review. The accused must be provided with a copy of the decision of the Board of Military Review bearing an endorsement notifying the accused of his/her right to petition the Governor for review. The endorsement must inform the accused that such a petition:

(a) May be filed only within 60 days from the earlier of

(i) The date on which the accused was notified of the decision of the Board of Military Review and the approval of The Adjutant General, or

(ii) The date on which a copy of the decision of the Board of Military Review and the approval The Adjutant General, after being served on counsel of record for the accused (if any), is deposited in the United States mail for delivery by first class, certified mail to the accused, at an address provided by the accused or, if no such address has been provided by the accused, at the latest address noted for the accused in his/her official service record (see NYSML, Section 130.66(b)); and

(b) May be forwarded through the officer immediately exercising GCM jurisdiction over the accused and through The Adjutant General.

(3) Receipt by the accused, disposition. The receipt by the accused of a copy of the decision of the Board of Military Review, a certificate of service on the accused, or the postal receipt for delivery of certified mail must be transmitted in duplicate by expeditious means to The Adjutant General. If the accused is personally served, the receipt or certificate of service must show the date of service. The Adjutant General must forward one copy of the receipt, certificate, or postal receipt to the Governor when required by him.

e. Cases not reviewed by the Governor. If the accused has not timely petitioned the Governor to review the decision of the Board of Military Review and approval by The Adjutant General or, if the Governor has denied a petition for review, the State JA must --

(1) If the sentence affirmed by the Board for Military Review includes a dismissal and is approved by The Adjutant General, transmit the record, the decision of the Board of Military Review and approval of The Adjutant General for action under N.Y.R.C.M. 1205; or

(2) If the sentence affirmed by the Board of Military Review does not include a dismissal, notify the convening authority, the officer exercising GCM jurisdiction over the accused, or The Adjutant General, as appropriate, who, subject to

N.Y.R.C.M. 1113(c)(1), may order into execution any unexecuted sentence affirmed by the Board of Military Review or take other action, as authorized.

Rule 1204. Review by the Governor.

a. Cases reviewed by the Governor. The Governor shall review the record in all cases reviewed by a Board for Military Review and approved by The Adjutant General in which, upon petition by the accused and on good cause shown, the Governor grants such review.

b. Counsel to assist the accused in connection with review by the Governor. When the accused is notified of the right to forward a petition for review by the Governor, if requested by the accused, associate counsel qualified under N.Y.R.C.M. 502(d)(1) must be detailed to advise and assist the accused in connection with preparing a petition for further appellate review.

c. Action on cases reviewed by the Governor.

(1) In general. In any case reviewed by him, the Governor may act only with respect to the findings and sentences as approved by the convening authority and as affirmed or set aside as incorrect in law by the Board of Military Review. He may affirm only such findings of guilty in the sentence or such part or amount of the sentence, as he finds correct in law and fact and determined, on the basis of the entire record, should be approved. In considering the record, he may weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. (See NYSML, Section 130.66))

(2) Action when sentence is set aside. If the Governor sets aside the findings and sentence, he may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence, and does not order a rehearing, he must order that the charges be dismissed. If the Governor has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

Rule 1205. Powers and responsibilities of The Adjutant General.

a. Sentences requiring approval by The Adjutant General. No part of a sentence extending to dismissal of an officer may be executed until approved by The Adjutant General.

b. Remission and suspension.

(1) In general. The Adjutant General may commute, remit or suspend all or any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures, other than a sentence approved by the Governor.

(2) Substitution of discharge. The Adjutant General may, for good cause, substitute an administrative discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

Rule 1206. Restoration.

a. New trial. All rights, privileges and property affected by an executed part of a court-martial sentence, which has been set aside or disapproved, except an executed dismissal or discharge, must be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing. (See NYSML, Section 130.73(a))

b. Administrative discharge.

(1) Dishonorable or bad conduct discharge. If a previously executed sentence of dishonorable or bad conduct discharge is not imposed on a new trial, The Adjutant General shall substitute therefore a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his/her enlistment.

(2) Dismissal. If a previously executed sentence of dismissal is not imposed on a new trial, The Adjutant General shall substitute therefore a form of discharge authorized for administrative issue, and the officer dismissed by the sentence may be reappointed by the opinion of the Governor alone to such commissioned grade and with such rank as in the opinion of the Governor that former officer would have attained had he not been dismissed. The reappointment of such a former officer must be consistent with federal regulations. (See NYSML, Section 130.73(c))

Rule 1207. Finality of courts-martial.

a. When a conviction is final. A court-martial conviction is final when:

(1) Review is completed by a Board of Military Review and approved by The Adjutant General, and

(a) The accused does not file a timely petition for review by the Governor,

(b) A petition for review is denied or otherwise rejected by the Governor.

(2) In cases not reviewed by a Board of Military Review --

(a) The findings and sentence have been found legally sufficient by a JA and, when action by such officer is required, have been approved by the officer exercising GCM jurisdiction over the accused at the time the court-martial was convened (or that officer's successor); or

(b) The findings and sentence have been affirmed by the State JA when review by the State JA is required under N.Y.R.C.M. 1112(g)(1) or 1201(b)(1).

b. Effect of finality. The appellate review of records of trial provided by the code, the proceedings, findings and sentences of courts-martial as approved, reviewed or affirmed as required by the code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation is required by the code, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the State, subject only to action upon a petition for a new trial under NYSML, Section 130.71, or action by The Adjutant General as provided in NYSML, Section 130.72, and the authority of the Governor. (See NYSML, Section130.74)

Rule 1208. New trial.

a. In general. At any time with two years after approval by the convening authority of a court-martial sentence, the accused may petition the State JA for a new trial on the grounds of newly discovered evidence or fraud on the court-martial. A petition may not be submitted after the death of the accused.

b. Who may petition? A petition for a new trial may be submitted by the accused personally, or by the accused's counsel, regardless of whether the accused has been separated from the service.

c. Form of petition. A petition for a new trial in triplicate is to be written and signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition must contain the following information, or an explanation why such matters are not included:

(1) The name, service number and current address of the accused.

(2) The date and location of the trial.

(3) The type of court-martial and the title or position of the convening authority.

(4) The sentence or a description thereof as approved or affirmed, with any later reduction thereof by clemency or otherwise.

(5) The request for the new trial.

(6) A brief description of any findings or sentence believed to be unjust.

(7) A full statement of the newly discovered evidence or fraud on the court-martial, which is relief upon for the remedy, sought.

(8) Affidavits pertinent to the matters in subsection c(6) of this rule.

(9) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly facts within the personal knowledge of the witness.

d. Effect of petition. The submission of a petition for a new trial does not stay the execution of a sentence.

e. Who may act on petition? If the accused's case is pending before a Board of Military Review or the Governor, the State JA must refer the petition to that board or to the Governor, as appropriate, for action. Otherwise, the State JA must act on the petition. (See NYSML, Section 130.71)

f. Grounds for a new trial.

(1) In general. A new trial may be granted only on grounds of newly discovered evidence of fraud on the court-martial.

(2) Newly discovered evidence. A new trial cannot be granted on the grounds of newly discovered evidence unless the petition shows that:

(a) The evidence was discovered after the trial.

(b) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence.

(c) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) Fraud on court-martial. No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

g. Action on the petition. The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in its discretion, the authority considering the petition may permit oral argument on the matter. If the State JA or a Board of Military Review believes meritorious grounds for relief under NYSML, Section 130.72, have been established but that a new trial is not appropriate, he/she may act under NYSML, Section 130.72, if authorized to do so, or transmit the petition and related papers to The Adjutant General with a recommendation. The State JA may also, in cases, which have been finally reviewed but have not been reviewed by a Board of Military Review, act under NYSML, Section 130.68.

h. Action when new trial is granted.

(1) Forwarding to convening authority. When a petition for a new trial is granted, the State JA must select and forward the case to a convening authority for disposition.

(2) Charges at new trial. At a new trial, the accused may not be tried for any offense of which the accused was found not guilty or upon which the accused was not tried at the earlier court-martial.

(3) Action by convening authority. The convening authority's action on the record of a new trial is the same as in other courts-martial.

(4) Disposition of record. The disposition of the record of a new trial is the same as for other courts-martial.

(5) Court-martial orders. Court-martial orders promulgating the final action taken as a result of a new trial, including any restoration of rights, privileges and property is promulgated in accordance with N.Y.R.C.M. 1114.

(6) Action by persons charged with execution of the sentence. Persons charged with the administrative duty of executing a sentence adjudged upon a new trial after it has been ordered and executed must credit the accused with any executed portion or amount of the original sentence included in the new sentence in computing the term of the amount of punishment actually to execute pursuant to the sentence.

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PART II

CHAPTER 13

SUMMARY COURTS-MARTIAL (SCM)

Rule 1301. SCM generally.

a. Composition. A SCM is composed of one officer. Whenever practicable, a SCM should be an officer whose grade is not below lieutenant commander of the Naval Militia or major of the Army National Guard or Air National Guard. When only one officer is present with a command or detachment, that officer is to be the SCM of that command or detachment. When more than one officer is present with a command or detachment, the convening authority may not be the SCM of that command or detachment.

b. Function. The function of the SCM is to promptly adjudicate minor offenses under a simple procedure. The SCM is to thoroughly and impartially inquire into both sides of the matter and shall ensure that the interests of both the State and the accused are safeguarded and that justice is done. A SCM may seek advice from a JA or legal officer on questions of law, but the SCM may not seek advice from any person on factual conclusions, which should be drawn from evidence or the sentence, which should be imposed, as the SCM has the independent duty to make these determinations.

c. Jurisdiction. Subject to Chapter II, SCMs have the power to try persons subject to the code, except officers and warrant officers.

d. Punishments. SCMs have the power to sentence to confinement at hard labor not exceeding 25 days, fines not exceeding $25.00, confinement at hard labor in lieu of fines imposed not exceeding one day for each dollar of fine imposed, forfeiture of pay and allowances not exceeding $25.00, reprimand, reduction of non-commissioned officers to an inferior grade, and to combine any two or more of such punishments in the sentence imposed. (See NYSML, Section 130.20(c)) SCMs also may not combine an alternative sentence of confinement at hard labor in lieu of fine with any other sentence authorized in subdivision d except reprimand and reduction if the result would exceed the jurisdictional limitations of a SCM.

e. Counsel. The accused at a SCM does not have the right to counsel. If the accused has civilian counsel provided by the accused and qualified under N.Y.R.CM. 502(d)(3), that counsel must be permitted to represent the accused at the SCM if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

f. Power to obtain witnesses and evidence. A SCM may obtain evidence pursuant to N.Y.R.C.M. 703.

Rule 1302. Convening a SCM.

a. Who may convene SCMs. Unless limited by competent authority, SCM may be convened by:

(1) Any person who may convene a GCM or SPCM,

(2) The field grade commander of any Organization authorized if a commander in the grade of lieutenant colonel or equivalent or higher,

(3) The commander or officer in charge of any other command when empowered by The Adjutant General,

(4) A superior competent authority to any of the above.

b. When convening authority is accuser. If the convening authority or the SCM is the accuser, it is discretionary with the convening authority whether to forward the charges to a superior authority with a recommendation to convene the SCM, if the convening authority or the SCM is not affected.

c. Procedure. After the requirements of Chapters III and IV of this part have been satisfied, SCMs are to be convened in accordance with N.Y.R.C.M. 504(d)(2). The convening authority may be by notation signed by the convening authority on the charge sheet. Charges must be referred to SCMs in accordance with N.Y.R.C.M. 601.

Rule 1303. Right to object to trial by SCM.

No person who objects thereto before arraignment may be tried by SCM.

Rule 1304. Trial procedure.

a. Pretrial duties.

(1) Examination of file. The SCM must carefully examine the charge sheet, allied papers, and immediately available personnel records of the accused before trial.

(2) Report of irregularity. The SCM must report to the convening authority any substantial irregularity in the charge sheet, allied papers or personnel records.

(3) Correction and amendment. The SCM may, subject to N.Y.R.C.M. 603, correct errors on the charge sheet and amend charges and specifications. Any such corrections or amendments must be initialed.

b. SCM procedure.

(1) Preliminary proceeding. After complying with N.Y.R/C.M. 1304(a), the SCM must hold a preliminary proceeding during which the accused must be given a copy of the charge sheet and informed of the following:

(a) The general nature of the charges.

(b) The fact that the charges have been referred to a SCM for trial and the date of referral.

(c) The identity of the convening authority.

(d) The name(s) of the accuser(s).

(e) The names of the witnesses who could be called to testify and any documents or physical evidence which the SCM expects to introduce into evidence.

(f) The accused's right to inspect the allied papers and immediately available personnel records.

(g) That during the trial the SCM will not consider any matters, including statement previously made by the accused to the officer detailed as SCM unless admitted in accordance with the Military Rules of Evidence

(h) The accused's right to plead not guilty or guilty.

(i) The accused's right to cross-examine witnesses and have the SCM cross-examine witnesses on behalf of the accused.

(j) The accused's right to call witnesses and produce evidence with the assistance of the SCM, as necessary.

(k) The accused's right to testify on the merits, or to remain silent with the assurance that no adverse inference will be drawn by the SCM from such silence.

(l) If any findings of guilty are announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, and to testify, and to introduce evidence in extenuation or mitigation.

(m) The maximum sentence, which the SCM may adjudge if the accused is found guilty of the offense or offenses alleged.

(n) The accused's right to object to trial by SCM.

(2) Trial proceeding.

(a) Objection to trial. The SCM must give the accused a reasonable period of time to decide whether to object to trial by SCM. The SCM must thereafter record the response. If the accused objects to trial by SCM, the SCM must return the charge sheet, allied papers, and personnel records to the convening authority. If the accused fails to object to trial by SCM, trial must proceed.

(b) Arraignment. After complying with N.Y.R.C.M. 1304(b)(1) and (2)(A), the SCM must read and show the charges and specifications to the accused and, if necessary, explain them. The accused may waive the reading of the charges. The SCM must then ask the accused to plead to each specification and charge.

(c) Motions. Before receiving pleas the SCM must allow the accused to make motions to dismiss or for other relief. The SCM must take action on behalf of the accused, if requested by the accused, or if it appears necessary in the interest of justice.

(d) Pleas.

(i) No guilty pleas. When a not guilty plea is entered, the SCM must proceed to trial.

(ii) Guilty pleas. If the accused pleads guilty to any offense, the SCM must comply with N.Y.R.C.M. 910.

(iii) Rejected guilty pleas. If the SCM is in doubt that the accused's pleas of guilty are voluntarily and understandingly made or, if at any time during the trial, any matter inconsistent with pleas of guilty arises, which inconsistency cannot be resolved, the SCM must enter not guilty pleas as to the affected charges and specifications.

(iv) No plea. If the accused refuses to plead, the SCM must enter not guilty pleas.

(v) Changed pleas. The accused may change any plea at any time before findings are announced. The accused may change pleas from guilty to not guilty after findings are announced only for good cause.

(e) Presentation of evidence.

(i) The Military Rules of Evidence (Part III) apply to SCMs.

(ii) The SCM shall arrange for the attendance of necessary witnesses for the prosecution and defense, including those requested by the accused.

(iii) Witnesses for the prosecution shall be called first and examined under oath. The accused shall be permitted to cross-examine these witnesses. The SCM must aid the accused in cross-examination if such assistance is requested or appears necessary in the interest of justice. The witnesses for the accused must then be called and similarly examined under oath.

(iv) The SCM shall obtain evidence, which tends to disprove the accused's guilt or establishes extenuating circumstances.

(f) Findings and sentence.

(i) The SCM shall apply the principles in N.Y.R.C.M. 917 in determining the findings. The SCM shall announce the findings to the accused in open session.

(ii) The SCM shall follow the procedures in N.Y.R.C.M. 1001 and apply the principles in the remainder of Chapter X in determining a sentence. The SCM shall announce the sentence to the accused in open session.

(iii) If the sentence includes confinement, the SCM shall advise the accused of the right to apply to the convening authority for deferment of the service of the confinement.

(iv) If the accused is found guilty, the SCM shall advise the accused of the rights under N.Y.R.C.M. 1306(a) and (d) after the sentence is announced.

(v) The SCM shall, as soon as practicable, inform the convening authority of the findings, sentence, recommendations, if any, for suspension of the sentence, and any deferment request.

(vi) If the sentence includes confinement, the SCM must cause the delivery of the accused to the accused's commanding officer or the commanding officer's designee.

Rule 1305. Record of trial.

a. In general. The record of trial of a SCM shall be prepared as prescribed in subsection b of this rule. The convening or higher authority may prescribe additional requirements for the record of trial.

b. The SCM shall prepare an original and at least two copies of the record of trial, which shall include:

(1) The pleas, findings and sentence, and if the accused was represented by counsel at the SCM, a notation to that effect.

(2) The fact that the accused was advised of the matters set forth in N.Y.R.C.M. 1304(b)(1).

(3) If the SCM is the convening authority, a notation to that effect.

c. Authentication. The SCM shall authenticate the record by signing each copy.

d. Forwarding copies of the record.

(1) Accused's copy.

(a) Service. The SCM shall cause a copy of the record of trial to be served on the accused as soon as it is authenticated.

(b) Receipt. The SCM shall cause the accused's receipt for the copy of the record of trial to be obtained and attached to the original record of trial or shall attach to the original record of trial a certificate that the accused was served a copy of the record. If the record of trial was not served on the accused personally, the SCM shall attach a statement explaining how and when such service was accomplished. If the accused was represented by counsel, such counsel may be served with the record of trial.

(c) Classified information. If classified information is included in the record of trial of a SCM, N.Y.R.C.M. 1104(b)(1)(D) shall apply.

(2) Forwarding to the convening authority. The original and one copy of the record of trial must be forwarded to the convening authority after compliance with subsection d(1) of this rule.

(3) Further disposition. After compliance with N.Y.R.C.M. 1306(b) and (c), the record of trial shall be forwarded to DMNA, ATTN: MNP-ARB, for inclusion in the member's permanent 201 file.

Rule 1306. Post-trial procedure.

a. Matters submitted by the accused. After a sentence is adjudged, the accused may submit written matters to the convening authority in accordance with N.Y.R.C.M. 1105.

b. Convening authority's action.

(1) Who acts? Except as provided herein, the convening authority must take action in accordance with N.Y.R.C.M. 1107. The convening authority cannot take action before the period prescribed in N.Y.R.C.M. 1105(c)(3) has expired, unless the right to submit matters has been waived under N.Y.R.C.M. 1105(d).

(2) Action. The action of the convening authority must be shown on all copies of the record of trial except that provided the accused if the accused has retained that copy. An order promulgating the result of a trial by SCM need not be issued. A copy of the action must be forwarded to the accused.

(3) Signature. The action on the original record of trial must be signed by the convening authority. The convening authority's action on other copies of the record of trial must either be signed by the convening authority or be prepared and certified as true copies of the original.

(4) Subsequent action. Any action on a SCM after the initial action by the convening authority must be in writing, signed by the authority taking the action, and promulgated in appropriate orders.

c. Review by a JA. The original record of the SCM must be reviewed by a JA in accordance with N.Y.R.C.M. 1112.

d. Review by the State JA. The accused may request review of a final conviction by SCM by the State JA in accordance with N.Y.R.C.M. 1201(b)(3).

e. Review by a Board of Military Review. The accused may appeal his/her conviction or sentence to a Board of Military Review in accordance with N.Y.R.C.M. 1203 where the sentence, as approved, includes confinement.

PART III

SECTION 1

MILITARY RULES OF EVIDENCE
GENERAL PROVISIONS

Rule 101. Scope.

a. Applicability. These rules are applicable in courts-martial, including SCM, to the extent and with the exception stated in Military Rules of Evidence 1101.

b. Secondary sources. If not otherwise prescribed in this manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this manual, courts-martial shall apply:

(1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and

(2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

c. Rule of construction. Except as otherwise provided in these rules, the term "military judge" includes the president of a SPCM without a military judge and SCM officer.

Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of the evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on evidence.

a. Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.

The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

b. Record of offer and ruling. The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.

c. Hearing of members. In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the member.

d. Plain error. Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

Rule 104. Preliminary questions.

a. Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

b. Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment

of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this manual provide expressly to the contrary.

c. Hearing of members. Except in cases tried before a SPCM without a military judge, hearings on the admissibility of statements of an accused under Military Rules of Evidence 301-306 shall in all cases be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

d. Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

e. Weight and credibility. This rule does not limit the right of a party to introduce before the members evidence relevant to weight or credibility.

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted to the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly.

Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other party or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

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PART III

SECTION 2

MILITARY RULES OF EVIDENCE
JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts.

a. Scope of rule. This rule governs only judicial notice of adjudicative facts.

b. Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

c. When discretionary. The military judge may take judicial notice, whether requested or not. The parties shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establishing an element of the case.

d. When mandatory. The military judge shall take judicial notice if requested by a party and supplied with the necessary information.

e. Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

f. Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

g. Instructing members. The military judge shall instruct the members that they may, but are not required to, accept as conclusive any matter judicially noticed.

Rule 201A. Judicial notice of law.

a. Domestic law. The military judge may take judicial notice of domestic law. Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Military Rules of Evidence--except Military Rules of Evidence 201(g)--apply.

b. Foreign law. A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The military judge, in determining foreign law, may consider any relevant material or source including testimony whether or not submitted by a party or admissible under these rules. Such a determination shall be treated as a ruling on a question of law.

PART III

SECTION 3

MILITARY RULES OF EVIDENCE
EXCLUSIONARY RULES AND RELATED MATTERS
CONCERNING SELF-INCRIMINATION, SEARCH AND SEIZURE,
AND EYEWITNESS IDENTIFICATION

Rule 301. Privilege concerning compulsory self-incrimination.

a. General rule. The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and NYSML, Section 130.31, are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied.

b. Standing.

(1) In general. The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness.

(2) Judicial advice. If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and, except in a SPCM without a military judge, the members. Failure to do so advise a witness does not make the testimony of the witness inadmissible.

c. Exercise of the privilege. If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

(1) Immunity generally. The minimum grant of immunity adequate to overcome the privilege is that which under either N.Y.R.C.M. 704 or other proper authority provides that neither the testimony of the witness nor any evidence obtained from the testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) Notification of immunity or leniency. When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

d. Waiver by a witness. A witness who answers a question without having asserted the privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to the fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Military Rules of Evidence 608(b).

e. Waiver by the accused. When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he/she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Military Rules of Evidence 608(b).

f. Effect of claiming the privilege.

(1) Generally. The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the Government.

(2) On cross-examination. If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

(3) Pretrial. The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or NYSML, Section 130.31, remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused.

g. Instructions. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interest of justice.

Rule 302. Privilege concerning mental examination of an accused.

a. General rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under N.Y.R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Military Rules of Evidence 305 at the examination.

b. Exceptions.

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to reasons for the expert's conclusions and the reasons therefore as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in b(1).

c. Release of evidence. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to N.Y.R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge may, upon motion, order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interest of justice.

d. Noncompliance by the accused. The military judge may prohibit an accused that refuses to cooperate in a mental examination authorized under N.Y.R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

e. Procedure. The privilege in this rule may be claimed by the accused only under the procedure set forth in Military Rules of Evidence 304 for an objection or a motion to suppress.

Rule 303. Degrading questions.

No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person.

Rule 304. Confessions and admissions.

a. General rule. Except as provided in subsection b, an involuntary statement or any derivative evidence there from may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

b. Exceptions.

(1) Where the statement is involuntary only in terms of noncompliance with the requirements concerning counsel under Military Rules of Evidence 305(d), 305(e), and 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused for the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

(2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

(3) Derivative evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

c. Definitions. As used in these rules:

(1) Confession. A "confession" is an acknowledgment of guilt.

(2) Admission. An "admission" is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

(3) Involuntary. A statement is "involuntary" if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

d. Procedure.

(1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces.

(2) Motions and objections.

(a) Motions to suppress or objections under this rule or Military Rules of Evidence 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(b) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may take such orders as are required in the interest of justice.

(c) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule or Military Rules of Evidence 302 or 305 shall be made in accordance with the procedure for challenging a statement under a. If such evidence has not been so disclosed prior to arraignment, the requirements of b apply.

(3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interest of justice, including authorization for the defense to make a general motion to suppress or general objection.

(4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(5) Effect of guilty plea. Except as otherwise expressly provided in N.Y.R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

e. Burden of proof. When appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subdivision d(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(1) In general. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a SPCM without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such objection is made, it shall be resolved pursuant to N.Y.R.C.M. 801(e)(3)(c).

(2) Weight of the evidence. If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence without the voluntaries of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate weight to give the statement.

(3) Derivative evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a

preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement has not been made.

f. Defense evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he/she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

g. Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) Quantum of evidence needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced, as corroboration is a factor to be considered by the truer of fact in determining the weight, if any, to be given to the admission or confession.

(2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

h. Miscellaneous.

(1) Oral statements. A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(2) Completeness. If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

(3) Certain admissions by silence. A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation.

(4) Refusal to obey order to submit body substance. If an accused refuses a lawful order to submit for chemical analysis a sample of his/her blood, breath, urine or other body substance, evidence of such refusal may be admitted into evidence on:

(a) A charge of violating an order to submit such a sample, or

(b) Any other charge on which the results of the chemical analysis would have been admissible.

Rule 305. Warnings about rights.

a. General rule. A statement obtained in violation of this rule is involuntary and shall be treated under Military Rules of Evidence 304.

b. Definitions. As used in this rule.

(1) Person subject to the code. A "person subject to the code" includes a person acting as a knowing agent of a military unit or of a person subject to the code.

(2) Interrogation. "Interrogation" includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

c. Warnings concerning the accusation, right to remain silent, and use of statements. A person subject to the State code who is required to give warnings under NYSML, Section 130.31, may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(1) Informing the accused or suspect of the nature of the accusation,

(2) Advising the accused or suspect that the accused or suspect has the right to remain silent, and

(3) Advising the accused or suspect that any statements made may be used as evidence against the accused or suspect in a trial by court-martial.

d. Counsel rights and warnings.

(1) General rule. When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation if--

(a) The interrogation is conducted by a person subject to the code who is required to give warnings under NYSML, Section 130.31, and the accused or suspect is in custody, could reasonably believe himself/herself to be in custody, or is otherwise deprived of his/her freedom of action in any significant way; or

(b) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity, or an agent of such a person, the interrogation is conducted subsequent to referral of charges or the imposition of pretrial restraint under N.Y.R.C.M. 304, and the interrogation concern the offenses or matters that were the subject of the referral of charges or were the cause of the imposition of pretrial restraint.

(2) Counsel. When a person entitled to counsel under this rule requests counsel, a JA who is a member of the bar of this State shall be provided by the State of New York at no expense to the person and without regard to the person's indigence or lack thereof before the interrogation may proceed. In addition to counsel supplied by the State of New York, the person may retain civilian counsel at no expense to the State of New York. An accused or suspect does not have a right under this rule to have military counsel of his/her own selection.

e. Notice to counsel. When a person subject to the code who is required to give warnings under subdivision c intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

f. Exercise of rights. If a person chooses to exercise the privilege against self-incrimination or the right to counsel under this rule, questioning must cease immediately.

g. Waiver.

(1) General rule. After receiving applicable warnings under this rule, a person may waive the rights described therein and in Military Rules of Evidence 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she understands the rights involved, affirmatively decline the right to counsel and affirmatively consent to making a statement.

(2) Counsel. If the right to counsel in subdivision d is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel. In addition, if the notice to counsel in subdivision e is applicable, a waiver of the right to counsel is not effective unless the prosecution demonstrates by a preponderance of the evidence that reasonable efforts to notify the counsel were unavailing or that the counsel did not attend an interrogation scheduled within a reasonable period of time after the required notice was given.

h. Nonmilitary interrogations.

(1) General rule. When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a state, commonwealth, or possession of the United States, or any political subdivision of such a state, commonwealth, or possession, and such official or agent is not required to give warnings under subdivision c, the person's entitlement to rights warnings and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations.

(2) Foreign interrogations. Neither warnings under subdivisions c or d, nor notice to counsel under subdivision e are required during an interrogation conducted abroad by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision h(1). A statement obtained during such an interrogation is involuntary within the meaning of Military Rules of Evidence 304(b)(3) if it is obtained through the use of coercion, unlawful influence, or unlawful inducement. An interrogation is not "participated in" by military personnel or their agents or by the officials or agents listed in subdivision h(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

Rule 306. Statements by one of several accused.

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him/her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

Rule 311. Evidence obtained from unlawful searches and seizures.

a. General rule. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) Objection. The accused makes a timely motion to suppress or an objection to the evidence under this rule.

(2) Adequate interest. The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

b. Exceptions.

(1) Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(2) Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

(3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(a) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Military Rules of Evidence 315(d) or from a search warrant or arrest warrant issued by competent civilian authority.

(b) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause.

(c) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

c. Nature of search or seizure. A search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) Military personnel. Military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Military Rules of Evidence 312-317.

(2) Other officials. Other officials or agents of the United States of the District of Columbia, or of a state, commonwealth, or possession of the United States or any political subdivision of such a state, commonwealth, or possession and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district courts involving a similar search or seizure.

(3) Officials of a foreign government. Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure which subjected the accused to gross and brutal maltreatment.

A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

d. Motions to suppress and objections.

(1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

(2) Motion or objection.

(a) When evidence has been disclosed under subdivision d(1), any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(b) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(c) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (a). If such evidence has not been so disclosed prior to arraignment, the requirements of (b) apply.

(3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interest of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

e. Burden of proof.

(1) In general. When an appropriate motion or objection has been made by the defense under subdivision d, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant.

(2) Derivative evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend or a search warrant or an arrest warrant.

(3) Specific motions or objections. When a specific motion or objection has been required under subdivision d(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

f. Defense evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he/she testifies. Nothing said by the accused on either direct of cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

g. Scope of motions and objections challenging probable cause.

(1) Generally. If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in paragraph (2).

(2) False statements. If the defense makes a substantial preliminary showing that a Government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of falsity or reckless disregard for the truth.

If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules.

h. Objections to evidence seized unlawfully. If a defense motion or objection under this rule is sustained in whole or in part, the members may not be informed of that fact except insofar as the military judge must instruct the members to disregard evidence.

i. Effect on guilty plea. Except as otherwise expressly provided in N.Y.R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the Constitution of the United States and Military Rules of Evidence 311-317 with respect to that offense whether or not raised prior to plea.

Rule 312. Body views and intrusions.

a. General rule. Evidence obtained from body views and intrusions conducted in accordance with this rule are admissible at trial when relevant and not otherwise inadmissible under these rules.

b. Visual examination of the body.

(1) Consensual. Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection in accordance with Military Rules of Evidence 314(e).

(2) Involuntary. An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under the following provisions of the Military Rules of Evidence: inspections and inventories under Military Rules of Evidence 313; searches under Military Rules of Evidence 314(b) and 314(c) if there is a reasonable suspicion that

weapons, contraband, or evidence of crime is concealed on the body of the person to be searched; searches within jails and similar facilities under Military Rules of Evidence 314(j), if reasonably necessary to maintain the security of the institution or its personnel; searches incident to lawful apprehension under Military Rules of Evidence 314(g); emergency searches under Military Rules of Evidence 314(I); and probable cause searches under Military Rules of Evidence 315. An examination of the unclothed body under this rule should be conducted whenever practicable by a person of the same sex as that of the person being examined; provided, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of Military Rules of Evidence 311.

c. Intrusion into body cavities. A reasonable nonconsensual physical intrusion into the mouth, nose and ears may be made when a visual examination of the body under subdivision b is permissible. Nonconsensual intrusions into other body cavities may be made:

(1) For purposes of seizure. When there is a clear indication that weapons, contraband, or other evidence of crime is present, to remove weapons, contraband, or evidence of crime discovered under subdivisions b and c(2) of this rule or under Military Rules of Evidence 136(d)(4)(c) if such intrusion is made in a reasonable fashion by a person with appropriate medical qualifications; or

(2) For purposes of search. To search for weapons, contraband, or evidence of crime if authorized by a search warrant or search authorization under Military Rules of Evidence 315 and conducted by a person with appropriate medical qualifications.

Notwithstanding this rule, a search under Military R. Evidence 314(h) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband, or evidence of crime.

d. Extraction of body fluids. Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Military Rules of Evidence 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Military Rules of Evidence 315(g), only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

e. Other intrusive searches. Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband, or evidence of crime and not within the scope of subdivisions b or c may be made only upon search warrant or search authorization under Military Rules of Evidence 315 and only if such search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section. Notwithstanding this rule, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

f. Intrusions for valid medical purposes. Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a service member. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Military Rules of Evidence 311.

Rule 313. Inspections and inventories in the armed forces.

a. General rule. Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule are admissible at trial when relevant and not otherwise inadmissible under these rules.

b. Inspections. An "inspection" is an examination of the whole or in part of a unit, Organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command to the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, Organization, installation, vessel, aircraft, or vehicle. An inspection may include, but is not limited to, an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards or readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, Organization,

installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination, or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Military Rules of Evidence 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

c. Inventories. Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Military Rules of Evidence 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 314. Searches not requiring probable cause.

a. General rule. Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

b. Searches upon entry to or exit from United States installations, aircraft, and vessels abroad. In addition to the authority to conduct inspections under Military Rules of Evidence 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Military Rules of Evidence 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.

c. Searches of Federal or State Government property. Federal or State Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable

expectation of privacy in Government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use, but the determination as to whether a person has a reasonable expectation of privacy in Government property issued for personal use depends on the facts and circumstances at the time of the search.

d. Consent searches.

(1) General rule. Searches may be conducted of any person or property with lawful consent.

(2) Who may consent. A person may consent to a search of his/her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) Scope of consent. Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

(4) Voluntariness. To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

(5) Burden of proof. Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of the consent, but it does not affect the burden of proof.

e. Searches incident to a lawful stop.

(1) Stops. A person authorized to apprehend under N.Y.R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him/her reasonably to conclude in light of his/her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) Frisks. When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(3) Motor vehicles. When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

f. Searches incident to a lawful apprehension.

(1) General rule. A person who has been lawfully apprehended may be searched.

(2) Search for weapons and destructible evidence. A search may be conducted for weapons or destructible evidence in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area which the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property, provided that the passenger compartment of an automobile and containers within the passenger compartment may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.

(3) Examination for other persons. When an apprehension takes place at a location in which other persons reasonably might be present who might interfere with the apprehension or endanger those apprehending, a reasonable examination may be made of the general area in which such other persons might be located.

g. Searches within jails, confinement facilities, or similar facilities. Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

h. Emergency searches to save life or for related purposes. In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

i. Searches of open fields or woodlands. A search of open fields or woodlands is not an unlawful search within the meaning of Military Rules of Evidence 311.

j. Other searches. A search of a type not otherwise included in this rule and not requiring probable cause under Military Rules of Evidence 315 may be conducted when permissible under the Constitution of the United States and State of New York as applied to members of the armed forces and State Organized militia.

Rule 315. Probable cause searches.

a. General rule. Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

b. Definitions. As used in these rules.

(1) Authorization to search. An "authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) Search warrant. A "search warrant" is an express permission to search and seize issued by competent civilian authority.

c. Scope of authorization. A search authorization may be issued under this rule for a search of:

(1) Persons. The person of anyone subject to federal or State military law or the law of war wherever found.

(2) Military property. Military property of the United State or the State of New York of non-appropriated fund activities of an armed force of the United States wherever located.

(3) Persons and property within military control. Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located.

(4) Nonmilitary property within a foreign country.

(a) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, hoes not render a search unlawful within the meaning of Military Rules of Evidence 311.

(b) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign country with respect to a search under paragraph (4)(b) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Military Rules of Evidence 311.

d. Power to authorize. Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) Commander. A commander or other person serving in a position designated by The Adjutant General as either a person analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or if that place is not under military control, having control over persons subject to federal or State military law or the law of war; or

(2) Military judge. An otherwise impartial authorizing official does not lose that character merely because he/she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization, nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

e. Power to search. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision g.

f. Basis for search authorizations.

(1) Probable cause requirement. A search authorization issued under this rule must be based upon probable cause.

(2) Probable cause determination. Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

(a) Written statements communicated to the authorizing officer.

(b) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication.

(c) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion.

The Adjutant General may prescribe additional requirements.

g. Exigencies. A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) Insufficient time. There is reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought.

(2) Lack of communications. There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought.

(3) Search of operable vehicle. An operable vehicle is to be searched, except in the circumstances where a search warrant or authorization is required by the Constitution of the United States or the State of New York, this manual, or these rules.

(4) Not required by the Constitution. A search warrant or authorization is not otherwise required by the Constitution of the United States or the State of New York as applied to members of the armed forces or State Organized militia.

For purpose of this rule, a vehicle is "operable" unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

h. Execution.

(1) Notice. If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should, when possible, notify him/her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of Military Rules of Evidence 311.

(2) Inventory. An inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Military Rules of Evidence 311.

(3) Foreign searches. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) Search warrants. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States, an applicable Act of Congress, or the Constitution of the State of New York.

Rule 316. Seizures.

a. General rule. Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

b. Seizure of property. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

c. Apprehension. Apprehension is governed by N.Y.R.C.M. 302.

d. Seizure of property or evidence.

(1) Abandoned property. Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) Consent. Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Military Rules of Evidence 314.

(3) Federal or State Government property. Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision e, unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Military Rules of Evidence 314(d), at the time of the seizure.

(4) Other property. Property or evidence not included in paragraph (1)-(3) may be seized for use in evidence by any person listed in subdivision e if:

(a) Authorization. The person is authorized to seize the property or evidence by a search warrant or a search authorization under Military Rules of Evidence 315.

(b) Exigent circumstances. The person has probable cause to seize the property or evidence and under Military Rules of Evidence 315(g) a search warrant or search authorization is not required.

(c) Plain view. The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.

(5) Temporary detention. Nothing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States and the State of New York.

e. Power to seize. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent or any such person, may seize property pursuant to this rule.

f. Other seizures. A seizure of a type not otherwise included in this rule may be made when permissible under the Constitution of the United States and State of New York as applied to members of the armed forces or state Organized militia.

Rule 317. Interception of wire and oral communications.

General rule. Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of Military Rules of Evidence 311 when such evidence may be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces or the Constitution of the State of New York as applied to members of the State Organized militia.

Rule 321. Eyewitness identification.

a. General rule.

(1) Admissibility. Testimony concerning a relevant out of court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules. The witness making the identification and any person who has observed the previous identification may testify concerning it. When in testimony a witness identifies the accused as being, or not being, a participant in an offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness' testimony as to identify even if the credibility or the witness has not been attached directly, subject to appropriate objection under this rule.

(2) Exclusionary rule. An identification of the accused as being a participant in an offense, whether such identification is made at the trial or otherwise, is inadmissible against the accused if:

(a) The accused makes a timely motion to suppress or an objection to the evidence under this rule and if the identification is the result of an unlawful lineup or other unlawful identification process conducted by the Unites States or other domestic authorities.

(b) Exclusion of the evidence is required by the due process clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces of the New York State Constitution. Evidence other than an identification of the accused that is obtained as a result of the unlawful lineup or unlawful identification process is inadmissible against the accused if the accused makes a timely motion to suppress or an objection to the evidence under this rule and if exclusion of the evidence is required under the Constitution of the United States as applied to members of the armed forces.

b. Definition of "unlawful."

(1) Lineups and other identification processes. A lineup or other identification process is "unlawful" if the identification is unreliable. Identification is unreliable if the lineup or other identification process, under the circumstances, is so suggestive as to create a substantial likelihood of misidentification.

(2) Lineups: right to counsel. A lineup is "unlawful" if it is conducted in violation of the following rights to counsel:

(a) Military lineups. An accused or suspect is entitled to counsel if, after preferral of charges or imposition of pretrial restraint under R.C.M. 304 for the offense under investigation, the accused is subjected by persons subject to the state code or their agents to a lineup for the purpose of identification. When a person entitled to counsel under this rule requests counsel, a JA who is a member of the bar of this State shall be provided by the State of New York at no expense to the accused or suspect and without regard to indigence or lack thereof before the lineup may proceed. The accused or suspect may waive the rights provided in this rule if the waiver is freely, knowingly, and intelligently made.

(b) Nonmilitary lineups. When a person subject to the code is subjected to a lineup for purposes of identification by an official or agent of the United States, of the District of Columbia, or of a state, commonwealth, or possession of the United States, or any political subdivision of such a state, commonwealth, or possession, and the provisions of paragraph (a) do not apply, the person's entitlement to counsel and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups, provided that such principles are not contrary to the Constitution of the State of New York.

c. Motions to suppress and objections.

(1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence of a prior identification of the accused as a lineup or other identification process that it intends to offer into evidence against the accused at trial.

(2) Motion or objection.

(a) When such evidence has been disclosed, any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move constitutes a waiver of the motion or objection.

(b) If the prosecution intends to offer such evidence and the evidence was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(c) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (a). If such evidence has not been so disclosed prior to arraignment, the requirements of (b) apply.

(3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the lineup or other identification process, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

d. Burden of proof. When a specific motion or objection has been required under subdivision c(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence. When an appropriate objection under this rule has been made by the defense, the issue shall be determined by the military judge as follows:

(1) Right to counsel. When an objection raises the right to presence of counsel under this rule, the prosecution must prove by a preponderance of the evidence that counsel was present at the lineup or that the accused, having been advised of the right to the presence of counsel, voluntarily and intelligently waived that right prior to the lineup. When the military judge determines that identification is the result of a lineup conducted without the presence of counsel or an appropriate waiver, any later identification by one present at such unlawful lineup is also a result thereof unless the military judge determines that the contrary has been shown by clear and convincing evidence.

(2) Unreliable identification. When an objection raises the issue of an unreliable identification, the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances, provided, however, that if the military judge finds the evidence of identification inadmissible under this subdivision, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

e. Defense evidence. The defense may present evidence relevant to the issue of the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the lineup or identification process-giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he/she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

f. Rulings. A motion to suppress or an objection to evidence made prior to plea under this rule shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state his/her essential findings of fact on the record.

g. Effect of guilty pleas. Except as otherwise expressly provided in N.Y.R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under this rule with respect to that offense whether or not raised prior to the plea.

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PART III

SECTION 4

MILITARY RULES OF EVIDENCE
RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

Rule 402. Relevant evidence generally admissible, irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the State of New York as applied to members of the armed forces or state organized militia, the code, these rules, this manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct, exceptions, other crimes.

a. Character evidence generally. Evidence if a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) Character of the accused. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or

evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide or assault case to rebut evidence that the victim was an aggressor.

(3) Character of witness. Evidence of the character of a witness as provided in Military Rules of Evidence 607, 608 and 609.

b. Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of proving character.

a. Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

b. Specific instances of conduct. In cases in which character or a trait of character of a person is in essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

c. Affidavits. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

d. Definitions. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit, routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose such as proving ownership, control, or feasibility of precautionary measures, if controverter, or impeachment.

Rule 408. Compromise and offer to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose such as proving bias or prejudice of a witness, negative a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

a. In general. Except as otherwise provided in this rule, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn,

(2) A plea of nolo contendere,

(3) Any statement made in the course of any judicial inquiry regarding either of the foregoing pleas, or

(4) Any statement made in the course of plea discussions with the convening authority, SJA, trial counsel or other counsel for the Government which does not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record or in the presence of counsel.

b. Definition. A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Nonconsensual sexual offenses, relevance of victim's past behavior.

a. Notwithstanding any other provision of these rules of this manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

b. Notwithstanding any other provision of these rules or this manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subdivisions c(1) and c(2) and is constitutionally required to be admitted, or

(2) Admitted in accordance with subdivision c and is evidence of --

(a) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(b) Past sexual behavior with the accused is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(c) Procedure to determine admissibility.

(1) If the person accused of committing a nonconsensual offense intends to offer under subdivision b evidence of specific instances of the alleged victim's past sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in subdivision b, the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to NYSML, Section 130.39(a).

(3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

d. For purposes of this rule, the term "past sexual behavior' means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged.

e. A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offenses.

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PART III

SECTION 5

MILITARY RULES OF EVIDENCE
PRIVILEGES

Rule 501. General rule.

a. A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) The Constitution of the State of New York;

(3) An Act of Congress applicable to trials by courts-martial;

(4) NYSML.

(5) These rules of this manual; or

(6) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to, or inconsistent with, the State code, these rules, or this manual.

b. A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

(1) Refuse to be a witness,

(2) Refuse to disclose any matter,

(3) Refuse to produce any object or writing, or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

c. The term "person" includes an appropriate representative of the federal Government, a state, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.

d. Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Rule 502. Lawyer-client privilege.

a. General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (1) between the client or the client's representative and the lawyer or the lawyer's representative. (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

b. Definitions. As used in this rule.

(1) A "client" is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces or state organized militia detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation proceedings. The term "lawyer" does not include a member of the armed forces or state organized militia serving in a capacity other than as a JA, legal officer, or law specialist, unless the member: (a) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding; (b) is authorized by the armed forces or state organized militia, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces or state organized militia; or (c) is authorized to practice law and renders professional legal services during off-duty employment.

(3) A "representative" of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication if "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

c. Who may claim the privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

d. Exceptions. There is no privilege under this rule under the following circumstances:

(1) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

(3) Breach of duty by lawyer or client. As to communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer.

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to clergy.

a. General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

b. Definitions. As used in this rule.

(1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of communication or to those reasonably necessary for the transmission of the communication.

c. Who may claim the privilege. The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

Rule 504. Husband-wife privilege.

a. Spousal incapacity. A person has a privilege to refuse to testify against his or her spouse.

b. Confidential communication made during marriage.

(1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) Definition. A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) Who may claim the privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

c. Exceptions.

(1) Spousal incapacity only. There is no privilege under subdivision a when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) Spousal incapacity and confidential communications. There is no privilege under subdivisions a or b:

(a) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse.

(b) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision a, the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other, or with respect to the privilege in subdivision b, the relationship was a sham at the time of the communication.

Rule 505. Classified information.

a. General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security.

b. Definitions. As used in this rule:

(1) Classified information. "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C., Section 2014(y).

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

c. Who may claim the privilege Government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his/her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

d. Action prior to referral of charges. Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information. The convening authority may:

(1) Delete specified items or classified information from the documents made available to the accused,

(2) Substitute a portion or summary of the information for such classified documents,

(3) Substitute a statement admitting relevant facts that the classified information would tend to prove,

(4) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused, or

(5) Withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the national security.

Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

e. Pretrial session. At anytime after referral of charges and prior to arraignment, any party may move for a session under NYSML, Section 130.39(a), to consider matters relating to classified information that may arise in connection with the trial. Following such motion or sua sponte, the military judge promptly shall hold a session under NYSML, Section 130.39(a), to establish the timing of requests for discovery, the provision of notice under subdivision h, and the initiation of the procedure under subdivision i. In addition, the military judge may consider any other matters that relate to classified information or that may promote a fair and expeditious trial.

f. Action after referral of charges. If a claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable

defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

(1) Institute action to obtain the classified information for use by the military judge in making a determination under subdivision 1,

(2) Dismiss the charges,

(3) Dismiss the charges or specifications or both to which the information relates, or

(4) Take such action as may be required in the interest of justice.

If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

g. Disclosure of classified information to the accused.

(1) Protective order. If the Government agrees to disclose classified information to the accused, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(a) Prohibiting the disclosure of the information except as authorized by the military judge,

(b) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed,

(c) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice,

(d) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense,

(e) Requiring the maintenance of legs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense,

(f) Regulating the making and handling of notes taken from material containing classified information, or

(g) Requesting the convening authority to authorize the assignment of Government security personnel and the provision of Government storage facilities.

(2) Limited disclosure. The military judge, upon motion of the Government, shall authorize (a) the deletion of specified items of classified information from documents to be made available to the defendant, (b) the substitution of a portion or summary of the information for such classified documents, or (c) the substitution of a statement admitting relevant facts that the classified information would tend to prove, information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

(3) Disclosure at trial of certain statements previously made by a witness:

(a) Scope. After a witness called by the Government has testified on direct examination, the military judge, on motion of the accused, may order production of statements in the possession of the State under N.Y.R.C.M. 914. This provision does not preclude discovery or assertion of a privilege otherwise authorized under these rules or this manual.

(b) Closed session. If the privilege in this rule is invoked during consideration of a motion under N.Y.R.C.M. 914, the Government may deliver such statement for the inspection only by the military judge in camera and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the Government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise the portion from the statement. With such material excised, the military judge shall then direct delivery of such statement to the accused for use by the accused. If the military judge finds that such portion of the statement is inconsistent with the witness' testimony, the Government may move for a proceeding under subdivision i.

(4) Record trial. If, under this subdivision, any information is withheld from the accused, the accused objects to such withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be sealed and attached to the record of trial as an appellate exhibit. Such material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

h. Notice of the accused's intention to disclose classified information.

(1) Notice by the accused. If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given within the time specified by the military judge under subdivision e or, if no time has been specified, prior to arraignment of the accused.

(2) Continuing duty to notify. Whenever the accused learns of classified information not covered by a notice under (1) that the accused reasonably expects to disclose at any such proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) Content of notice. The notice required by this subdivision shall include a brief description of the classified information.

(4) Prohibition against disclosure. The accused may not disclose any information known or believed to be classified until notice has been given under this subdivision and until the Government has been afforded a reasonable opportunity to seek a determination under subdivision i.

(5) Failure to comply. If the accused fails to comply with the requirements of this subdivision, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

i. In camera proceedings for cases involving classified information.

(1) Definition. For purposes of this subdivision, an "in camera proceeding" is a session under NYSML, Section 130.39(a), from which the public is excluded.

(2) Motion for in camera proceeding. Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an in camera proceeding concerning the use of additional classified information.

(3) Demonstration of national security nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information for examination only by the military judge and shall demonstrate by affidavit that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(4) In camera proceeding.

(a) Procedure. Upon finding that the Government has met the standard set forth in subdivision i(3) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following the briefing and argument by the parties in the in camera proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

(b) Standard. Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.

(c) Ruling. Unless the military judge makes a written determination that the information meets the standard set forth in (b), the information may not be disclosed or

otherwise elicited at a court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(d) Alternatives to full disclosure. If the military judge makes a determination under this subdivision that would permit disclosure of the information or if the Government elects not to contest the relevance, necessity, and admissibility of any classified information, the Government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion of summary to be used in lieu of the information. The military judge shall order that such statement, portion, or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

(e) Sanctions. If the military judge determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interest of justice requires. Such an order may include an order:

(i) Striking or precluding all or part of the testimony of a witness,

(ii) Declaring a mistrial,

(iii) Finding against the Government on any issue as to which the evidence is relevant and material to the defense,

(iv) Dismissing the charges, with or without prejudice, or

(v) Dismissing the charges or specifications or both which the information relates.

Any such order shall permit the Government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

j. Introduction of classified information.

(1) Classification status. Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(2) Precautions by the military judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

(3) Contents of writing, recording, or photograph. The military judge may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

(4) Taking of testimony. During the examination of a witness, the Government may object to any question or line of inquiry that may require the witness to disclose classification information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the Government to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(5) Closed session. If counsel for all parties, the military judge, and the members have received appropriate security clearances, the military judge may exclude the public during that portion of the testimony of a witness that discloses classified information.

(6) Record of trial. The record of trial with respect to any classified matter will be prepared under N.Y.R.C.M. 1103(h) and 1104(b)(D).

k. Security procedures to safeguard against compromise of classified information disclosed to courts-martial. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.

Rule 506. Government information other than classified information.

a. General rule of privilege. Except where disclosure is required by an Act of Congress, Government information is privileged from disclosure if disclosure would be detrimental to the public interest.

b. Scope. "Government information" includes official communication and documents and other information within the custody or control of the Federal Government. This rule does not apply to classified information (Military Rules of Evidence 505) or to the identity of an informant (Military Rules of Evidence 507).

c. Who may claim the privilege. The privilege may be claimed by the head of the executive or military department or Government agency concerned. The privilege for investigations of the Inspectors General may be claimed by the authority ordering the investigation or any superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his/her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

d. Action prior to referral of charges. Prior to referral of charges, the Government shall respond in writing to a request for Government information if the privilege in this rule is claimed for such information. The Government shall:

(1) Delete specified items of Government information claimed to be privileged from documents made available to the accused,

(2) Substitute a portion or summary of the information for such documents,

(3) Substitute a statement admitting relevant facts that the Government information would tend to prove,

(4) Provide the document subject to conditions similar to those set forth in subdivision g of this rule, or

(5) Withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the public interest.

e. Action after referral of charges. If a claim of privilege has been made under this rule with respect to Government information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

(1) Institute action to obtain the information for use by the military judge in making a determination under subdivision i,

(2) Dismiss the charges,

(3) Dismiss the charges or specifications or both to which the information relates, or

(4) Take other action as may be required in the interest of justice.

If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

f. Pretrial session. At any time after referral of charges and prior to arraignment any party may move for a session under NYSML, Section 130.39(a), to consider matters relating to Government information that may arise in connection with the trial. Following such motion, or sua sponte, the military judge promptly shall hold a pretrial session under NYSML, Section 130.39(a), to establish the timing of requests for discovery, the provision of notice under subdivision h, and the initiation of the procedure under subdivision i. In addition, the military judge may consider any other matters that relate to Government information or that may promote a fair and expeditious trial.

g. Disclosure or Government information to the accused. If the Government agrees to disclose Government information to the accused subsequent to a claim of privilege under this rule, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(1) Prohibiting the disclosure of the information except as authorized by the military judge,

(2) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed upon reasonable notice,

(3) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice,

(4) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the Government information in connection with the preparation of the defense,

(5) Regulating the making and handling of notes taken from material containing Government information, or

(6) Requesting the convening authority to authorize the assignment of Government security personnel and the provision of Government storage facilities.

h. Prohibition against disclosure. The accused may not disclose any information known or believed to be subject to a claim of privilege under this rule until the Government has been afforded a reasonable opportunity to seek a determination under subdivision i.

i. In camera proceedings.

(1) Definition. For the purpose of this subdivision, an "in camera proceeding" is a closed session under NYSML, Section 130.39(a).

(2) Motion for in camera proceeding. Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any Government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege may grant the Government leave to move for an in camera proceeding concerning the use of additional Government information.

(3) Demonstration of public interest nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall demonstrate through submission of affidavits and the information for examination only by the military judge that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(4) In camera proceeding.

(a) Procedure. Upon finding that the disclosure of some or all of the information submitted by the Government under subsection (1) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the specific information of concern to the Government when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding, the military judge

shall determine whether the information may be disclosed at the court-martial proceeding at which disclosure is sought, the military judge shall rule prior to commencement of the relevant proceeding.

(b) Standard. Government information is subject to disclosure under the subdivision if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence of the accused and otherwise inadmissible in the court-martial proceeding.

(c) Ruling. Unless the military judge makes a written determination that the information is not subject to disclosure under the standard set forth in (b), the information may be disclosed at the court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(d) Sanction. If the military judge makes a determination under this subdivision that permits disclosure of the information and the Government continues to object to disclosure of the information, the military judge shall dismiss the charges or specifications or both to which the information relates.

j. Introduction of Government information subject to a claim of privilege.

(1) Precautions by military judge. In order to prevent unnecessary disclosure of Government information after there has been a claim of privilege under this rule, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the Government information contained therein.

(2) Contents of writing, recording, or photograph. The military judge may permit proof of the contents of a writing, recording, or photograph that contains Government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

(3) Taking of testimony. During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose Government information not previously found relevant and necessary to the defense if such information has been or is reasonably likely to be the subject of a claim privilege under this rule. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any Government information. Such action may include

requiring the Government to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

k. Procedures to safeguard against compromise of Government information disclosed to courts-martial. The Secretary of Defense may prescribe procedures for protection against the compromise of Government information submitted to courts-martial and appellate authorities after a claim of privilege.

Rule 507. Identity of informant.

a. Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime. Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent disclosure of the informant's identity.

b. Who may claim the privilege. The privilege may be claimed by an appropriate representative of the State, regardless of whether information was furnished to an officer of the United States or a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

c. Exceptions.

(1) Voluntary disclosures, informant as witness. No privilege exists under this rule: (A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action, or (B) if the informant appears as a witness for the prosecution.

(2) Testimony on the issue of guilt or innocence. If a claim of privilege has been made under this rule, the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or

from other showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interest of justice.

(3) Legality of obtaining evidence. If a claim of privilege has been made under this rule with respect to a motion under Military Rules of Evidence 311, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the Constitution of the United States, or the State of New York as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interest of justice.

d. Procedures. If a claim of privilege has been made under this rule, the military judge may make any order required by the interest of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

Rule 508. Political vote.

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 509. Deliberations of courts and juries.

Except as provided in Military Rules of Evidence 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

Rule 510. Waiver of privilege by voluntary disclosure.

a. A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or person's

predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

b. Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his/her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he/she may be entitled pertaining to the confidential matter or communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege.

a. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

b. The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary and in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege, instruction.

a. Comment or inference not permitted.

(1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn there from.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn there from except when determined by the military judge to be required by the interest of justice.

b. Claiming privilege without knowledge of members. In a trial before a court-martial with members, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. The subdivision does not apply to a SPCM without a military judge.

c. Instruction. Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn there from except as provided in subdivision a(2).

PART III

SECTION 6

MILITARY RULES OF EVIDENCE
WITNESSES

Rule 601. General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules.

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Military Rules of Evidence 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath of affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

Rule 605. Competency of military judge as witness.

a. The military judge presiding at the court-martial may not testify in that court-martial as a witness. No objection need be made to preserve the point.

b. This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

Rule 606. Competency of court member as witness.

a. At the court-martial. A member of the court-martial may not testify as a witness before the other members in the trial of the case in which the member is sitting. If the member is called to testify, the opposing party, except in a SPCM with a military judge, shall be afforded an opportunity to object out of the presence of the members.

b. Inquiry into validity of findings or sentence. Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the members or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was properly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of character, conduct, and bias of witness.

a. Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

b. Specific instances of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Military Rules of Evidence 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

c. Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Rule 609. Impeachment by evidence of conviction of crime.

a. General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death, or imprisonment in excess of one year under the law under which the witness was convicted, and the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, or (2) involved dishonesty or false statement, regardless of the punishment.

b. Time limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

c. Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

d. Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that the admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

e. Pendency of appeal. The pendency of an appeal there from does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

f. Definition. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation.

a. Control by the military judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

b. Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

c. Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness or a witness identified with an adverse party, interrogation may be leading questions.

Rule 612. Writing used to refresh memory.

If a witness uses a writing to refresh his/her memory for the purpose of testifying, either

(1) While testifying, or

(2) Before testifying, if the military judge determines it is necessary in the interest of justice.

An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military

judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in the discretion of the military judge it is determined that the interest of justice so required, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this manual.

Rule 613. Prior statements of witnesses.

a. Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him/her at that time, but on request the same shall be shown or disclosed to opposing counsel.

b. Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Military Rules of Evidence 801(d)(2).

Rule 614. Calling and interrogation of witnesses by the court-martial.

a. Calling by the court-martial. The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules of this manual.

b. Interrogation by the court-martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

c. Objections. Objections to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

Rule 615. Exclusion of witnesses.

At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order sua sponte. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the State designated as representative of the State by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case.

PART III

SECTION 7

MILITARY RULES OF EVIDENCE
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue.

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court appointed experts.

a. Appointment and compensation. The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses. The employment and compensation of expert witnesses is governed by N.Y.R.C.M. 703.

b. Disclosure of employment. In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

c. Accused's experts of own selection. Nothing in this rule limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense.

PART III

SECTION 8

MILITARY RULES OF EVIDENCE
HEARSAY

Rule 801. Definitions.

The following definitions apply under this section:

a. Statement. A "statement" is (1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

b. Declarant. A "declarant" is a person who makes a statement.

c. Hearsay. "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

d. Statements, which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, of (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by these rules or by an Act of Congress applicable in trials by court-martial.

Rule 803. Hearsay exceptions, availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it

was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the Government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

(9) Records of vital statistics. Record or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Military Rule of Evidence 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious Organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact obtained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious Organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a time thereafter.

(13) Family records. Statements of facts concerning personal or family history contained in family bibles, genealogies, charts, engraving on rings, inscription on family portraits, engraving on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, directories, lists (including Government price lists), or other published compilations generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treaties. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of the person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning the person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death, or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstances guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. Hearsay exceptions; declarant unavailable.

a. Definitions of unavailability. "Unavailability as a witness" includes situations in which the declarant

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of hearsay exception under subdivision b(2), (3), or (4), the declarant's attendance or testimony) by process for other reasonable means; or

(6) is unavailable within the meaning of NYSML, Section 130.49(d).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

b. Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by NYSML, Section 103.32, is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

(2) Statement under belief of impending death. In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the military judge determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative of the point for which it is offered than any other evidence which the proponent can procure through reasonable

efforts, and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Military Rules of Evidence 801(d)(2)(C), (D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

PART III

SECTION 9

MILITARY RULES OF EVIDENCE
AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification.

a. General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

b. Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule.

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Non-expert opinion on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens, which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including

self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or fled in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or date compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by an Act of Congress, by rules prescribed by the Supreme Court pursuant to statutory authority, or by applicable regulations prescribed pursuant to statutory authority.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal zone, or Trust Territory of the Pacific Islands, or a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution of attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificates of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution of attestation. A final certification may be made by a secretary of embassy or legation, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report of entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraphs (1), (2), or (3) of this rule or complying with any Act of Congress, rule prescribed by the Supreme Court pursuant to statutory authority, or an applicable regulation prescribed pursuant to statutory authority.

(5) Documents or records of the United States or State of New York accompanied by attesting certificates. Documents or records kept under the authority of the United States or State of New York by any department, bureau, agency, office, or court thereof when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

(6) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(7) Newspapers and periodicals. Printed materials purporting to be issued by public authority.

(8) Trade inscriptions and the like. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(9) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(10) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(11) Presumptions under Acts of Congress and regulations. Any signature, document, or other matter declared by an Act of Congress or by applicable regulation prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

PART III

SECTION 10

MILITARY RULES OF EVIDENCE
CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions.

For purposes of this section the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, x-ray films, videotapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print there from. If data are stored in a computer, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduce the original.

Rule 1002. Requirement of an original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, this manual, or by an Act of Congress.

Rule 1003 . Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Originals not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be provided by copy, certified as correct or attested to in accordance with Military Rules of Evidence 902 or testified to be correct by a witness who has compared it with the original. If a copy, which complies with the foregoing, cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The military judge may order that they be produced in court.

Rule 1007. Testimony on written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the non-production of the original.

Rule 1008. Functions of military judge and members.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the military judge to determine in accordance with the provisions of Military Rules of Evidence 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at trial is the original; or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

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PART III

SECTION 11
MILITARY RULES OF EVIDENCE
MISCELLANEOUS RULES

Rule 1101. Applicability of rules.

a. Rules applicable. Except as otherwise provided in this manual, these rules apply generally to all courts-martial, including SCM; to proceedings pursuant to Section 103.39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

b. Rules of privilege. The rules with respect to privileges in Sections 3 and 4 apply at all states of all actions, cases, and proceedings.

c. Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under N.Y.R.C.M. 1001 and otherwise as provided in this manual.

d. Rules inapplicable. These rules (other than with respect to privileges) do not apply in investigative hearings pursuant to NYSML, Section 130.32; proceedings for vacation of suspension of sentence pursuant to NYSML, Section 130.70; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this manual and not listed in sub-division a.

Rule 1102. Amendments.

Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President or The Adjutant General.

Rule 1103. Title.

These rules may be known and cited as the Military Rules of Evidence.

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PART IV

PUNITIVE ARTICLES

Introduction.

Paragraphs 1 and 2 discuss the two articles of the code that are located in the punitive article part of the code, but which are not punitive as such: NYSML, Section 130.73, principals; and NYSML, Section 130.75, lesser included offenses.

N.Y.R.C.M. 307 prescribes rules for referral of charges. The discussion under that rule explains how to allege violations under the code using the format of charge and specification.

Beginning with paragraph 3, the punitive articles of the code are discussed using the following sequence:

a. Text of the article.

b. Elements of the offense or offenses.

c. Explanation.

d. Lesser-included offenses.

e. Sample specifications.

The maximum punishment for each offense under the code is that which is the jurisdictional limit of the court-martial before which the case is being heard. See N.Y.R.C.M. 1002.

1. NYSML, Section 130.73 - Principals.

a. Text.

"Any person subject to this code who -

"(1) commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission; or

"(2) causes an act to be done which if directly performed by him would be punishable by this code; is a principal."

b. Explanation.

(1) Purpose. NYSML, Section 130.73, does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of the offense as done who commits it directly, and may be punished to the same extent.

NYSML, Section 130.73, eliminates the common law distinctions between principal in the first degree ("perpetrator"); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime - commonly known as an "aider and abettor"); and accessory before the fact (one who aids, counsels, commands, encourages the commission of an offense and who is not present at the scene of the crime). All of these are now "principals."

(2) Who may be liable for an offense?

(a) Perpetrator. A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a soldier shot a person who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).

(b) Other parties. If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose or design.

One who, without knowledge of the criminal venture of plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. See the parenthetical in the examples in paragraph b(2)(a) above. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) Presence.

(a) Not necessary. Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal. For example, one who, knowing that a person intends to shoot another person and intending that such an assault be carried out, provides the person with a pistol, is guilty of assault when the offense is committed, even though not present at the scene.

(b) Not sufficient. Mere presence at the scene of a crime does not make one a principal unless the requirements of paragraphs 1b(2)(a) or (b) have been met.

(4) Parties whose intent differs from the perpetrators. When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or and "other party" to the crime. It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator. For example, when a homicide is committed, the perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer.

(5) Responsibility for other crimes. A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused that is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, or murder. (See also paragraph 5 concerning liability for offenses committed by co-conspirators.)

(6) Principals independently liable. One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) Withdrawal. A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

(c) The withdrawal must be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense.

2. NYSML, Section 130.75 - Conviction of lesser-included offense.

a. Text.

"An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit ether the offense charged or an offense necessarily included therein."

b. Explanation.

(1) In general. A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, larceny as a lesser included offense of robbery);

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious; or

(c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, absence without leave is a lesser-included offense of desertion).

The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged.

(2) Multiple lesser-included offenses. When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged.

(3) Findings of guilty to a lesser included offense. A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser-included offense by the process of exception and substitution. The court-martial may delete the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. If a court-martial finds an accused guilty of a lesser-included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of NYSML, Section 130.75.

(4) Specific lesser included offenses. Specific lesser-included offenses, if any, are listed for each offense discussed in this part, but the lists are not all-inclusive.

3. NYSML, Section 130.74 - Accessory after the fact.

a. Text.

"Any person subject to this code who, knowing that an offense punishable by this code has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."

b. Elements.

(1) That an offense punishable by the code was committed by a certain person;

(2) That the accused knew that this person had committed such offense;

(3) That thereafter the accused received, comforted, or assisted the offender; and

(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. Explanation.

(1) In general. The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

(2) Failure to report offense. The mere failure to report a known offense will not make one an accessory after the fact. Such failure may violate a general order or regulation, however, and thus constitute an offense under NYSML, Section 130.88. (See paragraph 16) If the offense involved is a serious offense, failure to report it may constitute the offense of misprision of a serious offense under NYSML, Section 130.15. (See paragraph 95)

(3) Offense punishable by the code. The term "offense punishable by this code" in the text of the article means any offense described in the code.

(4) Status of principal. The principal who committed the offense in question need not be subject to the code, but the offense committed must be punishable by the code.

(5) Conviction or acquittal of principal. The prosecution must prove that a principal committed the offense to which the accused is allegedly an accessory after the fact. However, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted as an accessory after the fact despite the acquittal in a separate trial of the principal whom the accused allegedly comforted, received, or assisted.

(6) Accessory after the fact is not a lesser-included offense. The offense of being an accessory after the fact is not a lesser-included offense of the primary offense.

(7) Actual knowledge. Actual knowledge is required but may be proved by circumstantial evidence.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), knowing that (at/on board - location), on or about _____ 20__ , _____ had committed an offense punishable by the New York Code of Military Justice, to wit: _____, did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____ 20__, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said _____, (receive) (comfort) (assist) the said _____ by _____ _____.

4. NYSML, Section 130.76 - Attempts.

a. Text.

"(a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

"(b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

"(c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

b. Elements.

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. Explanation.

(1) In general. To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) More than preparation. Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to apply a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) Factual impossibility. A person who purposely engages in conduct, which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reached into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) Solicitation. Soliciting another to commit an offense does not constitute an attempt. See paragraph 6 for a discussion of NYSML, Section 130.78, Solicitation.

(5) Attempts not under NYSML, Section 130.76. While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

(a) NYSML, Section 130.81 - Desertion.

(b) NYSML, Section 130.90 - Mutiny or sedition.

(c) NYSML, Section 130.96 - Subordinate compelling.

(d) NYSML, Section 130.100 - Aiding the enemy.

(6) Regulations. An attempt to commit conduct, which would violate a lawful general order or regulation under NYSML, Section 130.88, (see paragraph 16), should be charged under NYSML, Section 130.76. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. Lesser-included offenses. If the accused were charged with an attempt under NYSML, Section 130.76, and the offense attempted has a lesser-included offense, then the offense of attempting to commit the lesser-included offense would ordinarily be a lesser-included offense to the charge of attempt. For example, if an accused were charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser-included offense, although it, like the attempted larceny, would be a violation of NYSML, Section 130.76.

e. Sample specification.

In that _____ (personal jurisdiction data) did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____ 20__, attempt to (describe offense with sufficient detail to include expressly or be necessary implication every element).

5. NYSML, Section 130.77 - Conspiracy.

a. Text.

"Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

b. Elements.

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. Explanation.

(1) Co-conspirators. Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of

another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

(2) Agreement. The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

(3) Object of the agreement. The object of the agreement must, at least in part, involve the commission of one or more offenses under the code. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery.

(4) Overt act.

(a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

(b) The overt act need not be in itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

(c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) Liability for offenses. Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.

(6) Withdrawal. A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. A conspirator who effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the abandonment or withdrawal. However, a person who has abandoned or withdrawn from the conspiracy is not liable for offenses committed thereafter by the remaining conspirators. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) Factual impossibility. It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, or that the conspirators were not physically able to accomplish their intended object.

(8) Conspiracy as a separate offense. A conspiracy to commit an offense is a separate and distinct offense from the offense, which is the object of the conspiracy, and both the conspiracy and the consummated offense, which was its object, may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act, which is an element of the conspiracy to commit that offense.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, conspire with _____ (and _____) to commit an offense under the New York Code of Military Justice, to wit: and in order to effect the object of the conspiracy the said _____ (and _____) did _____.

6. NYSML, Section 130.78 - Solicitation.

a. Text.

"(a) Any person subject to this code who solicits or advises another or others to desert in violation of Section 130.90 shall or mutiny in violation of Section 130.90 shall,

if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commissions of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

"(b) Any person subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of Section 130.95 or sedition in violation of Section 130.90 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit any of the four offenses named in NYSML, Section 130.78, and

(2) That the accused did so with the intent that the offense actually be committed.

[Note: If the offense solicited or advised was attempted or committed, add the following element.]

(3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

c. Explanation.

(1) Instantaneous offense. The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit any of the four offenses names in NYSML, Section 130.78. It is not necessary that the person or persons solicited or advised agree to act upon the solicitation or advice.

(2) Form of solicitation. Solicitation may be by means other than word of mouth or writing. Any act or conduct, which reasonably may be construed as a serious request or advice to commit one of the four offenses names in NYSML, Section 130.78, may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) Solicitations in violation of NYSML, Section 130.115. Solicitation to commit offenses other than violations of the four offenses named in NYSML, Section 130.78, may be charged as violations of NYSML, Section 130.115. (See paragraph 105). However, some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under NYSML, Sections 130.78 and 130.115. When the accused's act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense in violation of NYSML, Section 130.115.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) For soliciting desertion (NYSML, Section 130.81) or mutiny (NYSML, Section 130.90).

In that _____ (personal jurisdiction data), did (at/on board - location), on or about _____ 20__, (a time or war) by (here state the manner and form of solicitation or advice), (solicit) (advise) _____ (and _____) to (desert in violation of NYSML, Section 130.81) (mutiny in violation of NYSML, Section 130.90 ([Note: If the offense solicited or advised is attempted or committed, add the following at the end of the specification:] and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, 20__, (at/on board - location), committed by _____ (and _____).

(2) For soliciting an act of misbehavior before the enemy (NYSML, Section 130.95) or sedition (NYSML, Section 130.90).

In that _____ (personal jurisdiction data) did, (at/on board - location), on or about _____, 20__, (a time or war) by (here state the manner and form of solicitation or advice), (solicit), advise), _____ (and _____) to commit (an act of misbehavior before the enemy in violation of NYSML, Section 130.95) (sedition in violation of NYSML, Section 130.90). [Note: If the offense solicited or advised is committed, add the following at the end of the specification:] and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, 20__, (at/on board - location), committed by _____ (and _____).

7. NYSML, Section 130.79 - Fraudulent enlistment, appointment, or separation.

a. Text.

"Any person who -

"(1) procures his own enlistment or appointment in the Organized militia by means of knowingly false representations or deliberate concealment as to his qualifications for such enlistment or appointment and receives pay or allowances hereunder; or

"(2) procures his own separation from the Organized militia by knowingly false representations or deliberate concealment as to his eligibility for that separation;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Fraudulent enlistment or appointment.

(a) That the accused was enlisted or appointed in a force of the Organized militia;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;

(c) That the accused's enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and

(d) That under this enlistment or appointment the accused received pay or allowances or both.

(2) Fraudulent separation.

(a) That the accused was separated from a force of the Organized militia;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts about the accused's eligibility for separation; and

(c) That the accused's separation was obtained or procured by that knowingly false representation or deliberate concealment.

c. Explanation.

(1) In general. A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications or disqualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer.

(2) Receipt of pay or allowances. A member of a force of the Organized militia who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under NYSML, Section 130.79, only if that member has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the Government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. The receipt of pay or allowances may be proved by circumstantial evidence.

(3) One offense. One, who procures one's own enlistment, appointment, or separation by several misrepresentations or concealment as to qualifications for the one enlistment, appointment, or separation so procured, commits only one offense under NYSML, Section 130.79.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) For fraudulent enlistment or appointment.

In that _____ (personal jurisdiction data), did, (at/on board - location), on or about _____, 20__, by means of [knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were concealed)], procure himself/herself to be (enlisted as a _____) in the (here state the force of the

Organized militia in which the accused procured the enlistment or appointment), and did thereafter, (at/on board - location), receive (pay) (allowances) (pay and allowances) under the (enlistment) (appointment) so procured.

(2) For fraudulent separation.

In that _____ (personal jurisdiction data), did, (at/on board - location), on or about _____, 20__, by means of [knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here the fact or facts concealed which made the accused ineligible for separation)], procure himself/herself to be separated from the (here state the force of the Organized militia from which the accused procured his/her separation).

8. NYSML, Section 130.80 - Effecting unlawful enlistment, appointment, or separation.

a. Text.

"Any person subject to this code who effects an enlistment or appointment in or a separation from the Organized militia of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it prohibited by law, regulation, or order shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused effected the enlistment, appointment, or separation of the person names;

(2) That this person was ineligible for this enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and

(3) That the accused knew of the ineligibility at the time of the enlistment, appointment, or separation.

c. Explanation. It must be proved that the enlistment, appointment, or separation was prohibited by law, regulation, or order when affected and that the accused then knew that the person enlisted, appointed, or separated was ineligible for the enlistment, appointment, or separation.

d. Lesser-included offense. NYSML, Section 130.76 - attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board - location), on or about _____, 20__, effect [the (enlistment) (appointment) of _____ as a _____ in (here state the force of the Organized militia in which the person was enlisted or appointed)] [the separation of _____ from (here state the force of the Organized militia from which the person was separated)], then well knowing that the said _____ was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

9. NYSML, Section 130.81 - Desertion.

a. Text.

"(a) Any member of the Organized militia who -

"(1) without proper authority goes or remains absent from his place of service, Organization, or place of duty with intent to remain away there from permanently; or

"(2) quits his unit or Organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or

"(3) without being regularly separated from one of the forces of the Organized militia enlists or accepts an appointment in the same or another one of the forces of the Organized militia without fully disclosing the fact that he has not been so regularly separated;

"(4) is guilty of desertion.

"(b) Any officer of the Organized militia who, having tendered his resignation and prior to due notice of the acceptance of same, quits his post or proper duties without leave and with intent to remain away there from permanently is guilty of desertion.

"(c) Any person found guilty of desertion or attempt to desert shall be punished, as a court-martial may direct."

b. Elements.

(1) Desertion with intent to remain away permanently.

(a) That the accused absented himself or herself from his or her place of service, Organization or place of duty;

(b) That such absence was without authority;

(c) That the accused, at the time the absence began or at some time during the absence, intended to remain away form his or her unit, Organization, or place of duty permanently; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element.]

(e) That the accused's absence was terminated by apprehension.

(2) Desertion with intent to avoid hazardous duty or to shirk important service.

(a) That the accused quit his or her unit, Organization, or other place of duty;

(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;

(c) That the duty to be performed was hazardous or the service important;

(d) That the accused knew that he or she would be required for such duty or service; and

(e) That the accused remained absent until the date alleged.

(3) Desertion before notice of acceptance of resignation.

(a) That the accused was a commissioned officer of a force of the Organized militia, and had tendered his or her resignation;

(b) That before he or she received notice of the acceptance of the resignation, the accused quit his or her post or proper duties;

(c) That the accused did so with the intent to remain away permanently from his or her post or proper duties; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element.]

(e) That the accused's absence was terminated by apprehension.

(4) Attempted desertion.

(a) That the accused did a certain overt act;

(b) That the act was done with the specific intent to desert;

(c) That the act amounted to more that mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of desertion.

c. Explanation.

(1) Desertion with intent to remain away permanently.

(a) In general. Desertion with intent to remain away permanently is complete when the person absents himself or herself without authority from his or her unit, Organization, or place of duty, with the intent to remain away there from permanently. A prompt repentance and return, while material in extenuation, is no defense. It is not necessary that the person be absent entirely from military jurisdiction and control.

(b) Absence without authority - inception, duration, termination. (See paragraph 10.c)

(c) Intent to remain away permanently.

(i) The intent to remain away permanently from the unit, Organization, or place of duty may be formed any time during the unauthorized absence. The intent need not exist throughout the absence, or for any particular period of time, as long as it exists at some time during the absence.

(ii) The accused must have intended to remain away permanently from the unit, Organization, or place of duty. When the accused had such intent, it is not defense that the accused also intended to report for duty elsewhere, or to enlist or accept an appointment in the same or a different armed force.

(iii) The intent to remain away permanently may be established by circumstantial evidence. Among the circumstances from which an inference may be drawn that an accused intended to remain absent permanently or that the period of absence was lengthy; that the accused attempted to, or did, dispose of uniforms or other military property; that the accused purchased a ticket for a distant point or was arrested, apprehended, or surrendered a considerable distance from the accused's station; that the accused could have conveniently surrendered to military control but did not; that the accused was dissatisfied with the accused's unit, ship, or with military service; that the accused made remarks indicating an intention to desert; that the accused was under charges or had escaped from confinement at the time of the absence; that the accused made preparations indicative of an intent not to return (for example, financial arrangements); or that the accused enlisted or accepted an appointment in the same or another force of the Organized militia without disclosing the fact that the accused had not been regularly separated, or entered any foreign armed service without being authorized by the State. On the other hand, the following are included in the circumstances which may tend to negate an inference that the accused intended to remain away permanently: previous long and excellent; that the accused left valuable personal property in the unit or on the ship; or that the accused was under the influence of alcohol or drugs during the absence. These lists are illustrative only.

(iv) Entries on documents, such as personnel accountability records, which administratively refer to an accused as a "deserter", are not evidence of intent to desert.

(v) Proof of, or a plea of guilty to, and unauthorized absence, even of extended duration, does not, without more, prove guilt of desertion.

(d) Effect of enlistment or appointment in the same or a different force of the Organized militia. NYSML, Section 130.81(a)(3), does not state a separate offense. Rather, it is a rule of evidence by which the prosecution may prove intent to remain away permanently. Proof of an enlistment or acceptance of an appointment in a service without disclosing a pre-existing duty status in the same or a different service provides the basis from which an inference of intent to permanently remain away from the earlier unit, Organization, or place of duty may be drawn. Furthermore, if a person, without being regularly separated from one of the forces of the Organized militia enlists or accepts an appointment in the same or another force, the person's presence in the military service under such an enlistment or appointment is not a return to military control and does not terminate any desertion or absence without authority from the earlier unit or Organization, unless the facts of the earlier period of service are known to military authorities. If a person, while in desertion, enlists or accepts an appointment in the same or another force of the Organized militia, and deserts while serving that enlistment or appointment, the person may be tried and convicted for each desertion.

(2) Quitting unit, Organization, or place of duty with intent to avoid hazardous duty or to shirk important service.

(a) Hazardous duty or important service. "Hazardous duty" or "important service" may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power, in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches are not ordinarily "hazardous duty or important service." Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide.

(b) Quits. "Quits" in NYSML, Section 130.81 means, "goes absent without authority."

(c) Actual knowledge. NYSML, Section 130.81(a)(2), requires proof that the accused actually knew of the hazardous duty or important service. Actual knowledge may be proved by circumstantial evidence.

(3) Attempting to desert. Once the attempt is made, the fact that the person deserts, voluntarily or otherwise, does not cancel the offense. The offense is complete, for example, if the person, intending to desert, hides in an empty freight car on a military reservation, intending to escape by being taken away in the car. Entering the car with the intent to desert is the overt act. For a more detailed discussion of attempts, see paragraph 4. For an explanation concerning intent to remain away permanently, see subparagraph 9c(1)(c).

(4) Prisoner with executed punitive discharge. A prisoner whose dismissal or dishonorable or bad-conduct discharge has been executed is not a "member of the Organized militia" within the meaning of NYSML, Section 130.81, or NYSML, Section 130.82, although the prisoner may still be subject to the code.

d. Lesser-included offense. NYSML, Section 130.82 - Absence without leave.

e. Sample specifications.

(1) Desertion with intent to remain away permanently.

In that _____ (personal jurisdiction data), did, on or about _____, 20__, (a time of war) without authority and with intent to remain away there from permanently, absent himself/herself from his/her (place of service) (Organization) (place of duty), to wit: _____, located at (_____), and did remain so absent in desertion until (he/she was apprehended) on or about _____, 20__.

(2) Desertion with intent to avoid hazardous duty or shirk important service.

In that _____ (personal jurisdiction data), did, on or about _____, 20__, (a time of war) (avoid hazardous duty) (shirk important service), namely: _____, quit his/her (unit) (Organization) (place of duty), to wit:_____, located at (_____), and did remain so absent in desertion until on or about _____, 20__.

(3) Desertion prior to acceptance of resignation.

In that _____ (personal jurisdiction data) having tendered his/her resignation and prior to due notice of the acceptance of the same, did, on or about _____, 20__, (a time of war) without leave and with intent to remain away there from permanently, quit his/her (post) (proper duties), to wit: _____ _____, and did remain so absent in desertion until (he/she was apprehended) on or about _____, 20__.

(4) Attempted desertion.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (a time of war) attempt to [absent himself/herself from his/her (unit) (Organization) (place of duty) to wit:_____, without authority and with intent to remain away there from permanently] [quit his/her (unit) (Organization) (place of duty), to wit: _____, located at _____, with intent to (avoid hazardous duty) (shirk important service) namely _____].

10. NYSML, Section 130.82 - Absence without leave.

a. Text.

"Any person subject to this code who, without proper authority -

"(1) fails to go to his appointed place of duty at the time prescribed; or

"(2) goes from that place; or

"(3) absents himself or remains absent from his unit, Organization, or place of duty at which he is required to be at the time prescribed;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Failure to go to appointed place of duty.

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, failed to go to the appointed place of duty at the time prescribed.

(2) Going from appointed place of duty.

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, went from the appointed place of duty after having reported at such place.

(3) Absence from unit, Organization, or place of duty.

(a) That the accused absented himself or herself from his or her unit, Organization, or place of duty at which he or she was required to be;

(b) That the absence was without authority from anyone competent to give him or her leave; and

(c) That the absence was for a certain period of time.

[Note: If the absence was terminated by apprehension, add the following element]

(d) That the absence was terminated by apprehension.

(4) Abandoning watch or guard.

(a) That the accused was a member of a guard, watch, or duty;

(b) That the accused absented himself or herself from his or her guard, watch, or duty section;

(c) That the absence of the accused was without authority; and

(d) That the accused intended to abandon his or her guard, watch, or duty section.

(5) Absence from unit, Organization, or place of duty with intent to avoid maneuvers or field exercises.

(a) That the accused absented himself or herself from his or her unit, Organization, or place of duty at which he or she was required to be;

(b) That the absence of the accused was without authority;

(c) That the absence was for a certain period of time;

(d) That the accused knew that the absence would occur during a part of a period of maneuvers or field exercises; and

(e) That the accused intended to avoid all or part of a period of maneuvers or field exercises.

c. Explanation.

(1) In general. This article is designed to cover every case not elsewhere provided for in which any member of the Organized militia is through the member's own fault not at the place where the member is required to be at a prescribed time. It is not necessary that the person be absent entirely from military jurisdiction and control. The first part of this article - relating to the appointing place of duty - applies whether the place is appointed as a rendezvous for several or for one only.

(2) Actual knowledge. The offenses of failure to go to and going from appointed place of duty require proof that the accused actually knew of the appointed time and place of duty. The offense of absence from unit, Organization, or place of duty with intent to avoid maneuvers or field exercises requires proof that the accused actually knew that the absence would occur during a part of a period or maneuvers or field exercises. Actual knowledge may be proved by circumstantial evidence.

(3) Intent. Specific intent is not an element of unauthorized absence. Specific intent is an element for certain aggravated unauthorized absences.

(4) Aggravated forms of unauthorized absence. There are variations of unauthorized absence under NYSML, Section 130.83(3), which are more serious because of aggravating circumstances such as duration of the absence, a special type of duty from which the accused absents himself or herself, and a particular specific intent which accompanies the absence. These circumstances are not essential elements of a violation of NYSML, Section 130.82. They simply constitute special matters in aggravation. The following are aggravated unauthorized absences:

(a) Duration of the unauthorized absence.

(b) Unauthorized absence from a guard, watch, or duty (special type of duty).

(c) Unauthorized absence from guard, watch, or duty section with the intent to abandon it (special type of duty and specific intent).

(d) Unauthorized absence with the intent to avoid maneuvers or field exercises (special type or duty and specific intent).

(5) Control by civilian authorities. A member of the Organized militia turned over to the civilian authorities upon request under NYSML, Section 130.14, (see N.Y.R.C.M. 106) is not absent without leave while held by them under that delivery. When a member of the Organized militia, being absent with leave, or absent without leave, is not thereby changed, regardless how long held. The fact that a member of the Organized militia is convicted by the civilian authorities, or adjudicated to be a juvenile offender, or the case is "diverted" out of the regular criminal process for a probationary period does excuse any unauthorized absence, because the member's inability to return was the result of willful misconduct. If a member is released by the civilian authorities without trial, and was on authorized leave at the time of arrest or detention, the member may be found guilty of unauthorized absence only if it is proved that the member actually committed the offense for which detained, thus establishing that the absence was the result of the member's own misconduct.

(6) Inability to return. The status of absence without leave is not changed by an inability to return through sickness, lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary is a factor in extenuation and should be given due weight when considering the initial disposition of the offense. When, however, a person on authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave.

(7) Determining the unit or Organization of an accused. A person undergoing transfer between activities is ordinarily considered to be attached to the activity to which ordered to report. A person on temporary additional duty continues as a member of the regularly assigned unit and if the person is absent from the temporary duty assignment, the person becomes absent without leave from both units, and may be charged with being absent without leave from either unit.

(8) Duration. Unauthorized absence under NYSML, Section 130.82(3), is an instantaneous offense. It is complete at the instant an accused absents himself or herself without authority. Duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. Even if the duration of the absence is not over three days, it is ordinarily alleged in a NYSML, Section 130.82(3), and specification. If the duration is not alleged or if alleged but not proved, an accused can be convicted of and punished for only one day of unauthorized absence.

(9) Computation of duration. In computing the duration of an unauthorized absence, any one continuous period of absence found that totals not more than 24 hours is counted as one day; any such period that totals more than 24 hours and not more than 48 hours is counted as two days, and so on. The hours of departure and return on different dates are assumed to be the same if not alleged and proved. For example, if an accused is found guilty of unauthorized absence from 0600, 4 April, to 1000, 7 April of the same year (76 hours) the maximum punishment would be based on absence of four days. However, if the accused were found guilty simply of unauthorized absence from 4 April to 7 April, the maximum punishment would be based on an absence of three days.

(10) Termination - methods of return to military control.

(a) Surrender to military authority. A surrender occurs when a person presents himself or herself to any military authority, whether or not a member of the same armed force, notifies that authority of his or her unauthorized absence status, and submits or demonstrates a willingness to submit to military control. Such a surrender terminates the unauthorized absence.

(b) Apprehension by military authority. Apprehension by military authority of a known absentee terminates an unauthorized absence.

(c) Delivery to military authority. Delivery of a known absentee terminates an unauthorized absence.

(d) Apprehension by civilian authorities at the request of the military. When an absentee is taken into custody by civilian authorities at the request of military authorities, the absence is terminated.

(e) Apprehension by civilian authorities without prior military request. When an absence is in the hands of civilian authorities for other reasons and these authorities make the absentee available for return to military control, the absence is terminated when the military authorities are informed of the absentee's availability.

(11) Findings of more than one absence under one specification. An accused may properly be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not misled. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Failing to go or leaving place of duty.

In that _____ (personal jurisdiction data) did, (at/on board-location), on or about _____, 20__, without authority, (fail to go at the time prescribed to) (go from) his/her appointed place of duty, to wit: (here set forth the appointed place of duty).

(2) Absence from unit, Organization, or place of duty.

In that _____ (personal jurisdiction data) did, (at/on board-location), on or about _____, 20__, without authority, absent himself/herself from his/her (unit) (Organization) (place of duty at which he/she was required to be), to wit: _____, located at _____, and did remain so absent until (he/she was apprehended) on or about _____, 20__.

(3) Absence from unit, Organization, or place of duty with intent to avoid maneuvers or field exercises.

In that _____ (personal jurisdiction data), did, on or about _____, 20__, without authority and with intent to avoid (maneuvers) (field exercises), absent himself/herself from his/her (unit) (Organization) (place of duty at which he/she was required to be), to wit: _____, located at _____, and did remain so absent until on or about _____, 20__.

(4) Abandoning watch or guard.

In that _____ (personal jurisdiction data), being a member of the _____ (guard) (watch) (duty section), did, (at/on board-location), on or about _____, 20__, without authority, go from his/her (guard) (watch) (duty section) with intent to abandon the same.

11. NYSML, Section 130.83 - Missing movement.

a. Text.

"Any person subject to this code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was required in the course of duty to move with a ship, aircraft or unit;

(2) That the accused knew of the prospective movement of the ship, aircraft or unit;

(3) That the accused missed the movement of the ship, aircraft or unit; and

(4) That the accused missed the movement through design or neglect.

c. Explanation.

(1) Movement. "Movement" as used in NYSML, Section 130.83, includes a move, transfer, or shift of a ship, aircraft, or unit involving a substantial distance and period of time. Whether a particular movement is substantial is a question to be

determined by the court-martial considering all the circumstances. Changes which do not constitute a "movement" include practice marches of a short duration with a return to the point of departure, and minor changes in location of ships, aircraft, or units, as when a ship is shifted from one berth to another in the same shipyard or harbor or when a unit is moved from one barracks to another on the same post.

(2) Mode of movement.

(a) Unit. If a person is required in the course of duty to move with a unit, the mode of travel is not important, whether it be military or commercial, and includes travel by ship, train, aircraft, truck, bus, or walking. The word "unit" is not limited to any specific technical category such as those listed in a table of Organization and equipment, but also includes units which are created before the movement with the intention that they have Organizational continuity upon arrival at their destination regardless of their technical designation, and units intended to be disbanded upon arrival at their destination.

(b) Ship, aircraft. If a person is assigned as a crewmember or is ordered to move as a passenger aboard a particular ship or aircraft, military or chartered, then missing the particular sailing or flight is essential to establish the offense of missing movement.

(3) Design. "Design" means on purpose, intentionally, or according to plan and requires specific intent to miss the movement.

(4) Neglect. "Neglect" means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement.

(5) Actual knowledge. In order to be guilty of the offense, the accused must have actually known of the prospective movement that was missed. Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. It is sufficient if the approximate date was known by the accused as long as there is a casual connection between the conduct of the accused and the missing of the scheduled movement. Knowledge may be proved by circumstantial evidence.

(6) Proof of absence. That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry in a log or a morning report. This fact may also be proved by the testimony of personnel of the ship, aircraft, or unit (or by other evidence) that the movement occurred at a certain time, together with evidence that the accused was physically elsewhere at that time.

d. Lesser-included offenses.

(1) Design.

(a) NYSML, Section 130.83 - Missing movement though neglect.

(b) NYSML, Section 130.82 - Absence without authority.

(c) NYSML, Section 130.76 - Attempts.

(2) Neglect. NYSML, Section 130.82 - Absence without authority.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, through (neglect) (design) miss the movement of (Aircraft No. _____) (Flight _____) (the USS _____) (Company A, 1st Battalion, 7th Infantry) (_____) with which he/she was required in the course of duty to move.

12. NYSML, Section 130.84 - Contempt toward officials.

a. Text.

"Any person subject to this code who uses contemptuous words against the President, Vice-President, Congress, Secretary of Defense, Secretary of a Military Department, Secretary of Transportation, the Governor or the Legislature shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was a person subject to the code;

(2) That the accused used certain words against an official or legislature named in the article;

(3) That by an act of the accused these words came to the knowledge of a person other than the accused; and

(4) That the words used were contemptuous, whether in themselves or by virtue of the circumstances under which they were used.

c. Explanation. The official or legislature against whom the words are used must be occupying one of the offices or be one of the legislatures named in NYSML, Section 130.84, at the time of the offense. "Legislature" does not include its members individually. "Governor" does not include "lieutenant governor." It is immaterial whether the words are used against the official in an official or private capacity. If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation or the article. Similarly, expressions of opinion made in a purely private conversation should not ordinarily be charged. Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, aggravates the offense. The truth or falsity of the statements is immaterial.

d. Lesser-include offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, [use (orally and publicly) (_____) the following words] against the [(President) (Governor) (legislature) of the State of New York)], to wit: "_____," or words to that effect.

13. NYSML, Section 130.85 - Disrespect toward superior officer.

a. Text.

"Any person subject to this code who behaves with disrespect toward his superior officer shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused did or omitted certain acts or used certain language to or concerning a certain officer;

(2) That such behavior or language was directed toward that officer;

(3) That the officer toward whom the acts, omissions, or words were directed was the superior officer of the accused;

(4) That the accused then knew that the officer toward whom the acts, omissions, or words were directed was the accused's superior officer; and

(5) That, under the circumstances, the behavior or language was disrespectful to that officer.

c. Explanation.

(1) Superior officer. (See NYSML, Section 130.1(3))

(a) Accused and victim in same force of the Organized militia. If the accused and the victim are in the same force of the Organized militia, the victim is a "superior officer" of the accused when either superior in rank or command to the accused; however, the victim is not a "superior officer" or the accused if the victim is inferior in command, even though superior in rank.

(b) Accused and victim in different forces of the Organized militia. If the accused and the victim are in different forces of the Organized militia, the victim is a "superior officer" of the accused when the victim is a officer and superior in the chain of command over the accused or when the victim, not a medical officer or a chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented. The victim is not a "superior officer" of the accused merely because the victim is superior in grade to the accused.

(c) Execution of office. It is not necessary that the superior officer be in the execution of office at the time of the disrespectful behavior.

(2) Knowledge. If the accused did not know that the person against whom the acts or words were directed was the accused's superior officer, the accused may not be convicted of a violation of this article. Knowledge may be proved by circumstantial evidence.

(3) Disrespect. Disrespectful behavior is that which detracts from the respect due to authority and person of a superior officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

(4) Presence. It is not essential that the disrespectful behavior is in the presence of the superior, but ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation.

(5) Special defense - unprotected victim. A superior officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. The accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by NYSML, Section 130.85.

d. Lesser-included offenses.

(1) NYSML, Section 130.11 - Provoking speeches or gestures.

(2) NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, behave himself/herself with disrespect toward _____, his/her superior officer, then known by the said _____ to be his/her superior officer, by (saying to him/her "_____," or words to that effect) (contemptuously turning from and leaving him/her while he/she, the said _____, was talking to him/her, the said _____) (_____).

14. NYSML, Section 130.86 - Assaulting or willfully disobeying officer.

a. Text.

"Any person subject to this code who -

"(1) strikes his superior officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

"(2) willfully disobeys a lawful command of his superior officer;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Striking or assaulting superior officer.

(a) That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain officer;

(b) The officer was the superior officer of the accused;

(c) That the accused then knew that the officer was the accused's superior officer; and

(d) That the superior officer was then in the execution of office.

(2) Disobeying superior officer.

(a) That the accused received a lawful command from a certain officer;

(b) That the officer was the superior officer of the accused;

(c) That the accused then knew that this officer was the accused's superior officer; and

(d) That the accused willfully disobeyed the lawful command.

c. Explanation.

(1) Striking or assaulting superior officer.

(a) Definitions.

(i) Superior officer. The definitions in paragraphs 13c(1)(a) and (b) apply here and in subparagraph 13c(2).

(ii) Strikes. "Strikes" means an intentional blow, and includes any offensive touching of the person of an officer, however slight.

(iii) Draws or lifts up any weapon against. The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated. The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of and at the superior is the sort of act

prescribed. The raising in a threatening manner of a firearm, whether or not loaded, of a club, or of anything by which a serious blow or injury could be given is included in "lifts up."

(iv) Offers any violence against. The phrase "offers any violence against" includes any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up." If not executed, the violence must be physically attempted or menaced. A mere threatening in words is not an offering of violence in the sense of this article.

(b) Execution of office. An officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage. In general, any striking or use of violence against any superior officer by a person over whom it is the duty of that officer to maintain discipline at the time, would be striking or using violence against the officer in the execution of office. The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times.

(c) Knowledge. If the accused did not know the officer was the accused's superior officer, the accused may not be convicted of this offense. Knowledge may be proved by circumstantial evidence.

(d) Defenses. In a prosecution for striking or assaulting a superior officer in violation of this article, it is a defense that the accused acted in the proper discharge of some duty, or that the victim behaved in a manner toward the accused such as to lose the protection of this article (see paragraph 13c(5)). For example, if the victim initiated an unlawful attack on the accused, this would deprive the victim of the protection of this article.

(2) Disobeying superior officer.

(a) Lawfulness of the order.

(i) Inference of lawfulness. An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.

(ii) Authority of issuing officer. The officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service.

(iii) Relationship to military duty. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs.

However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

(iv) Relationship to statutory or constitutional rights. The order must not conflict with the statutory or constitutional rights of the person receiving the order.

(b) Personal nature of the order. The order must be directed specifically to the subordinate. Violations of regulations, standing orders or directives, or failure to perform previously established duties are not punishable under this article, but may violate NYSML, Section 130.88.

(c) Form and transmission of the order. As long as the order is understandable, the form of the order is immaterial, as is the method by which it is transmitted to the accused.

(d) Specificity of the order. The order must be a specific mandate to do or not to do a specific act. An exhortation to "obey the law" or to perform one's military duty does not constitute an order under this article.

(e) Knowledge. The accused must have actual knowledge of the order and of the fact that the person issuing the order was the accused's superior officer. Actual knowledge may be proved by circumstantial evidence.

(f) Nature of the disobedience. "Willful disobedience" is an intentional defiance of authority. Failure to comply through heedlessness, remissness, or fOrgetfulness is not a violation of this article but may violate NYSML, Section 130.88.

(g) Time for compliance. When an order requires immediate compliance, an accused's declared intent not to obey and the failure to make any move to comply constitutes disobedience. If an order does not indicate the time within which it is to be complied with, either expressly or by implication, then a reasonable delay in compliance

does not violate this article. If an order requires performance in the future, an accused's present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may.

d. Lesser-included offenses.

(1) Striking superior officer in execution of office.

(a) NYSML, Section 130.86 - drawing or lifting up a weapon or offering violence to superior officer in execution of office.

(b) NYSM, Section 130.76 - attempts.

(2) Drawing or lifting up a weapon or offering violence to superior officer in execution of office.

NYSML, Section 130.76 - Attempts.

(3) Willfully disobeying lawful order of superior officer.

(a) NYSML, Section 130.88 - Failure to obey lawful order.

(b) NYSML, Section 130.85 - Disrespect to superior commissioned officer.

(c) NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Striking superior officer.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (a time of war) strike _____, his/her superior officer, then known by the said _____ to be his/her superior officer, who was then in the execution of his/her officer, (in) (on) the _____ with (a) (his/her) _____.

(2) Drawing or lifting up a weapon against superior officer.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (a time of war) (draw) (lift up) a weapon, to wit: _____, against _____, his/her supervisor officer, then known by the said _____ to be his/her superior officer, who was then in the execution of his/her officer.

(3) Offering violence to superior commissioned officer.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (a time of war) offer violence against _____, his/her superior officer, then known by the said _____ to be his/her superior officer, who was then in the execution of his/her officer, by _____.

(4) Willful disobedience of superior officer.

In that _____ (personal jurisdiction data), having received a lawful command from _____, his/her superior officer, then known by the said _____ to be his/her superior officer, to _____, or words to that effect, did, (at/on board-location), on or about _____, 20__, willfully disobey the same.

15. NYSML, Section 130.87 - Insubordinate conduct toward noncommissioned officer.

a. Text.

"Any warrant officer or enlisted person who -

"(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while such officer is in the execution of his office; or

"(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

"(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Striking or assaulting warrant, noncommissioned, or petty officer.

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

(c) That the striking or assault was committed while the victim was in the execution of office; and

(d) That the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned or petty officer of the accused, add the following elements.]

(e) That the victim was the superior noncommissioned or petty officer of the accused; and

(f) That the accused then knew that the person struck or assaulted was the accused's superior noncommissioned or petty officer.

(2) Disobeying a warrant, noncommissioned or petty officer.

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused received a certain lawful order from a certain warrant, noncommissioned or petty officer;

(c) That the accused then knew that the person giving the order was a warrant, noncommissioned or petty officer;

(d) That the accused had a duty to obey the order; and

(e) That the accused willfully disobeyed the order.

(3) Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused did or omitted certain acts, or used certain language;

(c) That such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

(d) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned or petty officer;

(e) That the victim was then in the execution of office; and

(f) That under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned or petty officer.

[Note: If the victim was the superior noncommissioned or petty officer of the accused, add the following elements.]

(g) That the victim was the superior noncommissioned or petty officer of the accused; and

(h) That the accused then knew that the person toward whom the behavior of language was directed was the accused's superior noncommissioned or petty officer.

c. Explanation.

(1) In general. NYSML, Section 130.87, has the same general objects with respect to warrant, noncommissioned and petty officers as NYSML, Section 130.85, and NYSML, Section 130.86, have with respect to officers, namely, to ensure obedience to their lawful orders, and to protect them from violence, insult or disrespect. Unlike NYSML, Section 130.85, and NYSML, Section 130.86, however, this article does not require a superior-subordinate relationship as an element of any of the offenses denounced. This article does not protect an acting noncommissioned officer or acting petty officer, nor does it protect military police or members of the shore patrol who are not warrant, noncommissioned or petty officers.

(2) Knowledge. All of the offenses prohibited by NYSML, Section 130.87, require that the accused have actual knowledge that the victim was a warrant, noncommissioned or petty officer. Actual knowledge may be proved by circumstantial evidence.

(3) Striking or assaulting a warrant, noncommissioned or petty officer. For a discussion of "strikes" and "in the execution of office," see paragraph 14c. Discussion of "assault" follows.

(4) Disobeying a warrant, noncommissioned or petty officer. See paragraph 14c(2) for a discussion of lawfulness, personal nature, form, transmission, and specificity of the order, nature of the disobedience, and time for compliance with the order.

(5) Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned or petty officer. "Toward" requires that the behavior and language be within the sight or hearing of the warrant, noncommissioned or petty officer concerned. For a discussion of "in the execution of his office," see paragraph 14c. For a discussion of disrespect, see paragraph 13c.

d. Lesser-included offenses.

(1) Striking or assaulting warrant, noncommissioned or petty officer. NYSML, Section 130.76 - attempts.

(2) Disobeying a warrant, noncommissioned or petty officer.

(a) NYSML, Section 130.88 - Failure to obey a lawful order.

(b) NYSML, Section 130.76 - Attempts.

(3) Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned or petty officer in the execution of office.

(a) NYSML, Section 130.111 -

(b) NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Striking or assaulting warrant, noncommissioned or petty officer.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (strike) (assault) _____, a _____ officer, then known to the said _____ to be a (superior) _____ officer who was then in the execution of his/her (in) (on) (the _____) with (a) _____ (his/her) _____.

(2) Willful disobedience of warrant, noncommissioned, or petty officer.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, [did treat with contempt] [was disrespectful in (language) (deportment) toward] _____, a _____ officer, then known by the said _____ to be a (superior) _____ officer, who was then in the execution of his/her office, by (saying to him/her, "_____," or words to that effect((spitting at his/her feet) (_____).

(3) Contempt or disrespect toward warrant, noncommissioned, or petty officer.

In that _____ (personal jurisdiction data), did, (at/on board-location, on or about _____, 20__, [did treat with contempt] [was disrespectful in (language) (deportment) toward] _____, a _____ officer, then known by the said _____ to be a (superior) _____ officer, who was then in the execution of his/her office,

by (saying to him/her, "_____," or words to that effect) (spitting at his/her feet) (_____).

16. NYSML, Section 130.88 - Failure to obey order or regulation.

a. Text.

"Any person subject to this code who -

"(1) violates or fails to obey any lawful general order or regulation;

"(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

"(3) is derelict in the performance of his duties;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Violation of or failure to obey a lawful general order or regulation.

(a) That there was in effect a certain lawful general order or regulation.

(b) That the accused had a duty to obey it; and

(c) That the accused violated or failed to obey the order or regulation.

(2) Failure to obey other lawful order.

(a) That a member of the armed forces issued a certain lawful order;

(b) That the accused had knowledge of the order;

(c) That the accused had a duty to obey the order; and

(d) That the accused failed to obey the order.

(3) Dereliction in the performance of duties.

(a) That the accused had certain duties;

(b) That the accused had knowledge of the duties; and

(c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

c. Explanation.

(1) Violation of or failure to obey a lawful general order or regulation.

(a) Authority to issue general orders and regulations. General orders or regulations generally applicable to an armed force which are properly published by the Governor, The Adjutant General, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

(i) An officer having GCM jurisdiction,

(ii) A general or flag officer in command, or

(iii) A commander superior to (I) and (ii).

(b) Effect of change of command on validity of order. A general order or regulation issued by a commander with authority under NYSML, Section 130.88(I), retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) Lawfulness. A general order or regulation is lawful unless it is contrary to the Constitutions, the laws of the United States or New York, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See the discussion of lawfulness in paragraph 14c(2)(a).

(d) Knowledge. Knowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) Enforceability. Not all provisions in general orders or regulations can be enforced under NYSML, Section 130.88(1). Regulations, which only supply general guidelines or advice for conducting military functions, may not be enforceable under NYSML, Section 130.88(1).

(2) Violation of or failure to obey other lawful order.

(a) Scope. NYSML, Section 130.88(2), includes all other lawful orders which may be issued by a member of the Organized militia, violations of which are not chargeable under NYSML, Sections 130.86, 130.87, or 130.88(1). It includes the violation of written regulations, which are not general regulations. See also subparagraph (1)(e) above, as applicable.

(b) Knowledge. In order to be guilty of this offense, a person must have had actual knowledge of the order or regulation. Knowledge of the order may be proved by circumstantial evidence.

(c) Duty to obey order.

(i) From a superior. A member of one force of the Organized militia who is senior in rank to a member of another force of the Organized militia is the superior of that member with authority to issue orders which that member has a duty to obey under the same circumstances as an officer of one force of the Organized militia is the superior officer of a member of another force of the Organized militia for the purposes of NYSML, Sections 130.85 and 130.86. (See paragraph 13c(1))

(ii) From one not a superior. Failure to obey the lawful order of one not a superior is an offense under NYSML, Section 130.88(2), provided the accused had a duty to obey the order, such as one issued by a sentinel. See paragraph 15b(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) Dereliction in the performance of duties.

(a) Duty. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.

(b) Knowledge. In order to be guilty of this offense, a person must have had actual knowledge of the duties. Knowledge of the duties may be proved by circumstantial evidence.

(c) Derelict. A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probably consequences of the act. "Negligently" means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care, which a reasonably prudent person would have exercised under the same, or similar circumstances. "Culpable inefficiency" is inefficiency for which there is no reasonable or just excuse.

(d) Ineptitude. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

d. Lesser-included offense. NYSML, Section 130.79 - Attempts.

e. Sample specifications.

(1) Violation or failure to obey lawful general order or regulation.

In that _____ (personal jurisdiction data) did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (violate) (fail to obey) a lawful general (order) (regulation), to wit: [specifically identify the order] [_____], by wrongfully _____.

(2) Violation or failure to obey other lawful written order.

In that _____ (personal jurisdiction data), having knowledge of a lawful order issued by _____, to wit: [specifically identify the order], an order, which it was his/her duty to obey, did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, fail to obey the same by (wrongfully) _____.

(3) Failure to obey other lawful order.

In that _____ (personal jurisdiction data), having knowledge of a lawful order issued by _____, (to submit to certain medical treatment) (to _____) (not to _____) (_____), an order which it was his/her duty to obey, did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, fail to obey the same by (wrongfully) _____.

(4) Dereliction in the performance of duties.

In that _____ (personal jurisdiction data), (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (from about _____, 20__ to about _____, 20__, having knowledge of his/her duties, was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed to _____, as it was his/her duty to do.

17. NYSML, Section 130.89 - Cruelty and maltreatment.

a. Text.

"Any person subject to this code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his order shall be punished as a court-martial may direct."

b. Elements.

(1) That a certain person was subject to the orders of the accused; and

(2) That the accused was cruel toward, or oppressed, or maltreated that person.

c. Explanation.

(1) Nature of victim. "Any person subject to his orders" means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

(2) Nature of act. The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (from about _____, 20__, [was cruel toward] [did (oppress) (maltreat)] _____, a person subject to his/her orders, by (kicking him/her in the stomach) (confining him/her for twenty-four hours without water) (_____).

18. NYSML, Section 130.90 - Mutiny or sedition.

a. Text.

"(a) Any person subject to this code -

"(1) who with intent to usurp or override lawful military authority, refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

"(2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person or persons, revolt, violence, or other disturbance against such authority of sedition;

"(3) fails to his utmost to prevent and suppress an offense of mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior or commanding officer of an offense of mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

"(b) A person who is found guilty of attempted mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished as a court-martial may direct."

b. Elements.

(1) Mutiny by creating violence or disturbance.

(a) That the accused created violence or a disturbance; and

(b) That the accused created this violence or disturbance with intent to usurp or override lawful military authority.

(2) Mutiny by refusing to obey orders or to perform duty.

(a) That the accused refused to obey orders or otherwise do the accused's duty;

(b) That the accused in refusing to obey orders or perform duty acted in concert with another person or persons; and

(c) That the accused did so with intent to usurp or override lawful military authority.

(3) Sedition.

(a) That the accused created revolt, violence, or disturbance against lawful civil authority;

(b) That the accused acted in concert with another person or persons; and

(c) That the accused did so with the intent to cause the overthrow or destruction of that authority.

(4) Failure to prevent and suppress a mutiny or sedition.

(a) That an offense of mutiny or sedition was committed in the presence of the accused; and

(b) That the accused failed to do the accused's utmost to prevent and suppress the mutiny or sedition.

(5) Failure to report a mutiny or sedition.

(a) That an offense of mutiny or sedition occurred;

(b) That the accused knew or had reason to believe that the offense was taking place; and

(c) That the accused failed to take all reasonable means to inform the accused's superior commissioned officer or commander of the offense.

(6) Attempted mutiny.

(a) That the accused committed a certain overt act;

(b) That the act was done with specific intent to commit the offense of mutiny;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of mutiny.

c. Explanation.

(1) Mutiny. NYSML, Section 130.90(a)(1), defines two types of mutiny, both requiring intent to usurp or override military authority.

(a) Mutiny by creating violence or disturbance. Mutiny by creating violence or disturbance may be committed by one person acting alone or by more than one acting together.

(b) Mutiny by refusing to obey orders or perform duties. Mutiny by refusing to obey orders or perform duties requires collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. This concert of insubordination need not be preconceived, nor is it necessary that the insubordination be active or violent. It may consist simply of a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent, that is, with intent to usurp or override lawful military authority. The intent may be declared in words or inferred from acts, omissions, or surrounding circumstances.

(2) Sedition. Sedition requires a concert of action in resistance to civil authority. This differs from mutiny by creating violence or disturbance. See subparagraph c.(1)(a) above.

(3) Failure to prevent and suppress a mutiny or sedition. "Utmost" means taking those measures to prevent and suppress a mutiny or sedition, which may properly be called for by the circumstances, including the rank, responsibilities, or employment of the person concerned. "Utmost" includes the use of such force, including deadly force, as may be reasonably necessary under the circumstances to prevent and suppress a mutiny or sedition.

(4) Failure to report a mutiny or sedition. Failure to "take all reasonable means to inform" includes failure to take the most expeditious means available. When the circumstances known to the accused would have caused a reasonable person in similar circumstances to believe that a mutiny or sedition was occurring, this may establish that the accused had such "reason to believe" that mutiny or sedition was occurring. Failure to report an impending mutiny or sedition is not an offense in violation of NYSML, Section 130.90. But see paragraph 16c(3) (dereliction of duty).

(5) Attempted mutiny. For a discussion of attempts, see paragraph 4.

d. Lesser-included offenses.

(1) Mutiny by creating violence or disturbance.

(a) NYSML, Section 130.86 - Assault on commissioned officer.

(b) NYSML, Section 130.87 - Insubordinate conduct toward noncommissioned officer.

(c) NYSML, Section 130.90 - Attempted mutiny.

(d) NYSML, Section 130.110 - Riot; breach of peace.

(e) NYSML, Section 130.115 - Disorderly conduct.

(2) Mutiny by refusing to obey orders or perform duties.

(a) NYSML, Section 130.86 - Willful disobedience of officer.

(b) NYSML, Section 130.87 - Insubordinate conduct toward noncommissioned officer.

(c) NYSML, Section 130.88 - Failure to obey lawful order.

(d) NYSML, Section 130.90 - Attempted mutiny.

(3) Sedition.

(a) NYSML, Section 130.110 - Riot; breach of peace.

(b) NYSML, Section 130.115 - Disorderly conduct.

(c) NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Mutiny by creating violence or disturbance.

In that _____ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself/herself in Barracks T7, firing his/her rifle at _____, and exhorting other persons to join him/her in defiance of (_____) (_____).

(2) Mutiny by refusing to obey orders or perform duties.

In that _____ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board-location) on or about _____, 20__, refuse, in concert with _____ (and _____) (others whose names are unknown), to (obey the orders of _____ to _____) (perform his/her duty as _____).

(3) Sedition.

In that _____ (personal jurisdiction data), with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, to wit: _____, did, (at/on board-location) (subject-matter jurisdiction data, if required) on or about _____, 20__, in concert with (_____) and (_____) (others whose names are unknown), create (revolt) (violence) (a disturbance) against such authority by (entering the Town Hall of _____ and destroying property and records therein) (marching upon and compelling the surrender of the police of _____) (_____).

(4) Failure to prevent and suppress a mutiny or sedition.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required) on or about _____, 20__, fail to do his/her utmost to prevent and suppress a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) (_____) of _____, which (mutiny) (sedition) was being committed in his/her presence, in that (he/she took no means to compel the dispersal of the assembly) (he/she made no effort to assist _____ who was attempting to quell the mutiny) (_____).

(5) Failure to report a mutiny or sedition.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required) on or about _____, 20__, fail to take all reasonable means to inform his/her superior officer or his/her commander of a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) (_____) of _____, which (mutiny) (sedition) he/she the said _____ (knew) (had reason to believe) was taking place.

(6) Attempted mutiny.

In that _____ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, attempt to [create (violence) (a disturbance) by _____] [_____].

19. NYSML, Section 130.91 - Arrest and confinement.

a. Text.

"Any person subject to this code who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct."

b. Elements.

(1) Resisting apprehension.

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused actively resisted the apprehension.

(2) Breaking arrest.

(a) That a certain person ordered the accused into arrest;

(b) That said person was authorized to order the accused into arrest; and

(c) That the accused when beyond the limits of arrest before being released from that arrest by proper authority.

(3) Escape from custody.

(a) That a certain person apprehended the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused freed himself or herself from custody before being released by proper authority.

(4) Escape from confinement.

(a) That a certain person ordered the accused into confinement;

(b) That said person was authorized to order the accused into confinement; and

(c) That the accused freed himself or herself from confinement before being released by proper authority.

c. Explanation.

(1) Resisting apprehension.

(a) Apprehension. Apprehension is the taking of a person into custody. (See N.Y.R.C.M. 302)

(b) Authority to apprehend. See N.Y.R.C.M. 302(b) concerning who may apprehend. Whether the status of a person authorized that person to apprehend the accused is a question of law to be decided by the military judge. Whether the person who attempted to make an apprehension had such a status is a question of fact to be decided by the fact finder.

(c) Nature of the resistance. The resistance must be active, such as assaulting the person attempting to apprehend or flight. Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses.

(d) Mistake. It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. However, the accused's belief at the time that no basis exists for the apprehension is not a defense.

(e) Illegal apprehension. A person may not be convicted of resisting apprehension if the attempted apprehension is illegal, but may be convicted of other offenses, depending on all the circumstances. An attempted apprehension by a person authorized to apprehend is presumed to be legal in the absence of evidence to the contrary. Ordinarily the legality of an apprehension is a question of law to be decided by the military judge.

(2) Breaking arrest.

(a) Arrest. There are two types of arrest: pretrial arrest under NYSML, Section 130.9, (see N.Y.R.C.M. 304), and arrest under NYSML, Section 130.15, (see paragraph 5c(3), Part V). This article prohibits breaking any arrest.

(b) Authority to order arrest. See N.Y.R.C.M. 304(b) and paragraphs 2 and 5b, Part V, concerning authority to order arrest.

(c) Nature of restraint imposed by arrest. In arrest, the restraint is moral restraint imposed by order fixing the limits of arrest.

(d) Breaking. Breaking arrest is committed when the person in arrest infringes the limits set by orders. The reason for the infringement is immaterial. For example, innocence of the offense with respect to which an arrest may have been imposed is not a defense.

(e) Illegal arrest. A person may not be convicted of breaking arrest if the arrest is illegal. An arrest ordered by one authorized to do so is presumed to be legal in the absence of some evidence to the contrary. Ordinarily, the legality of an arrest is a question of law to be decided by the military judge.

(3) Escape from custody.

(a) Custody. "Custody" is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) Authority to apprehend. (See subparagraph (1)(b) above)

(c) Escape. For a discussion of escape see subparagraph c(4)(c) below.

(d) Illegal custody. A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) Correctional custody. (See paragraph 45)

(4) Escape from confinement.

(a) Confinement. Confinement is physical restraint imposed under N.Y.R.C.M. 305, 1101, or paragraph 5b, Part V.

(b) Authority to order confinement. See N.Y.R.C.M. 304(b); 1101; and paragraphs 2 and 5b, Part V, concerning who may order confinement.

(c) Escape. An escape may be either with or without force or artifice, and either with or without the consent of the custodian. However, where a prisoner is released by one with apparent authority to do so, the prisoner may not be convicted of escape from confinement. (See paragraph 20c(1)(b)) Any completed casting off of the restraint of confinement, before release by property authority, is an escape, and lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. If the movement toward escape is opposed of before it is completed, an immediate pursuit follows. There is not escape until opposition is overcome or pursuit is shaken off.

(d) Status when temporarily outside confinement facility. A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) Legality of confinement. A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. Lesser-included offenses.

(1) Breaking arrest. NYSML, Section 130.76 - Attempts.

(2) Escape from custody. NYSML, Section 130.76 - Attempts.

(3) Escape from confinement. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Resisting apprehension.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, resist being apprehended by _____, a person authorized to apprehend the accused.

(2) Breaking arrest.

In that _____ (personal jurisdiction data), having been placed in arrest (in quarters) (in his/her company area) (_____) by a person authorized to order the accused into arrest, did, (at/on board-location) on or about _____, 20__, break said arrest.

(3) Escape from custody.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, escape from the custody of _____, a person authorized to apprehend the accused.

(4) Escape from confinement.

In that _____ (personal jurisdiction data), having been placed in confinement in (place of confinement), by a person authorized to order the accused into confinement did, did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 20__, escape from the custody of _____, escape from confinement.

20. NYSML, Section 130.92 - Releasing prisoner without proper authority.

a. Text.

"Any person subject to this code who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct."

b. Elements.

(1) Releasing a prisoner without proper authority.

(a) That a certain prisoner was committed to the charge of the accused; and

(b) That the accused released the prisoner without proper authority.

(2) Suffering a prisoner to escape through neglect.

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the prisoner escaped;

(c) That the accused did not take such care to prevent the escape as a reasonably careful person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and

(d) That the escape was the proximate result of the accused's neglect.

(3) Suffering a prisoner to escape through design.

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the design of the accused was to suffer the escape of that prisoner; and

(c) That the prisoner escaped as a result of the carrying out of the design of the accused.

c. Explanation.

(1) Releasing a prisoner without proper authority.

(a) Prisoner. "Prisoner" includes a civilian or military person who has been confined.

(b) Release. The release of a prisoner is removal of restraint by the custodian rather than by the prisoner.

(c) Authority to release. See N.Y.R.C.M. 305(g) as to who may release pretrial prisoners. Normally, the lowest authority competent to order release of a post-trial prisoner is the commander who convened the court-martial, which sentenced the prisoner or the officer exercising GCM jurisdiction over the prisoner. (See also N.Y.R.C.M. 110)

(d) Committed. Once a prisoner has been confined, the prisoner has been "committed" in the sense of NYSML, Section 130.92, and only a competent authority (see subparagraph (c)) may order release, regardless of failure to follow procedures prescribed by the code, this manual, or other law.

(2) Suffering a prisoner to escape through neglect.

(a) Suffer. "Suffer" means to allow or permit, not to forbid or hinder.

(b) Neglect. "Neglect" is a relative term. It is the absence of conduct, which would have been taken by a reasonably careful person in the same or similar circumstances.

(c) Escape. Escape is defined in paragraph 19c(4)(c).

(d) Status of prisoner after escape not a defense. After escape, the fact that a prisoner returns is captured, killed, or otherwise dies are not a defense.

(3) Suffering a prisoner to escape through design. An escape is suffered through design when it is intended. Such intent may be inferred from conduct to wantonly devoid of care that the only reasonable inference, which may be drawn, is that the escape was contemplated as a probable result.

d. Lesser-included offenses.

(1) Releasing a prisoner without proper authority. NYSML, Section 130.76 - Attempts.

(2) Suffering a prisoner to escape through neglect. None.

(3) Suffering a prisoner to escape through design.

(a) NYSML, Section 130.92 - Suffering a prisoner to escape through neglect.

(b) NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Releasing a prisoner without proper authority.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, without proper authority, release _____, a prisoner committed to his/her charge.

(2) Suffering a prisoner to escape through neglect or design.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, through (neglect) (design), suffer _____, a prisoner committed to his/her charge, to escape.

21. NYSML, Section 130.93 - Unlawful detention.

a. Text.

"Any person subject to this code who, except as provided by law, or regulations, apprehends, arrests, or confines any person shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused apprehended, arrested, or confined a certain person; and

(2) That the accused unlawfully exercised the accused's authority to do so.

c. Explanation.

(1) Scope. This article prohibits improper acts by those empowered by the code to arrest, apprehend, or confine. (See NYSML, Sections 130.7 and 130.9; N.Y.R.C.M. 302, 304, 305, and 1101, and paragraphs 2 and 5b, Part V. It does not apply to private acts of false imprisonment or unlawful restraint of another's freedom of movement by one not acting under such a delegation of authority under the code.

(2) No force required. The apprehension, arrest, or confinement must be against the will of the person restrained, but force is not required.

(3) Defense. A reasonable belief held by the person imposing restraint that it is lawful is a defense.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, unlawfully (apprehend _____) (place _____ in arrest) (confine _____ in _____).

22. NYSML, Section 130.94 - Noncompliance with procedural rules.

a. Text.

"Any person subject to this code who -

"(1) is responsible for unnecessary delay in the disposition of any case of a person accused or an offense under this code; or

"(2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Unnecessary delay in disposing of case.

(a) That the accused was charged with a certain duty in connection with the disposition of a case of a person accused of an offense under the code;

(b) That the accused knew that the accused was charged with the duty;

(c) That delay occurred in the disposition of the case;

(d) That the accused was responsible for the delay; and

(e) That, under the circumstances, the delay was unnecessary.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.

(a) That the accused failed to enforce or comply with a certain provision of the code regulating a proceeding before, during, or after a trial;

(b) That the accused had the duty of enforcing or complying with that provision of the code;

(c) That the accused knew that the accused was charged with this duty; and

(d) That the accused's failure to enforce or comply with that provision was intentional.

c. Explanation.

(1) Unnecessary delay in disposing of case. The purpose of Section (1) of NYSML, Section 130.94, is to ensure expeditious disposition of cases of person's accused of offenses under the code. A person may be responsible for delay in the disposition of a case only when that person's duties require action with respect to the disposition of that case.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code. Section (2) of NYSML, Section 130.94, does not apply to errors made in good faith before, during, or after trial. It is designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. Unlawful command influence under NYSML, Section 130.37, may be prosecuted under this article. (See also NYSML, Section 130.31, and N.Y.R.C.M. 104.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Unnecessary delay in disposing of case.

In that _____ (personal jurisdiction data), being charged with the duty of [(investigating) (taking immediate steps to determine the proper disposition of) charges preferred against _____, a person accused of an offense under the New York Code of Military Justice] [_____], was, (at/on board-location), on or about _____, 20__, responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges) (_____), in that he/she (did _____) (failed to _____) (_____).

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.

In that _____ (personal jurisdiction data), being charged with the duty of _____, did, (at/on board-location), on or about _____, 20__, knowingly and intentionally fail to (enforce) (comply with) 130.94, New York Code of Military Justice, in that he/she _____.

23. NYSML, Section 130.95 - Misbehavior before the enemy.

a. Text.

"Any person subject to this code who before or in the presence of the enemy -

"(1) runs away; or

"(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend; or

"(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property; or

"(4) casts away his arms or ammunition; or

"(5) is guilty of cowardly conduct; or

"(6) quits his place of duty to plunder or pillage;

"(7) causes false alarms in any command, unit, or place under control of the armed forces of the United States or the Organized militia; or

"(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

"(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies or to any other state or to the Organized militia, when engaged in battle;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Running away.

(a) That the accused was before or in the presence of the enemy;

(b) That the accused misbehaved by running away; and

(c) That the accused intended to avoid actual or impending combat with the enemy by running away.

(2) Shamefully abandoning, surrendering, or delivering up command.

(a) That the accused was charged by orders or circumstances with the duty to defend a certain command, unit, place, ship, or military property; and

(b) That, without justification, the accused shamefully abandoned, surrendered, or delivered up that command, unit, place ship, or military property; and

(c) That this act occurred while the accused was before or in the presence of the enemy.

(3) Endangering safety of a command, unit, place, ship, or military property.

(a) That it was the duty of the accused to defend a certain command, unit, place, ship, or certain military property;

(b) That the accused committed certain disobedience, neglect, or intentional misconduct;

(c) That the accused thereby endangered the safety of the command, unit, place, ship, or military property; and

(d) That this act occurred while the accused was before or in the presence of the enemy.

(4) Casting away arms or ammunition.

(a) That the accused was before or in the presence of the enemy; and

(b) That the accused cast away certain arms or ammunition.

(5) Cowardly conduct.

(a) That the accused committed an act of cowardice;

(b) That this conduct occurred while the accused was before or in the presence of the enemy; and

(c) That this conduct was the result of fear.

(6) Quitting place of duty to plunder or pillage.

(a) That the accused was before or in the presence of the enemy;

(b) That the accused quit the accused's place of duty; and

(c) That the accused's intention in quitting was to plunder or pillage public or private property.

(7) Causing false alarms.

(a) That an alarm was caused in a certain command, unit, or place under control or the armed forces of the United States or the Organized militia;

(b) That the accused caused the alarm;

(c) That the alarm was caused without any reasonable or sufficient justification or excuse; and

(d) That this act occurred while the accused was before or in the presence of the enemy.

(8) Willfully failing to do utmost to encounter enemy.

(a) That the accused was serving before or in the presence of the enemy;

(b) That the accused had a duty to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels, aircraft, or a certain other thing; and

(c) That the accused willfully failed to do the utmost to perform that duty.

(9) Failing to afford relief and assistance.

(a) That certain troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or an ally of the United States or any other state or the Organized militia were engaged in battle and required relief and assistance.

(b) That the accused was in a position and able to render relief and assistance to these troops, combatants, vessels, or aircraft, without jeopardy to the accused's mission;

(c) That the accused failed to afford all practicable relief and assistance; and

(d) That, at the time, the accused was before or in the presence of the enemy.

c. Explanation.

(1) Running away. "Running away," means an unauthorized departure to avoid actual or impending combat. It need not, however, be the result of fear, and there is no requirement that the accused literally run.

(a) Enemy. "Enemy" includes Organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as rebellious mob or a band of renegades, and includes civilians as well as members of military Organizations. "Enemy" is not restricted to the enemy Government or its armed forces. All the citizens of one belligerent are enemies of the Government or its armed forces. All the citizens of one belligerent are enemies of the Government and all the citizens of the other.

(b) Before the enemy. Whether a person is "before the enemy" is a question of tactical relation, not distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an Organization some distance from the front or immediate area of combat which is not a part of tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article.

(2) Shamefully abandoning, surrendering, or delivering up of command.

(a) Scope. This provision concerns primarily commanders chargeable with responsibility for defending a command, unit, place, ship or military property. Abandonment by a subordinate would ordinarily be charged as running away.

(b) Shameful. Surrender or abandonment without justification is shameful within the meaning of this article.

(c) Surrender; delivers up. "Surrenders" and "delivers up" are synonymous for the purposes of this article.

(d) Justification. Surrender or abandonment of a command, unit, place, ship or military property by a person charged with its defense can be justified only by the utmost necessity or extremity.

(3) Endangering safety of a command, unit, place, ship or military property.

(a) Neglect. "Neglect" is the absence of conduct, which would have been taken by a reasonably careful person in the same or similar circumstances.

(b) Intentional misconduct. "Intentional misconduct" does not include a mere error in judgment.

(4) Casting away arms or ammunition. Self-explanatory.

(5) Cowardly conduct.

(a) Cowardice. "Cowardice" is misbehavior motivated by fear.

(b) Fear. Fear is a natural feeling of apprehension when going into battle. The mere display of apprehension does not constitute this offense.

(c) Nature of offense. Refusal or abandonment of a performance of duty before or in the presence of the enemy as a result of fear constitutes this offense.

(d) Defense. Genuine and extreme illness, not generated by cowardice, is a defense.

(6) Quitting place of duty to plunder or pillage.

(a) Place of duty. "Place of duty" includes any place of duty, whether permanent or temporary, fixed or mobile.

(b) Plunder or pillage. "Plunder or pillage" means to seize or appropriate public or private property unlawfully.

(c) Nature of offense. The essence of this offense is quitting the place of duty with intent to plunder or pillage. Merely quitting with that purpose is sufficient, even if the intended misconduct is not done.

(7) Causing false alarms. This provision covers spreading of false or disturbing rumors or reports, as well as the false giving of established alarm signals.

(8) Willfully failing to do utmost to encounter enemy. Willfully refusing a lawful order to go on a combat patrol may violate this provision.

(9) Failing to afford relief and assistance.

(a) All practicable relief and assistance. "All practicable relief and assistance" means all relief and assistance, which should be afforded within the limitations imposed upon a person by reason of that person's own specific tasks or mission.

(b) Nature of offense. This offense is limited to a failure to afford relief and assistance to forces "engaged in battle."

d. Lesser-included offenses.

(1) Running away.

(a) NYSML, Section 130.81 - Desertion with intent to avoid hazardous or important service.

(b) NYSML, Section 130.82 - Absence without authority; going from appointed place of duty.

(c) NYSML, Section 130.76 - Attempts.

(2) Shamefully abandoning, surrendering, or delivering up command. NYSML, Section 130.76 - Attempts.

(3) Endangering safety of a command, unit, place, ship or military property.

(a) Through disobedience of order. NYSML, Section 130.88 - Failure to obey lawful order.

(b) NYSML, Section 130.76 - Attempts.

(4) Casting away arms or ammunition.

(a) NYSML, Section 130-103 - Military property - loss, damage, destruction, or wrongful disposition.

(b) NYSML, Section 130.76 - Attempts.

(5) Cowardly conduct.

(a) NYSML, Section 130.81 - Desertion with intent to avoid hazardous duty or important service.

(b) NYSML, Section 130.82 - Absence without authority.

(c) NYSML, Section 130.95 - Running away.

(d) NYSML, Section 130.76 - Attempts.

(6) Quitting place of duty to plunder or pillage.

(a) NYSML, Section 130.82 - Going from appointed place of duty.

(b) NYSML, Section 130.76 - Attempts.

(7) Causing false alarms. NYSML, Section 130.76 - Attempts.

(8) Willfully failing to do utmost to encounter enemy. NYSML, Section 130.76 - Attempts.

(9) Failing to afford relief and assistance. NYSML 130.76 - Attempts.

e. Sample specifications.

(1) Running away.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, run away (from his/her company) (and hide) (_____), (and did not return until after the engagement has been concluded) (_____).

(2) Shamefully abandoning, surrendering, or delivering up command.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, shamefully (abandon) (surrender) (deliver up) _____, which it was his/her duty to defend.

(3) Endangering safety of a command, unit place, ship or military property.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, endanger the safety of _____ which it was his/her duty to defend, by (disobeying an order from _____ to engage the enemy) (neglecting his/her duty as a sentinel by engaging in a card game while on his/her post) (intentional misconduct in that he/she became drunk and fired flares, thus revealing the location of his/her unit) (_____).

(4) Casting away arms or ammunition.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, cast away his/her (rifle) (ammunition) (_____).

(5) Cowardly conduct.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, was guilty of cowardly conduct as a result of fear, in that _____.

(6) Quitting place of duty to plunder or pillage.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, quit his/her place of duty for the purpose of (plundering) (pillaging) (plundering and pillaging).

(7) Causing false alarms.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, cause a false alarm in (Fort _____) (the said ship) (the camp) (_____) by [needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm)].

(8) Willfully failing to do utmost to encounter enemy.

In that _____ (personal jurisdiction data), being (before) (in the presence of) the enemy, did (at/on board-location), on or about _____, 20__, by, (ordering his/her troops to halt their advance) (_____), willfully fail to do his/her utmost to (encounter) (engage) (capture) (destroy), as it was his/her duty to do, (certain enemy troops which were in retreat) (_____).

(9) Failing to afford relief and assistance.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (before) (in the presence of) the enemy, fail to afford all practicable relief and assistance to (the USS _____, which was engaged in battle and has run aground, in that he/she failed to take her in tow) (certain troops of the ground forces of _____, which were engaged in battle and were pinned down by enemy fire, in that he/she failed to furnish air cover) (_____) as he/she properly should have done.

24. NYSML, Section 130.96 - Subordinate compelling surrender.

a. Text.

"Any person subject to this code who compels or attempts to compel a commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces of the United States or of any other state, or of the Organized militia to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished as a court-martial may direct."

b. Elements.

(1) Compelling surrender.

(a) That a certain person was in command of a certain place, vessel, aircraft or other military property or of a body of members of the armed forces of the United States or of any other state or of the Organized militia;

(b) That the accused did an overt act which was intended to and did compel that commander to give it up to the enemy or abandon it; and

(c) That the place, vessel, aircraft, or other military property or body of members of the armed forces of the United States or of any other state or of the Organized militia was actually given up to the enemy or abandoned.

(2) Attempting to compel surrender.

(a) That a certain person was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces of the United States or of any other state or of the Organized militia.

(b) That the accused did a certain overt act;

(c) That the act was done with the intent to compel the commander to give up to the enemy or abandon the place, vessel, aircraft, or other military property or body of members of the armed forces of the United States or of any other state, or of the Organized militia;

(d) That the act amounted to more than mere preparation; and

(e) That the act apparently tended to bring about the compelling of surrender or abandonment.

(3) Striking the colors or flag.

(a) That there was an officer of surrender to an enemy;

(b) That this offer was made by striking the colors or flag to the enemy or in some other manner;

(c) That the accused made or was responsible for the offer; and

(d) That the accused did not have proper authority to make the offer.

c. Explanation.

(1) Compelling surrender.

(a) Nature of offense. The offenses under this article are similar to mutiny or attempted mutiny designed to bring about surrender or abandonment. Unlike some cases of mutiny, however, concert of action is not an essential element of the offenses under this article. The offense is not complete until the place, military property, or command is actually abandoned or given up to the enemy.

(b) Surrender. "Surrender" and "to give it up to an enemy" are synonymous.

(c) Acts required. The surrender or abandonment must be compelled or attempted to be compelled by acts rather than words.

(2) Attempting to compel surrender. The offense of attempting to compel a surrender or abandonment does not require actual abandonment or surrender, but there must be some act done with this purpose in view, even if it does not accomplish the purpose.

(3) Striking the colors or flag.

(a) In general. To "strike the colors or flag" is to haul down the colors or flag in the face of the enemy or to make any other offer of surrender. It is traditional wording for an act of surrender.

(b) Nature of offense. The offense is committed when one assumes the authority to surrender a military force or position when not authorized to do so either by competent authority or by the necessities of battle. If continued battle has become fruitless and it is impossible to communicate with higher authority, those facts will constitute proper authority to surrender. The offense may be committed whenever there is sufficient contact with the enemy to give the opportunity of making an offer of surrender and it is not necessary that an engagement with the enemy be in progress. It is unnecessary to prove that the offer was received by the enemy or that it was rejected or accepted. The sending of an emissary charged with making the offer of surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.

(4) Enemy. For a discussion. "Enemy," see paragraph 23c(1)(b).

d. Lesser-included offense. Striking the colors or flag. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Compelling surrender or attempting to compel surrender.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (attempt to) compel _____, the commander of _____, (to give up to the enemy) (to abandon) said _____, by _____.

(2) Striking the colors or flag.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, without proper authority, offer to surrender to the enemy by [striking the (colors) (flag)] _____].

25. NYSML, Section 130.97 - Improper use of countersign.

a. Text.

"Any person subject to this code who in time of war discloses the parole or countersign to any person not entitled to receive it, or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished as a court-martial may direct."

b. Elements.

(1) Disclosing the parole or countersign to one not entitled to receive it.

(a) That, in time of war, the accused disclosed the parole or countersign to a person, identified or unidentified; and

(b) That this person was not entitled to receive it.

(2) Giving a parole or countersign different from that authorized.

(a) That, in time of war, the accused knew that the accused was authorized and required to give a certain parole or countersign; and

(b) That the accused gave to a person entitled to receive and use this parole or countersign a different parole or countersign from that which the accused was authorized and required to give.

c. Explanation.

(1) Countersign. A countersign is a word, signal, or procedure given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines. It consists of a secret challenge and a password, signal, or procedure.

(2) Parole. A parole is a word used as a check on the countersign; it is given only to those who are entitled to inspect guards and to commanders of guards.

(3) Who may receive countersign. The class of persons entitled to receive the countersign or parole will expand and contract under the varying circumstances of war.

Who these persons are will be determined largely, in any particular case, by the general or special orders under which the accused was acting. Before disclosing such a word, a person subject to military law must determine at that person's peril that the recipient is a person authorized to receive it.

(4) Intent, motive, negligence, mistake, ignorance not defense. The accused's intent or motive in disclosing the countersign or parole is immaterial to the issue of guilt, as is the fact that the disclosure was negligent or inadvertent. It is no defense that the accused did not know that the person to whom the countersign or parole was given was not entitled to receive it.

(5) How accused received countersigns or parole. It is immaterial whether the accused had received the countersign or parole in the regular course of duty or whether it was obtained in some other way.

(6) In time of war. This phrase means a period of war declared by Congress of the factual determination by the President that the existence of hostilities warrants a finding that a "time of war" exists.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Disclosing the parole or countersign to one not entitled to receive it.

In that _____ (personal jurisdiction data) did, (at/on board-location), on or about _____, 20__, a time of war, disclose the (parole) (countersign), to wit: _____, to _____, a person who was not entitled to receive it.

(2) Giving a parole or countersign different from that authorized.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, a time of war, give to _____, a person entitled to receive and use the (parole) (countersign), a (parole) (countersign), namely: _____ which was different from that which, to his/her knowledge, he/she was authorized and required to give, to wit: _____.

26. NYSML, Section 130.98 - Forcing a safeguard.

a. Text.

"Any person subject to this code who forces a safeguard shall be punished as a court-martial may direct."

b. Elements.

(1) That a safeguard had been issued or posted for the protection of a certain person or persons, place, or property;

(2) That the accused knew or should have known of the safeguard; and

(3) That the accused forced the safeguard.

c. Explanation.

(1) Safeguard. A safeguard is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency. The term also includes a written order left by a commander with an enemy subject or posted upon enemy property for the protection of that person or property. A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to ensure order within its own forces, even if those forces are in a theater of combat operations, and the posting of guards or of off-limits signs does not establish a safeguard unless a commander takes those actions to protect enemy or neutral persons or property. The effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national armed forces.

(2) Forcing a safeguard. "Forcing a safeguard," means to perform an act or acts in violation of the protection of the safeguard.

(3) Nature of offense. Any trespass on the protection of the safeguard will constitute an offense under this article, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

(4) Knowledge. Actual knowledge of the safeguard is not required. It is sufficient if an accused should have known of the existence of the safeguard.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, force a safeguard, [known by him/her to have been placed over the premises occupied by _____ at _____ by (overwhelming the guard posted for the protection of the same) (_____)] [_____]. _____.

27. NYSML, Section 130.99 - Captured or abandoned property.

a. Text.

"(a) All persons subject to this code shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

"(b) Any person subject to this code who -

"(1) fails to carry out the duties prescribed in subdivision (a) of this section; or

"(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

"(3) engages in looting or pillaging;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Failing to secure public property taken from the enemy.

(a) That certain public property was taken from the enemy;

(b) That this property was of a certain value; and

(c) That the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States.

(2) Failing to report and turn over captured or abandoned property.

(a) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused;

(b) That this property was of a certain value; and

(c) That the accused failed to give notice of its receipt and failed to turn over to proper authority, without delay, the captured or abandoned public or private property.

(3) Dealing in captured or abandoned property.

(a) That the accused bought, sold, traded, or otherwise dealt in or disposed of certain public or private captured or abandoned property;

(b) That this property was of certain value; and

(c) That by so doing the accused received or expected some profit, benefit, or advantage to the accused or to a certain person or persons connected directly or indirectly with the accused.

(4) Looting or pillaging.

(a) That the accused engaged in looting, pillaging, or looting and pillaging by unlawfully seizing or appropriating certain public or private property;

(b) That this property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and

(c) That this property was:

(i) left behind, owned by, or in the custody of the enemy, an occupied state, an inhabitant of an occupied state, or a person under the protection of the enemy or occupied state, or who, immediately prior to the occupation of the place where the act occurred, was under the protection of the enemy or occupied state; or

(ii) part of the equipment of a seized or captured vessel; or

(iii) owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel.

c. Explanation.

(1) Failing to secure public property taken from the enemy.

(a) Nature of property. Unlike the remaining offenses under this article, failing to secure public property taken from the enemy involves only public property. Immediately upon its capture from the enemy, public property becomes the property of the United States. Neither the person who takes it nor any other person has any private right in this property.

(b) Nature of duty. Every person subject to the code has an immediate duty to take such steps as are reasonably within that person's power to secure public property for the service of the United States and to protect it from destruction or loss.

(2) Failing to report and turn over captured or abandoned property.

(a) Reports. Reports of receipt of captured or abandoned property are to be made directly or through such channels as are required by current regulations, orders, or the customs of the service.

(b) Proper authority. "Proper authority" is any authority competent to order disposition of the property in question.

(3) Dealing in captured or abandoned property. "Disposed of" includes destruction or abandonment.

(4) Looting or pillaging. "Looting or pillaging" means unlawfully seizing or appropriating property, which is located in enemy or occupied territory.

(5) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Failing to secure public property taken from the enemy.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, fail to secure for the service of the United States certain public property taken from the enemy, to wit: _____, of a value of (about) $_____.

(2) Failing to report and turn over captured or abandoned property.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, fail to give notice and turn over to proper authority without delay certain (captured) (abandoned) property, which had come into his/her (possession) (custody) (control), to wit: _____, of a value of (about) $_____.

(3) Dealing in captured or abandoned property.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (buy) (sell) (trade) (deal in) (dispose of) (_____) certain (captured) (abandoned) property, which had come into his/her (possession) (custody) (control), to wit: _____, of a value of (about) $_____, thereby (receiving) (expecting a (profit)) (benefit) (advantage) to (himself/herself) (_____, his/her accomplice) (_____, his/her brother) (_____).

(4) Looting or pillaging.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, engage in (looting) (pillaging) (looting and pillaging) by unlawfully (seizing) (appropriating) _____, [property which had been left behind] [the property of _____, (an inhabitant of _____) (_____)].

28. NYSML, Section 130.100 - Aiding the enemy.

a. Text.

"Any person subject to this code who -

"(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

"(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Aiding the enemy.

(a) That the accused aided the enemy; and

(b) That the accused did so with certain arms, ammunition, supplies, money, or other things.

(2) Attempting to aid the enemy.

(a) That the accused did a certain overt act;

(b) That the act was done with the intent to aid the enemy with certain arms, ammunition, supplies, money, or other things;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to bring about the offense of aiding the enemy with certain arms, ammunition, supplies, money, or other things.

(3) Harboring or protecting the enemy.

(a) That the accused, without proper authority, harbored or protected a person;

(b) That the person so harbored or protected was the enemy; and

(c) That the accused knew that the person so harbored or protected was an enemy.

(4) Giving intelligence to the enemy.

(a) That the accused, without proper authority, knowingly gave intelligence information to the enemy; and

(b) That the intelligence information was true, or implied the truth, at least in part.

(5) Communicating with the enemy.

(a) That the accused, without proper authority, communicated, corresponded, or held intercourse with the enemy, and;

(b) That the accused knew that the accused was communicating, corresponding, or holding intercourse with the enemy.

c. Explanation.

(1) Scope of NYSML, Section 130.100. In contrast to Article 104 of the UCMJ, this article denounces offenses by all persons committed only by persons subject to the code.

(2) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

(3) Aiding or attempting to aid the enemy. It is not a violation of this article to furnish prisoners of war subsistence, quarters, and other comforts or aid to which they are lawfully entitled.

(4) Harboring or protecting the enemy.

(a) Nature of offense. An enemy is harbored or protected when, without proper authority, that enemy is shielded, either physically or by use of any artifice, aid, or representation from any injury or misfortunate which in the chance of war may occur.

(b) Knowledge. Actual knowledge is required, but may be proved by circumstantial evidence.

(5) Giving intelligence to the enemy.

(a) Nature of offense. Giving intelligence to the enemy is a particular case of corresponding with the enemy made more serious by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. This intelligence may be conveyed by direct or indirect means.

(b) Intelligence. "Intelligence" imports that the information conveyed is true or implies the truth, at least in part.

(c) Knowledge. Actual knowledge is required but may be proved by circumstantial evidence.

(6) Communicating with the enemy.

(a) Nature of the offense. No unauthorized communication, correspondence, or intercourse with the enemy is permissible. The intent, content, and method of the communication, correspondence, or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused. The communication, correspondence, or intercourse may be conveyed directly or indirectly. A prisoner of war may violate this article by engaging in unauthorized communications with the enemy. See also paragraph 29c(3).

(b) Knowledge. Actual knowledge is required but may be proved by circumstantial evidence.

d. Lesser-included offense. For harboring or protecting the enemy, giving intelligence to the enemy, or communicating with the enemy. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Aiding or attempting to aid the enemy.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, (attempt to) aid the enemy with (arms) (ammunition) (supplies) (money) (_____), by (furnishing and delivering to _____, members of the enemy's armed forces _____) (_____).

(2) Harboring or protecting the enemy.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, without proper authority, knowingly (harbor) (protect) _____, an enemy, by (concealing the said _____ in his/her house) (_____).

(3) Giving intelligence to the enemy.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, without proper authority, knowingly give intelligence to the enemy, by (_____).

(4) Communicating with the enemy.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, without proper authority, knowingly (communicate with) (correspond with) (hold intercourse with) the enemy [by writing and transmitting secretly through the lines to one _____, whom he/she, the said _____, knew to be (an officer of the enemy's armed forces) (_____) a communication in words and figures substantially as follows, to wit: _____)] [(indirectly by publishing in _____, a newspaper published at _____, a communication in _____, a newspaper published at _____, a communication in words and figures as follows, to wit: _____ which communication was intended to reach the enemy)] [(_____)].

29. NYSML, Section 130.101 - Misconduct as a prisoner.

a. Text.

"Any person subject to this code who, while in the hands of the enemy in time of war -

"(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

"(2) while in a position of authority over such persons maltreats them without justifiable cause;

"shall be punished as a court-martial may direct."

b. Elements.

(1) Acting without authority to the detriment of another for the purpose of securing favorable treatment.

(a) That without proper authority the accused acted in a manner contrary to law, custom, or regulation;

(b) That the act was committed while the accused was in the hands of the enemy in time of war;

(c) That the act was done for the purpose of securing favorable treatment of the accused by the captors; and

(d) That the other prisoners held by the enemy, either military or civilian, suffered some detriment because of the accused's act.

(2) Maltreating prisoners while in a position of authority.

(a) That the accused maltreated a prisoner held by the enemy;

(b) That the act occurred while the accused was in the hands of the enemy in time of war;

(c) That the accused held a position of authority over the person maltreated; and

(d) That the act was without justifiable cause.

c. Explanation.

(1) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

(2) In time of war. See paragraph 25c(6).

(3) Acting without authority to the detriment of another for the purpose of securing favorable treatment.

(a) Nature of offense. Unauthorized conduct by a prisoner of war must be intended to result in improvement by the enemy of the accused's condition and must operate to the detriment of other prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm. Examples of this conduct include reporting plans of escape being prepared by others or reporting secret food caches, equipment, or arms. The conduct of the prisoner must be contrary to law, custom, or regulation.

(b) Escape. Escape from the enemy is authorized by custom. An escape or escape attempt which results in closer confinement or other measures against fellow prisoners still in the hands of the enemy is not an offense under this article.

(4) Maltreating prisoners while in a position of authority.

(a) Authority. The source of authority is not material. It may arise from the military rank of the accused or - despite service regulations or customs to the contrary - designation by the captor authorities, or voluntary election or selection by other prisoners for their self.

(b) Maltreatment. The maltreatment must be real, although not necessarily physical, and it must be without justifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Acting without authority to the detriment of another for the purpose of securing favorable treatment.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, a time of war, without proper authority and for the purpose of securing favorable treatment by his/her captors, (report to the Commander of Camp _____ the preparations by _____, a prisoner at said camp, to escape, as a result of which report the said _____ was placed in solitary confinement) (_____).

(2) Maltreating prisoner while in a position of authority.

In that _____ (personal jurisdiction data), did, (at/on board-location), on or about _____, 20__, a time of war, while in the hands of the enemy and in a position of authority over _____, a prisoner at _____, as (officer in charge of prisoners at _____) (_____), maltreat the said _____ by (depriving him/her of _____) (_____), without justifiable cause.

30. NYSML 130.102 - False official statements.

a. Text.

"Any person subject to this code who with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, or makes any other false official statement knowing to be false, shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused signed a certain official document or made a certain official statement;

(2) That the document or statement was false in certain particulars;

(3) That the accused knew it to be false at the time of signing it or making it; and

(4) That the false document or statement was made with the intent to deceive.

c. Explanation.

(1) Official documents and statements. Official documents and official statements include all documents and statements made in the line of duty.

(2) Status of victim of the deception. The rank of any person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement or document from the accused. The Government may be the victim of this offense.

(3) Intent to deceive. The false representation must be made with the intent to deceive. It is not necessary that the false statement be material to the issue under inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive, while immateriality may tend to show an absence of this intent.

(4) Material gain. The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing on the element of intent to deceive.

(5) Knowledge that the document or statement was false. The false representation must be one, which the accused actually knew was false. Actual knowledge may be proved by circumstantial evidence. An honest, although erroneous, belief that a statement made is true is a defense.

(6) Statements made during an interrogation.

(a) Person without an independent duty or obligation to speak. A statement made by an accused or suspect during an interrogation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak. (See paragraph 79 (false swearing))

(b) Person with an independent duty or obligation to speak. If a suspect or accused does have an independent duty or obligation to speak, as in the case of a custodian who is required to account for property, a statement made by that person during an interrogation into the matter is official. While the person could remain silent (NYSML, Section 130.31(b)), if the person chooses to speak, the person must do so truthfully.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board-location), (subject matter jurisdiction data, if required), on or about _____, 20__, with intent to deceive, [sign an official (record) (return) (_____), to wit:_____] [make to _____, an official statement, to wit: _____], which (record) (return) (statement) (_____), was (totally false) (false in that _____), and was then known by the said _____ to be so false.

31. NYSML, Section 130.103 - Military property - loss, damage, destruction, or wrongful disposition.

a. Text.

"Any person subject to this code who, without proper authority -

"(1) sells or otherwise disposes of; or

"(2) willfully or through neglect damages, destroys, or loses; or

"(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of;

"any military property of the United States or of the State shall be punished as a court-martial may direct."

b. Elements.

(1) Selling or otherwise disposing of military property.

(a) That the accused sold or otherwise disposed of certain property (which was a firearm or explosive).

(b) That the sale or disposition was without proper authority;

(c) That the property was military property of the United States or of the State; and

(d) That the property was of a certain value.

(2) Damaging, destroying, or losing military property.

(a) That the accused, without proper authority, damaged or destroyed certain property in a certain way, or lost certain property;

(b) That the property was military property of the United States or of the State;

(c) That the damage, destruction, or loss was willfully caused by the accused or was the result of neglect by the accused; and

(d) That the property was of a certain value or the damage was of a certain amount.

(3) Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.

(a) That certain property (which was a firearm or explosive) was lost, damaged, destroyed, sold, or wrongfully disposed of;

(b) That the property was military property of the United States or of the State;

(c) That the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by the accused;

(d) That this omission was willful or negligent; and

(e) That the property was of a certain value or the damage was of a certain amount.

c. Explanation.

(1) Military property. Military property is all property, real or personal, owned, held, or used by one of the military departments of the United States or of the State. It is immaterial whether the property sold, disposed of, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by either direct or circumstantial evidence that items of individual issue were issued to the accused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of service exchange stores is not military property under this section.

(2) Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of. "To suffer" means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.

(3) Value and damage. In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment, which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the Government agency normally employed in such work, or the cost of replacement, as shown by Government price lists or otherwise, whichever is less.

d. Lesser-included offenses.

(1) Sale or disposition of military property.

(a) NYSML, Section 130.76 - Attempts.

(b) NYSML, Section 130.115 - Sale or disposition of nonmilitary Government property.

(2) Willfully damaging military property.

(a) NYSML, Section 130.103 - Damaging military property through neglect.

(b) NYSML, Section 130.76 - Attempt.

(3) Willfully suffering military property to be damaged.

(a) NYSML, Section 130.103 - Through neglect suffering military property to be damaged.

(b) NYSML, Section 130.76 - Attempts.

(4) Willfully destroying military property.

(a) NYSML, Section 130.103 - Through neglect destroying military property.

(b) NYSML, Section, 130.103 - Willfully damaging military property.

(c) NYSML, Section 130.103 - Through neglect damaging military property.

(d) NYSML, Section 130.76 - Attempts.

(5) Willfully suffering military property to be destroyed.

(a) NYSML, Section 130.103 - Through neglect suffering military property to be destroyed.

(b) NYSML, Section 130.103 - Willfully suffering military property to be damaged.

(c) NYSML, Section 130.103 - Through neglect suffering military property to be damaged.

(d) NYSML, Section 130.76 - Attempts.

(6) Willfully losing military property.

(a) NYSML, Section 130.103 - Through neglect, losing military property.

(b) NYSML, Section 130.76 - Attempts.

(7) Willfully suffering military property to be lost.

(a) NYSML, Section 130.103 - Through neglect, suffering military property to be lost.

(b) NYSML, Section 130.76 - Attempts.

(8) Willfully suffering military property to be sold.

(a) NYSML, Section 130.103 - Through neglect, suffering military property to be sold.

(b) NYSML, Section 130.76 - Attempts.

(9) Willfully suffering military property to be wrongfully disposed of.

(a) NYSML, Section 130.103 - Through neglect, suffering military property to be wrongfully disposed of in the manner alleged.

(b) NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Selling or disposing of military property.

In that _____ (personal jurisdiction data), did, (at/on board-location), (subject matter jurisdiction data, if required), on or about _____, 20__, without proper authority, (sell to _____) (dispose of by _____) _____ [(a firearm) (an explosive)] of a value of (about) $_____, military property of [(the United States) (the State of New York)].

(2) Damaging, destroying, or losing military property.

In that _____ (personal jurisdiction data), did, (at/on board-location), (subject matter jurisdiction data, if required), on or about _____, 20__, without proper authority, [(willfully) (through neglect)] [(damage by _____) (lose)] _____ [of a value of (about) $ _____m] military property of the [(the United States) (the State of New York)] [the amount of said damage being in the sum of (about) $ _____].

(3) Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.

In that _____ (personal jurisdiction data), did, (at/on board-location), (subject matter jurisdiction data, if required), on or about _____, 20__, without proper authority, (willfully) (through neglect) suffer _____, [(a firearm) (an explosive)] of a value of (about) $_____, military property of [(the United States) (the State of New York)], to be (lost) (damaged by _____) (destroyed by _____), (sold to _____), (wrongfully disposed of by _____) [the amount of said damage being in the sum of (about) $ _____].

32. NYSML, Section 130.104 - Property other than military property - waste, spoil, or destruction.

a. Text.

"Any person subject to this code who, while on active state duty or in a duty status other than active state duty, willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States or the State shall be punished as a court-martial may direct."

b. Elements.

(1) Wasting or spoiling of non-military property.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That the accused willfully or recklessly wasted or spoiled certain real property in a certain manner;

(c) That the property was that of another person; and

(d) That the property was of a certain value.

(2) Destroying or damaging non-military property.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That the accused willfully and wrongfully destroyed or damaged certain personal property in a certain manner;

(c) That the property was that of another person; and

(d) That the property was of a certain value or the damage was of a certain amount.

c. Explanation.

(1) Active state duty or in a duty status other than active state duty. The code was enacted in 1953, after several years study of prior military law. Such prior law had provided court-martial jurisdiction over many offenses primarily civil in nature. Because of the disparity in sentencing authority between what civilian criminal courts and courts-martial could adjudge. The 1953 codification deleted many of these civilian-cognizable offenses. One group of exceptions is that contained in NYSML, Section 130.104. Although this offense is primarily civil in nature and cognizable in civilian criminal courts in the interest of military discipline, it was felt necessary that courts-martial retain jurisdiction over this group of offenses. Hence, the duty status of the accused was specifically made an element of each offense.

(2) Wasting or spoiling non-military property. This portion of NYSML, Section 130.104, prescribes willful or reckless waste or spoilation of the real property of another. The terms "wastes" and "spoils" as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. This destruction is punishable whether done willfully, that is intentionally, or recklessly, that is through a culpable disregard of the foreseeable consequences of some voluntary act.

(3) Destroying or damaging non-military property. This portion of NYSML, Section 130.104, prescribes the willful and wrongful destruction or damage of the personal property of another. To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose. Damage consists of any physical injury to the property. To constitute an offense under this section, the destruction or damage of the property must have been willful and wrongful. As used in this section "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom. Willfulness may be proved by circumstantial evidence, such as the manner in which the acts were done.

(4) Value and damage. In the case of destruction, the value of the property destroyed controls the maximum punishment, which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. (Paragraph 46c(1)(g))

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), [(while on active State duty) (while in a duty status other than active State duty)], did, (at/on board-location), (subject matter jurisdiction data, if required), on or about _____, 20__, [(willfully) (recklessly) waste] [(willfully) (recklessly) spoil] [willfully and wrongfully (destroy) (damage) by _____] _____, [of a value of (about) $_____] [the amount of said damage being in the sum of (about) $ _____], the property of _____.

33. NYSML, Section 130.105 - Improper hazarding of vessel.

a. Text.

"(a) Any person subject to this code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the United States or of the Organized militia shall be punished as a court-martial may direct.

"(b) Any person subject to this code who negligently hazards or suffers to be hazarded any vessel of the United States or of the Organized militia shall be punished as a court-martial may direct."

b. Elements.

(1) That a vessel of the United States or of the Organized militia was hazarded in a certain manner; and

(2) That the accused by certain acts or omissions, willfully and wrongfully, or negligently, caused or suffered the vessel to be hazarded.

c. Explanation.

(1) Hazard. "Hazard" means to put in danger of loss or injury. Actual damage to, or loss of, a vessel of the armed forces by collision, stranding, running upon a shoal, or a rock, or by any other cause, is conclusive evidence that the vessel was hazarded but not of the fact of culpability on the part of any particular person. "Stranded" means run aground so that the vessel is fast for a time. If the vessel "touches and goes," she is not stranded; if she "touches and sticks," she is. A shoal is a sand, mud, or gravel bank or bar that makes the water shallow.

(2) Willfully and wrongfully. As used in this article, "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom.

(3) Negligence. "Negligence" as used in this article means the failure to exercise the care, prudence, or attention to duties, which the interests of Government require a prudent and reasonably person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something, which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order. However, a mere error in judgment that a reasonably able person might have committed under the same circumstances does not constitute an offense under this article.

(4) Suffer. "To suffer" means to allow or permit. A ship is willfully suffered to be hazarded by one who, although not in direct control of the vessel, knows a danger to be imminent but takes no steps to prevent it, as by a plotting officer of a ship under way who fails to report to the officer of the deck a radar target which is observed to be on a collision course with, and dangerously close to, the ship. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.

d. Lesser-included offenses.

(1) Willfully and wrongfully hazarding a vessel.

(a) NYSML, Section 130.105 - Negligently hazarding a vessel.

(b) NYSML, Section 130.76 - Attempts.

(2) Willfully and wrongfully suffering a vessel to be hazarded.

(a) NYSML, Section 130.105 - Negligently suffering a vessel to be hazarded.

(b) NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Hazarding or suffering to be hazarded any vessel, willfully and wrongfully.

In that _____ (personal jurisdiction data), did, (at/on board-location), while serving as _____ aboard the _____ in the vicinity of _____, willfully and wrongfully (hazard the said vessel) (suffer the said vessel to be hazarded) by (causing the said vessel to collide with _____) (allowing the said vessel to run aground) (_____).

(2) Hazarding of vessel, negligently.

(a) Example 1.

In that _____ (personal jurisdiction data), on _____, 20__, while serving in command of the _____, making entrance to (Boston Harbor), did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect the said _____, at or about _____ hours on the day aforesaid became stranded in the vicinity of (Channel Buoy Number _____).

(b) Example 2.

In that _____ (personal jurisdiction data), on _____, 20___, while serving as navigator of the _____, cruising on special service in the _____ ocean off the coast of _____, notwithstanding the fact that at about midnight, _____, 20__, the _____ point of _____ bore abeam and was about _____ miles distant, the said ship being then underway and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then negligently hazard the said vessel by failing and neglecting to exercise proper care and attention in navigating said ship while approaching _____ Island, in that he/she neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of said _____, ran upon a rock off the _____ coast of _____Island, at about _____ hours, _____, 20__, in consequence of which the said _____ was lost.

(c) Example 3.

In that _____ (personal jurisdiction data), on _____, 20___, while serving as navigator of the _____ and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from the _____ position, obtained and plotted by him/her, to the position of _____, and well knowing the difficulty of sighting _____, from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise his/her commanding officer to lay a safe course for said ship to the northward before continuing on a _____ course, as it was the duty of said _____ to do; in consequence of which the said ship was, at about _____ hours on the day above mentioned, run upon _____ bank in the _____ sea, about latitude _____ degrees, _____ minutes, _____, and longitude _____ degrees, _____ minutes _____, and seriously injured.

(3) Suffering a vessel to be hazarded, negligently.

In that _____ (personal jurisdiction data), while serving as combat intelligence center officer on board the _____, making passage from _____ to _____, and having, between _____ and _____ hours on _____, 20__, been duly informed of decreasing radar ranges and constant radar bearing indicating that the said _____ was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was his/her duty to do, and he/she , the said _____, through negligence, did cause the said _____ to collide with the _____ at or about _____ hours on said date, with resultant damage to both vessels.

34. NYSML, Section 130.106 - Drunken or reckless driving.

a. Text.

"Any person subject to this code who, while on active state duty or in a duty status other than active state duty, operates any vehicle while drunk, or in a reckless or wanton manner, or while impaired by drugs, will be punished as a court-martial may direct."

b. Elements.

(1) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(2) That the accused was operating a vehicle; and

(3) That the accused was drunk while operating the vehicle, or that the accused operated the vehicle in a reckless or wanton manner.

[Note: If injury resulted add the following element.]

(4) That the accused thereby caused the vehicle to injure a person.

c. Explanation.

(1) Active state duty or in a duty status other than active state duty. (See paragraph 32c(1))

(2) Vehicle. See N.Y.R.C.M. 103(34). Drunken or reckless operation of water and air transportation may be alleged under other articles of the code, as appropriate.

(3) Operating. Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency of another, but also the setting of its motive power in action or the manipulation or its controls so as to cause the particular vehicle to move.

(4) Drunk or impaired. "Drunk" and "impaired" means any intoxication which is sufficient sensibly to impair the rational and dull exercise of the mental or physical faculties. Whether the drunkenness or impairment was caused by liquor or drugs is immaterial.

(5) Reckless. The operation of a vehicle is "reckless" when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening or an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: whether, under all the circumstances, the accused's manner of operation of the vehicle was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is driving with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The condition of the surface on

which the vehicle is operated, the time of day or night, the traffic, and the condition of the vehicle are often matters of importance in the proof of an offense charged under this article and, where they are of importance, may properly be alleged.

(6) Wanton. "Wanton" includes "reckless," but in describing the operation of the vehicle, it may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(7) Separate offenses. While the same course of conduct may constitute both drunken and reckless driving, this article prescribes these as separate offenses, and both offenses may be charges. However, as recklessness is a relative matter, evidence of all the surrounding circumstances which made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

d. Lesser-included offenses. Drunken driving.

(1) NYSML, Section 130.107 - Drunk on duty.

(2) NYSML, Section 130.115 - Drunk on station.

e. Sample specification.

In that _____ (personal jurisdiction data) [(while on active state duty) (while in a duty status other than active state duty)], did (at/on board location) (subject-matter jurisdiction data, if required), on or about _____, 20___, (in the motor pool area) (near the Officers' Club) (on _____ Street between _____ and _____ Avenues) (_____) operate a vehicle, to wit: (a truck) (a passenger car) (_____), [while drunk] [while impaired by _____] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (driving at a speed in excess of 50 miles per hour on the sidewalk and wrong side of said street) (_____)] (and did thereby cause said vehicle to (strike and) injure _____).

35. NYSML, Section 130.107 - Drunk on duty - misbehavior.

a. Text.

"Any person subject to this code who is found drunk on duty or drunk or sleeping upon his post, or who leaves his post before he is regularly relieved, shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was on a certain duty or was posted or on post as a sentinel or lookout;

(2) That the accused was found drunk while on that duty or post, was found sleeping while on post, or left post before being regularly relieved.

c. Explanation.

(1) In general. This article encompasses the offenses found in Articles 112 and 113 of the UCMJ, and defines four kinds of misbehavior committed by those on duty as sentinels, lookouts or otherwise, being found drunk on duty, or sleeping or leaving it before being regularly relieved.

(2) Post. "Post" is the area where the sentinel or lookout is required to be for the performance of duties. It is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout goes an immaterial distance from the post, unless it is such a distance that the ability to fully perform the duty for which posted is impaired.

(3) On post. A sentinel or lookout becomes "on post" after having been given a lawful order to go "on post" as a sentinel or lookout and being formally or informally posted. The fact that a sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given. A sentinel or lookout is on post within the meaning of the article not only when at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

(4) Sentinel or lookout. A sentinel or a lookout is a person whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of the enemy, or to guard persons, property, or a place and to sound the alert, if necessary.

(5) Duty. "Duty" as used in this article means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. Within the meaning of this article, when in the actual exercise of command, the commander of a post, or of a command, or of a detachment in the field is constantly on duty, as is the commanding officer on board a ship. In the case of other officers or enlisted persons, "on duty" relates to duties of routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as "off duty" or "on liberty." In a region of active hostilities, the circumstances are often such that all members of command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

(6) Drunk. For an explanation of "drunk," see paragraph 34c(4).

(7) Sleeping. As used in this article, "sleeping" is that condition of insentience, which is sufficient sensibly to impair the full exercise of the mental and physical faculties of a sentinel or lookout. It is not necessary to show that the accused was in a wholly comatose condition.

(8) Defenses. The fact that the accused's sleeping resulted from a physical incapacity caused by disease or accident is an affirmative defense. See N.Y.R.C.M. 916(i). If the accused is known by superior authorities to be drunk at the time a duty is assigned and the accused is allowed to assume that duty anyway, or if the drunkenness resulted from an accidental over-dosage administered for medicinal purposes, the accused will have a defense to an offense wherein drunkenness is an element. (But see paragraph 51 (incapacitation for duty))

d. Lesser-included offenses.

(1) Drunk on duty. NYSML, Section 130.115 - Drunk on station.

(2) Drunk on post.

(a) NYSML, Section 130.107 - Drunk on duty.

(b) NYSML, Section 130.88 - Dereliction of duty.

(c) NYSML, Section 130.115 - Drunk on station.

(d) NYSML, Section 130.115 - Drunk in uniform in a public place.

(3) Sleeping on post.

(a) NYSML, Section 130.88 - Dereliction of duty.

(b) NYSML, Section 130.115 - Loitering or wrongfully sitting down on post.

(4) Leaving post.

(a) NYSML, Section 130.88 - Dereliction of duty.

(b) NYSML, Section 130.82 - Going from appointed place of duty.

e. Sample specifications.

(1) Drunk on duty.

In that _____ (personal jurisdiction data) was (at/on board location) on or about _____, 20___, found drunk while on duty as _____.

(2) Duty as sentinel or lookout.

In that _____ (personal jurisdiction data), on or about _____ (at/on board location) being (posted) (on post) as a (sentinel) (lookout) at (Warehouse No. 7) (Post No. 11) (for radar observation) (_____) [was found (drunk) (sleeping) upon his/her post] [did leave his/her post before he/she was regularly relieved].

36. NYSML, Section 130.108 - Dueling.

a. Text.

"Any person subject to this code who, while on active state duty or in a duty status other than active state duty, fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct."

b. Elements.

(1) Dueling.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That the accused fought another person with deadly weapons;

(c) That the combat was for private reasons; and

(d) That the combat was by prior agreement.

(2) Promoting a duel.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That the accused promoted a duel between certain persons; and

(c) That the accused did so in a certain manner.

(3) Conniving at fighting a duel.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That certain persons intended to and were about to engage in a duel;

(c) That the accused had knowledge of the planned duel; and

(d) That the accused connived at the fighting of the duel in a certain manner.

(4) Failure to report a duel.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That a challenge to fight a duel had been sent or was about to be sent;

(c) That the accused had knowledge of this challenge; and

(d) That the accused failed to report this fact promptly to proper authority.

c. Explanation.

(1) Active state duty or in a duty status other than active state duty. (See paragraph 32c(1))

(2) Duel. A duel is combat between two persons for private reasons fought with deadly weapons by prior agreement.

(3) Promoting a duel. Urging or taunting another to challenge or to accept a challenge to duel, acting as a second or as carrier of a challenge or acceptance, or otherwise furthering or contributing to the fighting of a duel are examples of promoting a duel.

(4) Conniving at fighting a duel. Anyone who has knowledge that steps are being taken or have been taken toward arranging or fighting a duel and who fails to take reasonable preventive action thereby connives at the fighting of a duel.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Dueling.

In that _____ (personal jurisdiction data) (and _____) did (at/on board location) (subject-matter jurisdiction data, if required) on or about _____, 20___, fight a duel (with _____), using as weapons therefore (pistols) (swords) (_____).

(2) Promoting a duel.

In that _____ (personal jurisdiction data) did (at/on board location) (subject-matter jurisdiction data, if required) on or about _____, 20___, promote a duel between _____ and _____ by (telling said _____ he/she would be a coward if he/she failed to challenge said _____ to a duel) (knowingly carrying from said _____ to _____ a challenge to fight a duel).

(3) Conniving at fighting a duel.

In that _____ (personal jurisdiction data) [(while on active state duty) (while in a duty status other than active state duty)], having knowledge that _____ and _____ were about to engage in a duel, did (at/on board location) (subject-matter jurisdiction data, if required) on or about _____, 20___, connive at the fighting of said duel by (failing to take reasonable preventive action) (_____).

(4) Failure to report a duel.

In that _____ (personal jurisdiction data) [(while on active state duty) (while in a duty status other than active state duty)], having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by _____ to _____, did (at/on board location) (subject-matter jurisdiction data, if required) on or about _____, 20___, fail to report that fact promptly to the proper authority.

37. NYSML, Section 130.109 - Malingering.

a. Text.

"Any person subject to this code who for the purpose of avoiding work, duty, or service in the militia -

"(1) feigns illness, physical disablement, mental lapse or derangement; or

"(2) intentionally inflicts self-injury; shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service in the militia;

(2) That the accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself or herself; and

(3) That the accused's purpose or intent in doing so was to avoid the work, duty, or service.

c. Explanation.

(1) Nature of offense. The essence of this offense is the design to avoid performance of any work, duty, or service, which may properly or normally be expected of one in the militia. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes this offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilty, nor is the seriousness of a physical or mental disability, which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

(2) How injury inflicted. The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission, which produces, prolongs, or aggravates any sickness or disability. Thus, voluntary starvation, which results in debility, is a self-inflicted injury and when done for the purpose of avoiding work, duty, or a service constitutes a violation of this article.

d. Lesser-included offenses.

(1) NYSML, Section 130.115 - Self-injury without intent to avoid service.

(2) NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data) did (at/on board location) (in a hostile fire pay zone) (subject-matter jurisdiction data, if required) on or about _____, 20___, (from about _____, 20__ to about _____, 20__), (a time of war) for the purpose of avoiding (his/her duty as officer of the day) (his/her duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person) (_____) [feign (a headache) (a sore back) (illness) (mental lapse) (mental derangement) (_____)] [intentionally injure himself/herself by _____].

38. NYSML, Section 130.110 - Riot or breach of peace.

a. Text.

"Any person subject to this code who, while on active state duty or in a duty status other than active state duty, causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct."

b. Elements.

(1) Riot.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That the accused was a member of an assembly of three or more persons;

(c) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

(d) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

(e) That these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

(2) Breach of the peace.

(a) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(b) That the accused caused or participated in a certain act of a violent or turbulent nature; and

(c) That the peace was thereby unlawfully disturbed.

c. Explanation.

(1) Active state duty or in a duty status other than active state duty. (See paragraph 32c(1))

(2) Riot. "Riot" is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against anyone who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. The gravamen of the offense of riot is terrorization of the public. It is immaterial whether the act intended was lawful. Furthermore, it is not necessary that the common purpose be determined before the assembly. It is sufficient if the assembly begins to execute in a tumultuous manner a common purpose formed after it assembled.

(3) Breach of the peace. A "breach of the peace" is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. The acts of conduct contemplated by this article are those, which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging is an affray and unlawful discharge which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct, which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language, which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others.

(4) Community and public. "Community" and "public" include a military Organization, post, camp, ship, aircraft, or station.

d. Lesser-included offenses.

(1) Riot.

(a) NYSML, Section 130.110 - Breach of the peace.

(b) NYSML, Section 130.115 - Disorderly conduct.

(c) NYSML, Section 130.76 - Attempts.

(2) Breach of the peace.

(a) NYSML, Section 130.115 - Disorderly conduct.

(b) NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Riot.

In that _____ (personal jurisdiction data), [(while on active state duty) (while in a duty status other than active state duty)] did (at/on board location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (cause) (participate in) a riot by unlawfully assembling with _____ (and _____) (and) (others to the number of about _____ whose names are unknown) for the purpose of resisting the police of _____) (assaulting passers-by) (_____) (_____) to the terror and disturbance of _____.

(2) Breach of peace.

In that _____ (personal jurisdiction data), [(while on active state duty) (while in a duty status other than active state duty)] did (at/on board location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (cause) (participate in) a breach of the peace by [wrongfully engaging in a fistfight in the dayroom with _____] [using the following provoking language (toward _____), to wit: "_____," or words to that effect] [wrongfully shouting and singing in a public place, to with: _____] [_____].

39. NYSML, Section 130.111 - Provoking speeches or gestures.

a. Text.

"Any person subject to this chapter who, while on active state duty or in a duty status other than active state duty, uses provoking or reproachful words or gestures toward any other person subject to this code shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was on active state duty or in a duty status other than active state duty at the time of the offense;

(2) That the accused wrongfully used words or gestures toward a certain person;

(3) That the words or gestures used were provoking or reproachful; and

(4) That the person toward whom the words or gestures were used was a person subject to the code.

c. Explanation.

(1) In general. As used in this article, "provoking" and "reproachful" describe those words or gestures, which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. These words and gestures do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

(2) Active state duty or in a duty status other than active state duty. (See paragraph 32c(1))

(3) Knowledge. It is not necessary that the accused have knowledge that the person toward whom the words or gestures are directed is a person subject to the code.

d. Lesser-included offenses. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), [(while on active state duty) (while in a duty status other than active state duty)] did (at/on board location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully use (provoking) (reproachful) words, to wit: "_____" or words to that effect) (and) (gestures, to wit: _____) toward (Sergeant _____, (_____).

40. NYSML, Section 130.112 - Perjury.

a. Text.

"Any person subject to this code who in a judicial proceeding or course of justice willfully and corruptly (1) gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry; or, (2) in any declaration certificate, verification, or statement under penalty of perjury, serves any false statement material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct."

b. Elements.

(1) Giving false testimony.

(a) That the accused took an oath or affirmation in a certain judicial proceeding or course of justice;

(b) That the oath or affirmation was administered to the accused in a matter in which an oath or affirmation was required or authorized by law;

(c) That the oath or affirmation was administered by a person having authority to do so;

(d) That upon the oath or affirmation the accused willfully gave certain testimony;

(e) That the testimony was material;

(f) That the testimony was false; and

(2) Subscribing false statement.

(a) That the accused subscribed a certain statement in a judicial proceeding or course of justice.

(b) That in the declaration, certification, verification or statement under the penalty of perjury, the accused declared, certified, verified or stated the truth of that certain statement;

(c) That the accused willfully subscribed the statement;

(d) That the statement was material;

(e) That the statement was false; and

(f) That the accused did not then believe the statement to be true.

(g) That the accused did not then believe the testimony to be true.

c. Explanation.

(1) In general. "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation conducted under NYSML, Section 130.32. If the accused is charged with having committed perjury before a court-martial was duly constituted.

(2) Giving false testimony.

(a) Nature. The testimony must be false and must be willfully and corruptly given; that is, it must be proved that the accused gave the false testimony willfully and did not believe it to be true. A witness may commit perjury by testifying to the truth of matter when in fact the witness knows nothing about it at all or is not sure about it, whether the thing is true or false in fact. A witness may also commit perjury in testifying falsely as to a belief, remembrance, or impression, or as to a judgment or opinion. It is no defense that the witness voluntarily appeared, that the witness was incompetent as a witness, or that the testimony was given in response to questions that the witness could have declined to answer.

(b) Material matter. The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving false testimony with respect to the credibility of a material witness or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact form which a legitimate inference may be drawn as the existence or nonexistence of a fact in issue. Whether the allegedly false testimony was with respect to a material matter is a question of law to be determined as an interlocutory question.

(c) Proof. The falsity of the allegedly perjured statement cannot be proved by circumstantial evidence alone except with respect to matters, which by their nature are not susceptible of direct proof. The falsity of the statement cannot be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if: the document is an official record shown to have been well known to the accused at the time the oath was taken; or the documentary evidence originated from the accused -- or had in any manner been recognized by the accused as containing the truth -- before the allegedly perjured statement was made.

(d) Oath. The oath must be one recognized or authorized by law and must be duly administered by one authorized to administer it. When a form of oath has been prescribed, a literal following of that form is not essential; it is sufficient if the oath administered conforms in substance to the prescribed form. "Oath" includes an affirmation when the latter is authorized in lieu of an oath.

(e) Belief of accused. The fact that the accused did not believe the statement to be true may be proved by testimony of one witness without corroboration or by circumstantial evidence.

(3) Subscribing false statement, see subparagraphs (1) and (2) above, as applicable. Section 210 of the New York Penal Law provides for subscribing to the truth of a document by signing it expressly subject to the penalty of perjury. The signing must take place in a judicial proceeding or course of justice. For example, if a witness signs under penalty of perjury summarized testimony given at a NYSML, Section 130.32, investigation, it is not required that the document be sworn before a third party. Section 210 does not change the requirement that a deposition be given under oath or alter the situation where an oath is required to be taken before a specific person.

d. Lesser-included offenses.

(1) NYSML, Section 130.115 - False swearing.

(2) NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), having taken a lawful (oath) (affirmation) in a (trial by _____ court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____) that he/she would (testify) (depose) truly, did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, willfully, corruptly, and contrary to such (oath) (affirmation), (testify) (depose) falsely in substance that _____, which (testimony) (deposition) was upon a material matter and which he/she did not then believe to be true.

41. NYSML, Section 130.113 - Frauds against the Government.

a. Text.

"Any person subject to this code --

"(1) who, knowing it to be false or fraudulent --

"(A) makes any claim against the United States, the State, or any officer thereof; or

"(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States, the State, or any officer thereof;

"(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States, the State or any officer thereof --

"(A) makes or uses any writing or other paper knowing the same to contain any false or fraudulent statements; or

"(B) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or

"(C) fOrges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be fOrged or counterfeited; or

"(3) who, having charge, possession, custody, or control of any money or other property of the United States, or the State, furnished or intended for the armed forces of the Unites States or the Organized militia or any force thereof, knowingly delivers to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States or the State furnished or intended for the armed forces or the Organized militia or any force thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States or the State;

"shall, upon conviction, be punished as a court-martial may direct."

b. Elements.

(1) Making a false or fraudulent claim.

(a) That the accused made a certain claim against the United States, or the State, or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(2) Presenting for approval or payment a false or fraudulent claim.

(a) That the accused presented for approval or payment to a certain person in the civil or military service of the United States or the State having authority to approve or pay it a certain claim against the United States, the State, or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(3) Making or using a false writing or other paper in connection with claims.

(a) That the accused made or used a certain writing or other paper;

(b) That certain material statements in the writing or other paper were false or fraudulent;

(c) That the accused then knew the statements were false or fraudulent; and

(d) That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States, the State or an officer thereof.

(4) False oath in connection with claims.

(a) That the accused made an oath to a certain fact or to a certain writing or other paper;

(b) That the oath was false in certain particulars;

(c) That the accused then knew it was false, and

(d) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States, the State or an officer thereof.

(5) FOrgery of signature in connection with claims.

(a) That the accused fOrged or counterfeited the signature of a certain person on a certain writing or other paper; and

(b) That the act was for the purpose of obtaining the approval, allowance, of payment of a certain claim against the United States, the State, or an officer thereof.

(6) Using fOrged signature in connection with claims.

(a) That the accused used the fOrged or counterfeited signature of a certain person;

(b) That the accused then knew that the signature was fOrged or counterfeited; and

(c) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States, the State, or an officer thereof.

(7) Delivering less than amount called for by receipt.

(a) That the accused had charge, possession, custody, or control of certain money or property of the United States, or the State, or an officer thereof or any of them;

(b) That the accused obtained a certificate or receipt for a certain amount or quantity of that money or property;

(c) That for the certificate or receipt the accused knowingly delivered to a certain person having authority to receive an amount or quantity of money or property less than the amount or quantity thereof specified in the certificate or receipt; and

(d) That the undelivered money or property was of a certain value.

(8) Making or delivering receipt without having full knowledge that it is true.

(a) That the accused was authorized to make or deliver a paper certifying the receipt from a certain person of certain property of the United States or the State furnished or intended for the armed forces thereof or any of them;

(b) That the accused made or delivered to that person a certificate or receipt;

(c) That the accused made or delivered the certificate without having full knowledge or the truth of a certain material statement or statements therein;

(d) That the act was done with intent to defraud the United States, or the State; and

(e) That the property certified as being received was of a certain value.

c. Explanation.

(1) Making a false or fraudulent claim.

(a) Claim. A "claim" is a demand for a transfer of ownership of money or property and does not include requisitions for the mere use of property. This article applies only to claims against the United States, the State, or any officer thereof as such, and not to claims against an officer of the United States or of New York in that officer's private capacity.

(b) Making a claim. Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The mere writing of a paper in the form of a claim, without any further act to cause the paper to become a demand against the United States, the State, or an officer thereof, does not constitute making a claim. However, any act placing the claim in official channels constitutes making a claim, even if that act does not amount to presenting a claim. It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. (See also subparagraph (2), below)

(c) Knowledge. The claim must be made with knowledge of its fictitious or dishonest character. This article does not proscribe claims, however groundless they may be, that the maker believes to be valid, or claims that are merely made negligently or without ordinary prudence.

(2) Presenting for approval or payment a false or fraudulent claim.

(a) False and fraudulent. False and fraudulent claims include not only those containing some material false statement, but also claims which the claimant knows to have been paid or for some other reason the claimant knows the claimant is not authorized to present or upon which the claimant knows the claimant has no right to collect.

(b) Presenting a claim. The claim must be presented, directly or indirectly, to some person having authority to pay it. The person to whom the claim is presented may be identified by position or authority to approve the claim, and need not be identified by name in the specification. A false claim may be tacitly presented, as when a person who knows that there is no entitlement to certain pay accepts it nevertheless without disclosing a disqualification, even though the person may not have made any representation of entitlement to the pay. For example, a person cashing a paycheck which includes an amount for a dependency allowance, knowing at the time that the entitlement no longer exists because of a change in that dependency status, has tacitly presented a false claim. (See also subparagraph (1), above)

(3) Making or using a false writing or other paper in connection with claims. The false or fraudulent statement must be material, that is, it must have a tendency to mislead governmental officials in their consideration of investigation of the claim. The offense of mailing a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented. (See also the explanation in subparagraphs (1) and (2), above)

(4) False oath in connection with claims. (See subparagraphs (1) and (2), above)

(5) FOrgery of signature in connection with claims. Any fraudulent making of the signature of another is fOrging or counterfeiting, whether or not an attempt is made to imitate the handwriting. (See paragraph 48(c) and subparagraphs (1) and (2), above)

(6) Delivering less than amount called for by receipt. It is immaterial by what means -- whether deceit, collusion, or otherwise -- the accused effected the transaction, or what was the accused's purpose.

(7) Making or delivering receipt without having full knowledge that it is true. When an officer or other person subject to military law is authorized to make or deliver any paper certifying the receipt of any property of the United States or the State furnished or intended for the armed forces thereof, and a receipt or other paper is presented for signature stating that a certain amount of supplies has been furnished by a certain contractor, it is that person's duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If the person signs the paper with intent to defraud the United States or the State and without that knowledge, that person is guilty of a violation of this section of the article. If the person signs the paper with knowledge that the full amount was not received, it may be inferred that the person intended to defraud the United States or the State.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Making false claim.

In that _____ (personal jurisdiction data), did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, [by preparing (a voucher) (_____) for presentation for approval or payment] [_____], make a claim against the [(United States) (State of New York)] (finance officer at _____) (_____) in the amount of $_____ for [private property alleged to have been (lost) (destroyed) in the military service] [_____], which claim was (false) (fraudulent) (false and fraudulent) in the amount of $_____ in that _____ and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(2) Presenting false claim.

In that _____ (personal jurisdiction data), did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, by presenting (a voucher) (_____) to _____, an officer of the [(United States) (State of New York)] duly authorized to (approve) (pay) (approve and pay) such claim, present for (approval) (payment) (approval and payment) a claim against the [(United States) (the State of New York)] (finance officer at _____) (_____) in the amount of $_____ for [private property alleged to have been (lost) (destroyed) in the military service] [_____], which claim was (false) (fraudulent) (false and fraudulent) in the amount of $_____ for (services alleged to have been rendered to the [(United States) (State of New York)] by _____ during _____) (_____), which claim was (false) (fraudulent) (false and fraudulent) in the amount of $_____ in that _____, and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(3) Making or using false writing.

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance and payment) of a claim against the [(United States) (State of New York)] in the amount of $_____, did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (make) (use) (make and use) a certain (writing) (paper), to wit: _____, which said (writing) (paper), as he/she, the said _____, then knew, contained a statement that _____, which statement was (false) (fraudulent) (false and fraudulent) in that _____, and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(4) Making false oath.

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance and payment) of a claim against the [(United States) (State of New York)] did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, make an oath [to the fact that _____], [to a certain (writing) (paper), to wit: _____, to the effect that _____], which said oath was false in that _____, and was then known by the said _____ to be false.

(5) FOrging or counterfeiting signature.

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance and payment) of a claim against the [(United States) (State of New York)] did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (fOrge) (counterfeit) (fOrge and counterfeit) the signature of _____upon a _____ in words and figures as follows: _____.

(6) Using fOrged signature.

In that _____, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance and payment) of a claim against the [(United States) (State of New York)] did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, use the signature of _____ on a certain (writing) (paper), to wit: _____, then knowing such signature to be (fOrged) (counterfeited) (fOrged and counterfeited).

(7) Paying amount less than called for by receipt.

In that _____ (personal jurisdiction data), having (charge) (possession) (custody) (control) of (money) (_____) of the [(United States) (State of New York)] (furnished) (intended) (furnished and intended) for the armed forces thereof, did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, knowingly deliver to _____, the said _____ having authority to receive the same, (an amount) (_____), which, as he/she, _____, then knew, was ($_____) (_____) less than the (amount) (_____) for which he/she received a (certificate) (receipt) from the said _____.

(8) Making receipt without knowledge of the facts.

In that _____ (personal jurisdiction data), being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of the property of the [(United States) (State of New York)] (furnished) (intended) (furnished and intended) for the armed forces thereof, did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, without having full knowledge of the statement therein contained and with intent to defraud the [(United States) (State of New York)], (make) (deliver) (make and deliver) to _____, such a writing, in words and figures as follows: _____, the property therein certified as received being of a value of (about) $_____.

42. NYSML, Section 130.114 - Conduct unbecoming an officer and gentleman.

a. Text.

"Any officer, who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused did or omitted to do certain acts; and

(2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and a gentleman.

c. Explanation.

(1) Gentleman. As used in this article, "gentleman" includes both male and female officers.

(2) Nature of offense. Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer cannot fall without seriously compromising the person's standing as an officer or the person's character as

a gentleman. This article prohibits conduct as an officer, which, taking all the circumstances into consideration is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Whenever the offense charged is the same as a specific offense set forth in this manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and a gentleman.

(3) Examples of offenses. Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Copying or using examination paper.

In that _____ (personal jurisdiction data), did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, while undergoing a written examination on the subject of _____, wrongfully and dishonorably (receive) (request) unauthorized aid by [(using) (copying) the examination paper of _____] [_____].

(2) Drunk and disorderly.

In that _____ (personal jurisdiction data), did, (at/on board - location), on or about _____, 20__, in a public place, to uniform, to the disgrace of the Organized militia.

43. NYSML, Section 130.115 - General article.

a. Text.

"Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the Organized militia and all conduct of a nature
to bring discredit upon the Organized militia of a force thereof, of which persons subject

to this code may be guilty, shall be taken cognizance of by a GCM, SPCM, or a SCM, according to the nature and degree of the offense, and shall be punished at the discretion of such court."

b. Elements. The following proof is required to punish the offense as a disorder or neglect to the prejudice of good order and discipline in the Organized militia, or of a nature to bring discredit upon the Organized militia of a force thereof.

(1) That the accused did or failed to do certain acts; and

(2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia of a force thereof.

c. Explanation.

(1) In general. NYSML, Section 130.115, makes punishable acts in two categories of offenses not specifically covered in any other article of the code. These are referred to as "clauses 1 and 2" of NYSML, Section 130.115. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the Organized militia. Clause 2 offenses involve conduct of a nature to bring discredit upon the Organized militia or a force thereof. If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article. (See subparagraph (5)(a) below. However, see paragraph 59c for offenses committed by officers.)

(2) Disorders and neglects to the prejudice of good order and discipline in the Organized militia (clause 1).

(a) To the prejudice of good order and discipline. "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts, which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the Organized militia could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the Organized militia. However, see N.Y.R.C.M. 302 concerning subject-matter jurisdiction.

(b) Breach of custom of the service. A breach of a custom of the service may result in a violation of clause 1 of NYSML, Section 130.115. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior, which is merely of frequent or usual occurrence. Custom arises out of long established practices, which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom, which has not been adopted by existing statute or regulation, ceases to exist when its observance has been generally abandoned. Many customs of the service are now set forth in regulations of the various forces of the Organized militia. Violation of these customs should be charged under NYSML, Section 130.88, as violations of the regulations in which they appear if the regulation is punitive. (See paragraph 16c)

(3) Conduct of a nature to bring discredit upon the Organized militia or a force thereof (clause 2). "Discredit" means to injure the reputation of. This clause of NYSML, Section 130.115, makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. (However, see N.Y.R.C.M. 203 concerning subject-matter jurisdiction.)

(4) Preemption doctrine. The preemption doctrine prohibits application of NYSML, Section 130.115, to conduct covered by NYSML, Section 130.73 through NYSML, Section 130.113.

(5) Drafting specifications for offenses under NYSML, Section 130.115.

(a) In general. A specification alleging a violation of NYSML, Section 130.115, need not expressly allege that the conduct was "a disorder or neglect," that it was "of a nature to bring discredit upon the Organized militia or a force thereof." The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the Organized militia and at the same time is of a nature to bring discredit upon the Organized militia of a force thereof.

(b) Specifications for clause 1 and 2 offenses not listed. If conduct by an accused does not fall under any of the listed offenses for violations of Article 130.15 of this manual (paragraphs 44 through 75 of this part), a specification not listed in this manual may be used to allege the offense.

44. NYSML, Section 130.115 - Abusing public animal.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused wrongfully abused a certain public animal; and

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. A public animal is any animal owned or used by the United States; any animal owned or used by a local or State government in the United States, its territories or possessions; or any wild animal located on any public lands in the United States, the State, its territories or possessions. This would include, for example, drug detector dogs used by the United States or State government.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully (kick a public drug detector dog in the nose) (_____).

45. NYSML, Section 130.115 - correctional custody - offenses against.

a. Text. (See paragraph 43)

b. Elements.

(1) Escape from correctional custody.

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in such correctional custody, the accused was under physical restraint;

(c) That the accused freed himself or herself from the physical restraint of this correctional custody before being released there from by proper authority; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

(2) Breach of correctional custody.

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in correctional custody, a certain restraint was imposed upon the accused;

(c) That the accused went beyond the limits of the restraint imposed before having been released from the correctional custody or relieved of the restraint by proper authority; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Escape from correctional custody. Escape from correctional custody is the act of a person undergoing the punishment of correctional custody pursuant to NYSML, Section 130.15, who, before being set at liberty by proper authority, casts off any physical restraint imposed by the custodian or by the place or conditions of custody.

(2) Breach of correctional custody. Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or period.

(3) Authority to impose correctional custody. (See Part V concerning who may impose correctional custody.) Whether the status of a person authorized that person to impose correctional custody is a question of law to be decided by the military judge. Whether the person who imposed correctional custody had such a status is a question of fact to be decided by the fact-finder.

d. Lesser-included offense. NYSML, Section 130-76 - Attempts.

e. Sample specifications.

(1) Escape from correctional custody.

In that _____ (personal jurisdiction data), while undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board - location), on or about _____, 20__, escape from correctional custody.

(2) Breach of correctional custody.

In that _____ (personal jurisdiction data), while duly undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board - location), on or about _____, 20__, breach the restraint imposed there under by _____.

46. NYSML, Section 130.115 - Debt, dishonorably failing to pay.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) That this debt became due and payable on or about a certain date;

(3) That while the debt was still due and payable the accused dishonorably failed to pay this debt; and

(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. More than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment of grossly indifferent attitude toward one's just obligations. For a debt to form the basis of this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused's belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law in relation to the debt, which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment. The length of the period of nonpayment and any denial of indebtedness, which the accused may have made, may tend to prove that the accused's conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that the conduct was in fact dishonorable.

d. Lesser-included offenses. None.

e. Sample specification.

In that _____ (personal jurisdiction data), being indebted to _____ in the sum of $_____ for _____, which amount became due and payable (on) (about) (on or about) _____, 20__, dishonorably fail to pay said debt.

47. NYSML, Section 130.115 - Disloyal statements.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused made a certain statement;

(2) That the statement was communicated to another person;

(3) That the statement was disloyal to the United States;

(4) That the statement was made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the Organized militia; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. Certain disloyal statements by military personnel may not constitute an offense under 18 U.S. C., Sections 2385, 2387, and 2388, but may, under the circumstances, be punishable under this article. Examples include praising the enemy, attacking the war aims of the United States, or denouncing our form of government with the intent to promote disloyalty or disaffection among members of the Organized militia. A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is a part of its administration.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board - location) on or about _____, 20__, with intent to [promote (disloyalty) (disaffection) (disloyalty and disaffection)] [(interfere with) (impair) the (loyalty) (good order and discipline)] of any member of the armed forces of the United States communicate to _____, the following statement, to wit: "_____," or words to that effect, which statement was disloyal to the United States.

48. NYSML, Section 130.115 - Disorderly conduct, drunkenness.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and

(2) That, under the circumstances, the conduct of the accused was to the prejudice or good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Drunkenness. (See paragraph 34c(4) for a discussion of intoxication)

(2) Disorderly. Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), was (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (drunk) (disorderly) (drunk and disorderly).

49. NYSML, Section 130.115 - Drinking liquor with prisoner.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused was a sentinel or in another assignment in charge of a prisoner.

(2) That, while in such capacity, the accused unlawfully drank intoxication liquor with a prisoner;

(3) That the prisoner was under the charge of the accused;

(4) That the accused knew that the prisoner was a prisoner under the accused's charge; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Prisoner. A "prisoner" is a person who is in confinement or custody imposed under N.Y.R.C.M. 302, 304 or 305, or under sentence of a court-martial who has not been set free by proper authority.

(2) Liquor. For the purposes of this offense, "liquor" includes any alcoholic beverage.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), a (sentinel) (_____) in charge of prisoners, did, (at/on board - location) on or about _____, 20__, unlawfully drink intoxicating liquor with _____, a prisoner under his/her charge.

50. NYSML, Section 130.115 - Drunken prisoner.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused was a prisoner;

(2) That while in such status the accused was found drunk; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Prisoner. (See paragraph 49c(11))

(2) Drunk. (See paragraph 34c(4) for a discussion of intoxication)

d. Lesser-included offenses. None.

e. Sample specifications.

In that _____ (personal jurisdiction data), a prisoner was (at/on board - location) on or about _____, 20__, found drunk.

51. NYSML, Section 130.115 - Drunkenness - incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused had certain duties to perform;

(2) That the accused was incapacitated for the proper performance of such duties;

(3) That such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Liquor. (See paragraph 49c(2))

(2) Incapacitated. Incapacitated means unfit or unable to perform properly. A person is "unfit" to perform duties if at the time the duties are to commence, the person is drunk, even though physically able to perform the duties. Illness resulting from previous overindulgence is an example of being "unable" to perform duties. For a discussion of "drunk" see paragraph 34c(4).

(3) Affirmative defense. The accused's lack of knowledge of the duties assigned is an affirmative defense to this offense.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), was (at/on board - location) on or about _____, 20__, as a result of wrongful previous overindulgence in intoxicating liquor or drugs, incapacitated for the proper performance of his/her duties.

52. NYSML, Section - False or unauthorized pass offenses.

a. Text. (See paragraph 43)

b. Elements.

(1) Wrongful making, altering, counterfeiting, or tampering with a military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully and falsely made, altered, counterfeited, or tampered with a certain military or official pass, permit, discharge certificate, or identification card; and

(b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

(2) Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully sold, gave, loaned, or disposed of a certain military official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

(3) Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully used or possessed a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

(c) That the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

Note: When there is intent to defraud or deceive, add the following element after (c) above: That the accused used or possessed the pass, permit, discharge certificate, or identification card with an intent to defraud or deceive.

c. Explanation.

(1) In general. "Military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies thereof.

(2) Intent to defraud or deceive. (See paragraph 49c(14) and (15), Manual for Court-martial)

d. Lesser-included offenses.

(1) Wrongful use or possession of false or unauthorized military or official pass, permit, discharge certificate, or identification card, with the intent to defraud or deceive. NYSML, Section 130.115 - same offenses, except without the intent to defraud or deceive.

(2) All false or unauthorized pass offenses. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Wrongful making, altering, counterfeiting, or tampering with military or official pass, permit, discharge certificate, or identification card.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully and falsely (make) (alter by _____) (counterfeit) (tamper with by (_____) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____.

(2) Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully (sell to _____) (give to _____) (loan to _____) (dispose of by _____) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____, he/she, the said _____, then well knowing the same to be (false) (unauthorized).

(3) Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully (use) (possess) with intent to (defraud) (deceive) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____), he/she, the said _____, then well knowing the same to be (false) (unauthorized).

53. NYSML, Section 130.115 - False pretenses, obtaining services under.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused wrongfully obtained certain services;

(2) That the obtaining was done by using false pretenses;

(3) That the accused then knew of the falsity of the pretenses;

(4) That the obtaining was with intent to defraud;

(5) That the services were of a certain value; and

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia of a force thereof.

c. Explanation. This offense is similar to the offenses of larceny and wrongful appropriation by false pretenses, except that the object of the obtaining is services (for example, telephone service) rather than money, personal property, or articles of value of any kind.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, with intent to defraud, falsely pretend to _____ that _____, then knowing that the pretenses were false, and by means thereof did wrongfully obtain from _____services, of a value of (about) $_____, to wit: _____.

54. NYSML, Section 130.115 - False swearing.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused took an oath or equivalent;

(2) That the oath or equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law;

(3) That the oath or equivalent was administered by a person having authority to do so;

(4) That upon this oath or equivalent the accused made or subscribed a certain statement;

(5) That the statement was false;

(6) That the accused did not then believe the statement to be true; and

(7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Nature of offense. False swearing is the making under a lawful oath or equivalent or any false statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding or course of justice, as these are under NYSML, Section 130.112, perjury. (See paragraph 40) Unlike a false official statement under NYSML, Section 130.102, (see paragraph 30) there is not a requirement that the statement be made with intent to deceive or that the statement is official. (See paragraphs 40c(1), c(2)(c), and c(2)(e), concerning "judicial proceeding or course of justice," proof of the falsity, and the belief of the accused, respectively.)

(2) Oath. See NYSML, Section 131.2, and N.Y.R.C.M. 807, as to the authority to administer oaths, and see Section IX of Part III (Military Rules of Evidence) concerning proof of the signatures of persons authorized to administer oaths. An oath includes an affirmation when authorized in lieu of an oath.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data) did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (in an affidavit) (in _____), wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: _____, which statement he/she did not then believe to be true.

55. NYSML, Section 130.115 - Firearm, discharging -- through negligence.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused discharged a firearm;

(2) That such discharge was caused by the negligence of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to being discredit upon the Organized militia of a force thereof.

c. Explanation. For a discussion of negligence, see paragraph 85c(2).

d. Lesser-included offenses. None.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (in an affidavit) (in _____), through negligence, discharge a (service rifle) (_____) in the (squadron) (tent) (barracks) (_____) of _____.

56. NYSML, Section 130.115 - Firearm, discharging -- willfully, under such circumstances as to endanger human life.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused discharged a firearm;

(2) That the discharge was willful and wrongful;

(3) That the discharge was under circumstances such as to endanger human life; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to being discredit upon the Organized militia of a force thereof.

c. Explanation. "Under circumstances such as to endanger human life" refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general.

d. Lesser-included offenses.

(1) NYSML, Section 130.115 - Firearm, discharging -- through negligence.

(2) NYSML, 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully and willfully discharge a firearm, to wit: _____, (in the mess hall of _____) (_____), under circumstances such as to endanger human life.

57. NYSML, Section 130.115 - Fraternization.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia of a force thereof.

c. Explanation.

(1) In general. The gist of this offense is a violation of the custom of the Organized militia against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has comprised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the Organized militia has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) Regulations. Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under NYSML, Section 130.88. (See paragraph 16)

d. Lesser-included offenses. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) on or about _____, 20__, knowingly fraternized with _____, an enlisted person, on terms of military equality, to wit: _____, in violation of the custom of the particular force of the Organized militia that officers shall not fraternize with enlisted persons on terms of military equality.

58. NYSML, Section 130.115 - Gambling with subordinate.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused gambled with a certain service member;

(2) That the accused was then a noncommissioned or petty officer;

(3) That the service member was not then a noncommissioned or petty officer and was subordinate to the accused;

(4) That the accused knew that the service member was not then a noncommissioned or petty officer and was subordinate to the accused; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. This offense can only be committed by a noncommissioned or petty officer gambling with an enlisted person of less than noncommissioned or petty officer rank. Gambling by an officer with an enlisted person may be a violation of NYSML, Section 130.114. (See also paragraph 57)

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, gamble with _____, then knowing that the said _____ was not a noncommissioned or petty officer and was subordinate to the said _____.

59. NYSML, Section 130.115 - Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused impersonated a commissioned, warrant, noncommissioned, or petty officer, or an agent of superior authority of one of the armed forces of the United States, or of one of the forces of the Organized militia, or an official of a certain government, in a certain manner;

(2) That the impersonation was wrongful and willful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

Note 1: If intent to defraud is an issue, add the following additional element after (2), above: That the accused did so with the intent to defraud a certain person or Organization in a certain manner.

Note 2: If the accused is charged with impersonating an official of a certain government without an intent to defraud, use the following additional element after (2), above: That the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have.

c. Explanation.

(1) Nature of offense. Impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, although this is an aggravating factor.

(2) Willfulness. "Willful" means with the knowledge that one is falsely holding one's self out as such.

(3) Intent to defraud. MCM, paragraph 49c(14).

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully and willfully impersonate [a (commissioned officer) (warrant officer) (noncommissioned officer) (petty officer) (agent of superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [an official of the government of _____] by [publicly wearing the uniform an insignia of rank of a (lieutenant of the _____) (_____)] [showing the credentials of _____] [_____] (with intent to defraud _____ by _____*) [and (exercised) (asserted) the authority of _____ by _____**].

*See subsection b, Note 1.

**See subsection b, Note 2.

60. NYSML, Section 130.115 - Indecent language.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused orally or in writing communicated to another person certain language;

(2) That such language was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. The language must violate community standards.

d. Lesser-included offenses.

(1) NYSML, Section 130.76 - Attempts.

(2) NYSML, Section 130.111 - Provoking speeches.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (orally) (in writing) communicate to _____, certain indecent language, to wit: _____.

61. NYSML, Section 130.115 - Jumping from vessel into the water.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused jumped from a vessel in use by the armed forces of the United States or by the Organized militia into the water;

(2) That such act by the accused was wrongful and intentional; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. "In use by" means any vessel operated by or under the control of the armed forces of the United States or by the Organized militia. This offense may be committed at sea, at anchor, or in port.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did on board _____, at (location), on or about _____, 20__, wrongfully and intentionally jump from _____, a vessel in use by the [armed forces of the United States) (Organized militia)], into the (sea) (lake) (river).

62. NYSML, Section 130.115 - Obstructing justice.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. This offense may be based on conduct that occurred before preferral of charges. Actual obstruction of justice is not an element of this offense. For purposes of this paragraph "criminal proceedings" includes NJP proceedings under Part V of this manual. Examples of obstruction of justice include wrongfully influencing, intimidating, impeding, or injuring a witness, a person acting on charges under this chapter, an investigation officer under N.Y.R.C.M. 406, or a party; and by means of

bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to a violation of any criminal stature of the United States or New York to a person authorized by a department, agency, or armed force of the United States or of the Organized militia to conduct or engage in investigations or prosecutions of such offenses; or endeavoring to do so. (See also paragraph 22 and NYSML, Section 130.37)

d. Lesser-included offenses. None.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, (wrongfully endeavor to) [impede (a trial by court-martial) (an investigation) (_____)] [influence the actions of _____, (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (_____)] [(influence) (alter) the testimony of _____ as a witness before (a court-martial) (an investigating officer) (_____)] in the case of _____, by [(promising0 (offering) (giving) to the said _____, (the sum of $_____) (_____, of a value of about $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) he/she, the said _____, would [recommend dismissal of charges against said _____] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such trial) (before such investigating officer)] [_____].

63. NYSML, Section 130.115 - Perjury: subordination of.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused induced and procured a certain person to take an oath or its equivalent and to falsely testify, depose, or state upon such oath or its equivalent concerning a certain matter;

(2) That the oath or its equivalent was administered to said person in a matter in which an oath or its equivalent was required or authorized by law;

(3) That the oath or its equivalent was administered by a person having authority to do so;

(4) That upon the oath or its equivalent said person willfully made or subscribed a certain statement;

(5) That the statement was material;

(6) That the statement was false;

(7) That the accused and the said person did not then believe that the statement was true; and

(8) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. See paragraph 40c for applicable principles. "Induce and procure" means to influence, persuade, or cause.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, procure _____ to commit perjury by inducing him/her, the said _____, to take a lawful (oath) (affirmation) in a (trial by court-martial of (_____) (trial by a court of competent jurisdiction, to wit: _____ of _____)(deposition for use in a trial by _____ of _____) (_____) that he/she, the said _____, would (testify) (depose) (_____) truly, and to (testify) (depose) (_____) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that _____, which (testimony) (deposition) (_____) was upon a material matter and which the accused and the said _____ did not then believe to be true.

64. NYSML, Section 130.115 - Public record: altering, concealing, removing, mutilating, obliterating, or destroying.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused altered, concealed, removed, mutilated, obliterated, destroyed, or took with the intent to alter, conceal, remove, mutilate, obliterate, or destroy, a certain public record;

(2) That the act of the accused was willful and unlawful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. "Public records" include records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report. "Public records" includes classified matters.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data) did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, willfully and unlawfully [(alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] [take with intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] a public record, to wit: _____.

65. NYSML, Section 130.115 - Quarantine: medical, breaking.

a. Text. (See paragraph 43)

b. Elements.

(1) That a certain person ordered the accused into medical quarantine;

(2) That the person was authorized to order the accused into medical quarantine;

(3) That the accused knew of this medical quarantine and the limits thereof;

(4) That the accused went beyond the limits of the medical quarantine before being released there from by proper authority; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. None.

d. Lesser-included offenses. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data) has been placed in medical quarantine by a person authorized to order the accused into medical quarantine, did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, break said medical quarantine.

~~**66. NYSML, Section 130.115 - Requesting commission of an offense.**~~

~~**a.** Text. (See paragraph 43)~~

~~**b.** Elements.~~

~~**(1)** That the accused communicated certain language;~~

~~**(2)** That the language advised, directed, requested, or suggested to certain person(s) to commit an offense under the code;~~

~~**(3)** That the communication was wrongful; and~~

~~**(4)** That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.~~

~~**c.** Explanation. This offense differs from solicitation to commit an offense (see paragraphs 6 and 69) in that for this offense the accused need not have specifically intended that the offense advised, directed, requested, or suggested by committed. Advice or a direction, request, or suggestion is wrongful if it is made in a manner or under circumstances, which the accused could reasonably expect the persons to whom it was made to take seriously and act upon.~~

~~**d.** Lesser-included offenses. None.~~

~~**e.** Sample specification.~~

~~In that _____ did (personal jurisdiction data), (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully communicated certain language, to wit: _____, to _____, which language (advised) (directed) (requested) (suggested to) the said _____ to commit _____, an offense under the code.~~

67. NYSML, Section 130.115 - Seizure: destruction, removal, or disposal of property to prevent.

a. Text. (See paragraph 43)

b. Elements.

(1) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;

(2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof;

(3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. See Military Rules of Evidence 316(e) concerning military personnel who may make seizures. It is not a defense that a search or seizure was technically defective.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, with intent to prevent its seizure, (destroy) (remove) (dispose of) _____, property which, as _____ then knew, (a) person(s) authorized to make searches and seizures were (seizing) (about to seize) (endeavoring to seize).

68. NYSML, Section 130.115 - Sentinel or lookout: offenses against or by.

a. Text. (See paragraph 43)

b. Elements.

(1) Disrespect to a sentinel or lookout.

(a) That a certain person was a sentinel or lookout;

(b) That the accused knew that said person was a sentinel or lookout;

(c) That the accused used certain disrespectful language or behaved in a certain disrespectful manner;

(d) That such language or behavior was wrongful;

(e) That such language or behavior was directed toward and within the sight or hearing of the sentinel or lookout;

(f) That said person was at the time in the execution of duties as a sentinel or lookout; and

(g) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

(2) Loitering or wrongfully sitting on post by a sentinel or lookout.

(a) That the accused was posted as a sentinel or lookout;

(b) That while so posted, the accused loitered or wrongfully sat down on post; and

(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Disrespect. For a discussion of "disrespect," see paragraph 13c(3).

(2) Loitering or wrongfully sitting on post.

(a) In general. The discussion set forth in paragraph 35c applies to loitering or sitting down while posted as a sentinel or lookout as well.

(b) Loiter. "Loiter" means to stand around, to move about slowly, to linger, or to lay behind when that conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty.

d. Lesser-included offenses.

(1) Disrespect to a sentinel or lookout. NYSML, Section 130.76 - Attempts.

(2) Loitering or wrongfully sitting on post by a sentinel or lookout. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

(1) Disrespect to a sentinel or lookout.

In that _____ (personal jurisdiction data), did (at/on board - location) on or about _____, 20__, then knowing that _____ was a sentinel or lookout, [wrongfully used the following disrespectful language "_____," or words to that effect, to _____ wrongfully behave in a disrespectful manner toward _____, by _____] a (sentinel) (lookout) in the execution of his/her duty.

(2) Loitering or wrongfully sitting down on post by a sentinel or lookout.

In that _____ (personal jurisdiction data), while posted as a (sentinel) (lookout), did (at/on board - location) on or about _____, 20__, (a time of war) (loiter) (wrongfully sit down) on his/her post.

69. NYSML, Section 130.115 - Soliciting another to commit an offense.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than one of the four offenses named in NYSML, Section 130.78;

(2) That the accused did so with the intent that the offense actually be committed; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. (See paragraph 6c) If the offense solicited was actually committed, see also paragraph 1.

d. Lesser-included offenses.

(1) NYSML, Section 130.115 - Requesting another to commit an offense, wrongful communication of language.

(2) NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data) did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully (solicit) (advise) _____ (to disobey a general regulation, to wit: _____) (to steal _____, of a value of (about) $_____, the property of _____) (to _____), by _____.

70. NYSML, Section 130.76 - Straggling.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused, while accompanying the accused's Organization on a march, maneuvers, or similar exercise, straggled;

(2) That the straggling was wrongful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. "Straggle" means to wander away, to stray, to become separated from, or to lag or linger behind.

d. Lesser-included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data) did at, _____, on or about _____, 20__, while accompanying his/her Organization of (a march) (maneuvers) (_____), wrongfully straggle.

71. NYSML, Section 130.115 - Testify: wrongful refusal.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused was in the presence of a court-martial, board of officer(s), military commission, court of inquiry, an officer conducting an investigation under NYSML, Section 130.32, or an officer taking a deposition, of or for the United States or the State, at which a certain person was presiding;

(2) That the said person presiding directed the accused to qualify as a witness or, having so qualified, to answer a certain question;

(3) That the accused refused to qualify as a witness or answer said question;

(4) That the refusal was wrongful; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or a force thereof.

c. Explanation. To "qualify as a witness" means that the witness declares that the witness will testify truthfully. (See N.Y.R.C.M.; Military Rules of Evidence 603) A good faith but legally mistaken belief in the right to remain silent does not constitute a defense to a charge of wrongful refusal to testify. (See also Military Rules of Evidence 301 and Section V)

d. Lesser-included offenses. None.

e. Sample specification.

In that _____ (personal jurisdiction data), being in the presence of (a) (an) [(general) (special) (summary) court-martial)] [board of officer(s)] [military commission] [court of inquiry] [officer taking a deposition] [_____] 9of) (for) the State of New York, of which _____ was (military judge) (president), (_____), (and having been directed by the said _____ to qualify as a witness) (and having qualified as a witness and having been directed by the said _____ to answer the following question(s) put to him/her as a witness, "_____"), did (at/on board - location) on or about _____, 20__, wrongfully refuse (to qualify as a witness) [to answer said question(s)].

72. NYSML, Section 130.115 - Threat or hoax: bomb.

a. Text. (See paragraph 43)

b. Elements.

(1) Bomb threat.

(a) That the accused communicated certain language;

(b) That the language communicated amounted to a threat;

(c) That the harm threatened was to be done by means of an explosive;

(d) That the communication was wrongful; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

(2) Bomb hoax.

(a) That the accused communicated or conveyed certain information;

(b) That the language or information concerned an attempt made or to be made by means of an explosive to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;

(c) That the information communicated by the accused was false and that the accused then knew it was false;

(d) That the communication of the information by the accused was malicious; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Threat. A "threat" is an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required. (See also paragraph 73)

(2) Malicious. A communication is "malicious" if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

(3) Explosive, (See N.Y.R.C.M. 103(13))

d. Lesser included offenses.

(1) Bomb threat.

(a) NYSML, Section 130.115 - Communicating a threat.

(b) NYSML, 130.76 - Attempts.

(2) Bomb hoax. NYSML, Section 130.76 - Attempts.

e. Sample specifications.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully communicate certain language, to wit: _____, which language constituted a threat to harm a person or property by means of an explosive.

(2) Bomb hoax.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully [(kill) (injure) (intimidate) _____] [(damage) (destroy) _____] by means of an explosive, to with: _____, which information was false and which _____ then knew to be false.

73. NYSML, Section 130.76 - Threat, communicating.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

(2) That the communication was made known to that person or to a third person;

(3) That the communication was wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. To establish the threat it is not necessary that the accused actually intended to do the injury threatened. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. (See also paragraph 72 concerning bomb threat)

d. Lesser included offenses.

(1) NYSML, Section 130.111 - Provoking speeches or gestures.

(2) NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully communicate to _____ a threat to (injure _____ by _____) (accuse _____ of having committed the offense of _____) (_____).

74. NYSML, Section 130.115 - Weapon: concealed, carrying.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused carried a certain weapon concealed on or about the accused's person;

(2) That the carrying was unlawful;

(3) That the weapon was a dangerous weapon; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation.

(1) Concealed weapon. A weapon is concealed when it is carried by a person and intentionally covered or kept from sight.

(2) Dangerous weapon. For purposes of this paragraph, a weapon is dangerous if it was specifically designed for the purpose of doing grievous bodily harm, or it was used or intended to be used by the accused to do grievous bodily harm.

(3) On or about. "On or about" means the weapon was carried on the accused person or was within the immediate reach of the accused.

d. Lesser included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, unlawfully carry on or about his/her person a concealed weapon, to wit: _____.

75. NYSML, Section 130.115 - Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button.

a. Text. (See paragraph 43)

b. Elements.

(1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform or civilian clothing;

(2) That the accused was not authorized to wear the item.

(3) That the wearing was wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Organized militia or was of a nature to bring discredit upon the Organized militia or a force thereof.

c. Explanation. None.

d. Lesser included offense. NYSML, Section 130.76 - Attempts.

e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board - location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully and without authority wear upon his/her (uniform) (civilian clothing) [the insignia of grade of a (master sergeant of _____) (chief gunner's mate of _____)] [Combat Infantry Badge] [The Distinguished Service Cross] [the ribbon representing the Silver Star] [the lapel button representing the Legion of Merit] [_____].

PART V

SECTION A

NON-JUDICIAL PUNISHMENT (NJP) PROCEDURES ARMY NATIONAL GUARD

CHAPTER 1

APPLICABLE POLICIES

1-1. General. The Administration of NJP in the State military forces shall be governed by Section 130.15 of the NYSML of the State of New York, by the Manual for Courts-Martial, United States, 1984 and AR 27-10, dated 25 September 1986, as amended, except insofar as the provisions of the Manual for Courts-Martial and AR 27-10 may be inconsistent with the State Code or inconsistent with or modified by this Part V, NY Manual for Courts-Martial. Any inconsistency with this Part V and any of the above cited references shall be resolved in favor of the Part V NYMCM.

1-2. Use of NJP.

a. A commander should use non-punitive measures to the fullest extent to further the efficiency of the command before resorting to NJP. Use of NJP is proper in all cases involving minor offenses in which non-punitive measures are considered inadequate or inappropriate. If it is clear that NJP may be imposed to:

(1) Correct, educate and reform offenders who the imposing commander determines cannot benefit from less stringent measures.

(2) Preserve a member's record of service from unnecessary stigma by a record of court-marital conviction, and

(3) Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

1-3. Relationship of NJP to non-punitive measures.

a. General. NJP is imposed to correct misconduct in violation of the State Code of Military Justice. Such conduct may result from intentional disregard of or failure to comply with prescribed standards of military conduct . Non-punitive measures usually deal with misconduct resulting from simple neglect, fOrgetfulness, laziness, and inattention

to instructions, sloppy habits, immaturity, difficulty in adjusting to disciplined military life and similar deficiencies. These measures are primarily tools for teaching proper standards of conduct and performance and do not constitute punishment.

b. Included among non-punitive measure are denial of pass or other privileges, counseling, administrative reduction in grade, administrative reprimands and admonitions, extra training, bar to reenlistment, and MOS reclassification. Certain commanders may administratively reduce enlisted personnel for inefficiency and other reasons. This authority exists apart from any authority to punish misconduct under NYSML, Section 130.15. These two separate and distinct kinds of authority must not be confused (AR 600-200).

c. Reprimands and admonitions.

(1) Commanding officers have authority to give admonitions or reprimands either as an administrative measure or as NJP. If imposed as a punitive measure under NYSML, Section 130.15, the procedure set forth in Chapter 3 of this regulation must be followed.

(2) A written administrative admonition or reprimand will contain a statement that it has been imposed as an administrative measure and not a punishment under NYSML, Section 130.15 (AR 600-37). Admonitions and reprimands imposed as punishment under Section 130.15, whether administered orally or in writing (paragraph 5c(1), Part V, MCM), should state clearly that they were imposed as punishment under that section.

d. Extra training or instruction. One of the most effective non-punitive measures available to a commander is extra training or instruction (AR 600-200). It is used when a member's duty performance has been substandard or deficient, e.g., a member who fails to maintain proper attire may be required to attend classes on the wearing of the uniform and stand inspection until the deficiency is corrected. The training or instruction should relate directly to the deficiency observed and should be oriented to correct that particular deficiency. Extra training or instruction may be conducted after duty hours.

e. Administrative reductions. These reductions may be made at the member's request to avoid adverse action. If taken to avoid such adverse action, reductions will state that the action was taken "with prejudice." (See AR 600-200, paragraph 6-33)

1-4. Personal exercise of discretion. A commander who is considering a case for possible disposition under NYSML, Section 130.15, will personally exercise discretion in:

a. Evaluating the case to determine whether NJP should be imposed.

b. Determining the amount and nature of any punishment, if punishment is appropriate.

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PART V

NON-JUDICIAL PUNISHMENT (NJP) PROCEDURES

CHAPTER 2

AUTHORITY

2-1. Who may impose NJP. Unless otherwise specified in this regulation, any commander is authorized to exercise the disciplinary powers conferred by NYSML, Section 130.15.

a. The term commander, as used in this section, is a commissioned or warrant officer who, by virtue of his or her grade and assignment, exercises primary command authority over a military Organization or prescribed territorial area that under pertinent official directives is recognized as a command.

b. In the case of Active Guard/Reserve (AGR) personnel, commander includes the lowest level supervisor of an AGR member at his/her workstation who is a commissioned or warrant officer.

c. The words “imposing commander” refers to the commander or other officer who actually imposes the NJP.

d. Commands include the following:

(1) Companies, troops and batteries

(2) Numbered units and detachments

(3) Missions

(4) Service school

(5) Area commands

(6) Workstation (in the case of AGR personnel)

e. Commands also include, in general, any other Organization of the kind mentioned in d, above, the commander of which is the one looked to by superior authority as the individual chiefly responsible for maintaining discipline in that Organization. Thus, an

infantry company, whether or not separate or detached, N.Y.R.C.M. 504(b)(2), is considered to be a command. However, an infantry platoon that is part of a company and is not separate or detached is not considered to be a command. Although a commissioned or warrant officer exercising command is usually designated as the commander, this position may be designated by various other titles having the same official connotation, e.g., commandant, chief of mission or work supervisor.

f. The Detachment Commander in HHD, STARC, will obtain the recommendation of the appropriate DMNA Director before imposing NJP on an AGR member who is a full-time DMNA employee.

2-2. Persons upon whom NJP may be imposed. Military personnel of his or her command. A commander may impose punishment as authorized under NYSML, Section 130.15, upon commissioned officers, warrant officers and other military personnel of his or her command.

a. For the purpose of NYSML, Section 130.15, military personnel are considered to be "of the command" of a commander if they are:

(1) Assigned to an Organization commanded by him or her.

(2) Affiliated with the command (by attachment, detail, TDY, AGR personnel or otherwise) under conditions, either expressed or implied, which indicate that the commander and the commander of the unit to which they are assigned, is to exercise administrative or disciplinary authority over them.

b. Under circumstances similar to paragraph 2-2a(1), a commander may be assigned territorial command responsibility so that all or certain military personnel in the area will be considered to be of his or her command for the purpose of NYSML, Section 130.15.

c. To determine if an individual is “of the command" of a particular commanding officer, refer first to those written or oral orders or directives that affect the status of the individual. If orders or directives do not expressly confer authority to administer NJP to the commander of the unit with which the service member is affiliated or present (as when, for example, they contain no provision attaching the member “for disciplinary purposes”), consider all attendant circumstances, such as:

(1) The phraseology used in the orders.

(2) Where the member slept, ate, was paid, performed duty, the duration of the status, and other similar factors.

(3) Whether the member is AGR under Title 32, Section 502(f), and is assigned to a certain workstation on a full-time basis which is different from his/her parent unit.

(4) Whether the commander exercises the usual responsibilities and attributes of command over the member.

d. If orders or directives include such terms as “attached for administration of military justice,” or simply “attached for administration,” the individual so attached will be considered to be of the command of the commander of the unit of attachment for the purpose of NYSML, Section 130.15.

e. Termination of status. NJP will not be imposed upon an individual by a commander after the individual ceases to be of his or her command, because of transfer or otherwise. However, if NYSML, Section 130.15, proceedings have been instituted and punishment has not been imposed prior to the time of change of assignment, the commander who instituted the proceedings may forward the record of proceedings to the gaining commander for appropriate disposition.

2-3. Minor offenses. Generally, the term “minor” includes misconduct involving a lesser degree of criminality than is involved in the average offense tried by SCM. Violations of or failures to obey general orders or regulations may be minor offenses if the prohibited conduct itself is of a minor nature even though also prohibited by a general order or regulation.

2-4. Multiple punishment prohibited. Several minor offenses arising out of substantially the same offense, act or conduct will not be made the basis of separate actions under NYSML, Section 130.15.

2-5. Punishment after exercise of jurisdiction by civil authorities. NJP may be imposed upon a member who has been tried in a civil court for the same act if the exercise of NYSML, Section 130.15, jurisdiction would promote the efficiency of the service.

2-6. Statute of limitations. No punishment shall be imposed under NYSML, Section 130.15, for any offense committed more than two years before the imposition of such punishment.

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PART V

NON-JUDICIAL PUNISHMENT (NJP) PROCEDURES

CHAPTER 3

PROCEDURES

3-1. General. The authority to impose NJP charges a commander with the responsibility of exercising his or her authority in an absolutely fair and judicious manner.

3-2. Preliminary inquiry. (See N.Y.R.C.M. 303)

a. The commander of the alleged offender must ensure that the matter is promptly and adequately investigated. The commander may either investigate the matters himself/herself or delegate such responsibility to a subordinate. However, in the latter case, the investigation should provide the commander with sufficient information to make an appropriate disposition of the incident. The investigation should cover:

(1) Whether an offense was committed.

(2) Whether the member was involved.

(3) The character and military record of the member.

b. Usually the preliminary investigation is informal and consists of interviews with witnesses and/or a review of police or other informative reports. If, after the preliminary inquiry, the commander determines that the member has committed an offense and that NJP is appropriate (See N.Y.R.C.M. 306, paragraph c(3)), the commander should take action as set forth in this section.

3-3. Commander's Guide for Notification and Imposition. In all cases, other than summarized proceedings, commanders should use Appendix 15 of this regulation as a guide in conducting the proceedings.

3-4. Proceedings, DMNA Form 1057.

a. All entries will be recorded on DMNA Form 1057 (Record of Proceedings under NYSML, Section 130.15, and Appendix 16. DMNA Form 1057 may be reproduced locally on 8½ x 11 inch paper.

b. Notification and explanation of rights.

(1) The imposing commander will ensure that the member is notified of the commander's intention to dispose of the matter under the provisions of State Military Code, Section 130.15. The member will be provided a copy of DMNA Form 1057 with items (1) and (2) completed, including the date and signature of the imposing commander. The imposing commander may authorize a commissioned officer, warrant officer, or NOC (E-7 or above), provided such person is senior to the member being notified, to deliver the DMNA Form 1057 and inform the member of his or her rights. The noncommissioned officer performing the notification should be the unit first sergeant. In such cases, the notifier should follow Appendix 15, modified as required. The member should be provided with a copy of DMNA Form 1057 and supporting documents and statement, for use during the proceedings. The member will return the copy to the commander for annotation. It will be given to the member for retention when all proceedings are completed.

(2) Right to remain silent. The member will be informed that :

(a) He or she is not required to make any statement regarding the offense or offenses of which he or she is suspected, and

(b) Any statement made may be used against him or her in NYSML, Section 130.15, or in any other proceedings, including a trial by court-martial.

(3) Right to counsel. The member will be informed of the right to consult with military counsel prior to the proceedings and be informed of the location of military counsel.

(4) Other rights. The member will be informed of the right to:

(a) Fully present his or her case in the presence, except in rare circumstances, of the imposing commander (see 3-4b(6) below).

(b) Call witnesses.

(c) Present evidence.

(d) Request he or she be accompanied by a spokesperson.

(e) Request an open proceeding (see 6(b) below).

(f) Examine available evidence.

(5) Decision period. If the member is in an inactive duty training (IDT) status the member should be given until the next regularly scheduled drill or 30 days absent extraordinary circumstances. If the member is in a period of annual training, FTNGD orders IAW Title 32, Section 502(f), SAD and or other periods of extended duty status the member should be given 14 days absent extraordinary circumstances. If a new imposing commander takes command after a member has been notified of the original imposing commander's intent to impose punishment, the member will be notified of the change.

(6) Proceeding.

(a) In the presence of the commander. The member will be allowed to personally present matters in defense, extenuation, or mitigation in the presence of the imposing commander, except when, under rare circumstances, it is not feasible. When personal appearance is requested, but is not possible, the imposing commander will appoint an officer to conduct the proceeding and make recommendations.

(b) Open proceeding. NYSML, Section 130.15, proceedings are open. However, a member may request an open or closed hearing. In all cases, the imposing commander will, after considering all of the facts and circumstances, determine whether the proceeding will be open to the public, but does not require the commander to hold the proceeding in a location different from that in which he or she conducts normal business, i.e., his or her office.

(7) Spokesperson. The person who may accompany the member to the NYSML, Section 130.15, proceeding and who speaks on his or her behalf need not be a lawyer. An offender has no right to legal counsel at the NJP proceeding; however, the commander may allow such representation in the proceeding based upon his/her discretion. A member may retain civilian counsel to act as his or her spokesperson, at no cost to the Government, but the commander need not grant a delay for the appearance of any spokesperson, to include civilian counsel so retained. No travel fees or any other unusual costs may be incurred at Government expense for the presence of the spokesperson. The spokesperson's presence is voluntary. Because the proceedings are not adversarial in nature, neither the member nor the spokesperson (including any attorney present, on behalf of the member) may examine or cross-examine witnesses, unless permitted by the imposing commander. The member or spokesperson may, however, indicate to the imposing commander relevant issues or questions he or she wishes to explore or ask. Notwithstanding this paragraph, examination and cross-examination should be permitted by the commander when reduction or fine is a permissible penalty.

(8) Witnesses. The member's request for witnesses in defense, extenuation or mitigation shall be restricted to those witnesses reasonably available as determined by the imposing commander. To determine whether a witness is reasonably available, the imposing commander will consider the fact that neither witness fees nor transportation fees are authorized. Reasonably available witnesses will ordinarily include only personnel at the unit or the installation concerned and others whose attendance will not unnecessarily delay the proceeding.

(9) Evidence. The imposing commander is not bound by the formal rules of evidence before courts-martial and may consider any matter, including unsworn statements; he or she reasonably believes to be relevant to the offense.

(10) Action terminating proceedings. If, after evaluation of all pertinent matters, the imposing commander determines that NJP is not warranted, the member will be notified that the proceedings have been terminated and all copies of DMNA Form 1057 will be destroyed.

(11) Imposition of punishment. If the imposing commander determines, beyond a reasonable doubt, that the member has committed an offense and decides to impose punishment, ordinarily he or she will announce the punishment to the member. The commander may, if he or she desires to do so, explain to the member why a particular punishment was imposed.

(12) Right to appeal. Appellate rights and procedures, which are available to the member, will be explained in Chapter 6.

3-5. No right to demand trial. NYARNG personnel, whether on orders under Title 32, United States Code or SAD under the NYSML may not demand trial by court-martial in lieu of NJP punishment. This paragraph is not applicable to officers and warrant officers.

PART V

NON-JUDICIAL PUNISHMENT(NJP) PROCEEDINGS

CHAPTER 4

PUNISHMENT

4-1. Rules and limitations. Whether to impose punishment and the nature of the punishment are solely the decisions of the imposing commander. However, commanders are encouraged to consult with their noncommissioned officers on the appropriate type, duration and limits of punishment to be imposed. Additionally, as noncommissioned officers are often in the best position to observe a member undergoing punishment and evaluate daily performance and attitude, their views on clemency should be given careful consideration.

TABLE 4-1 TYPES OF PUNISHMENT
A. MAXIMUM PUNISHMENT FOR ENLISTED MEMBERS

PUNISHMENT	IMPOSED BY COMPANY GRADE OFFICERS	IMPOSED BY FIELD GRADE OFFICERS
Admonition / Reprimand	Yes	Yes
Withholding of Privilege	2 Consecutive Weeks	2 Consecutive Weeks
Restriction With or Without Suspension from Duty	2 Consecutive Weeks	2 Consecutive Weeks
Extra Duties	2 Consecutive Weeks not to exceed 2 hours p/day; holidays included	2 Consecutive Weeks not to exceed 2 hours p/day; holidays included
Reduction (E2-E7)	E-2 through E-4, one grade but see Chapter 6 (NGR 600-200)	E-5, E-6 and E-7, one grade but see Chapter 6 (NGR 600-200)
Reduction (E8 and E9)	No, see Chapter 6 (NGR 600-200)	No, see Chapter 6 (NGR 600-200)
Fine	One Hundred & Fifty ($150.00) Dollars	One Hundred & Fifty ($150.00) Dollars

B. PUNISHMENT FOR COMMISSIONED AND WARRANT OFFICERS

Withholding of Privileges	2 Consecutive Weeks	2 Consecutive Weeks
Restrictions With Suspension from Duty	2 Consecutive Weeks	2 Consecutive Weeks
Restrictions Without Suspension from Duty	2 Consecutive Weeks	2 Consecutive Weeks

Imposed by Governor, Commanding Officer or Force of Organized Militia or General or Flag Ranking Command

Fine of Two Hundred ($200.00) Dollars

4-2. Type of punishment. (See Table 4-1 for maximum punishments)

a. Admonition – is a warning, reminder or reproof given by a commander to an offender to deter repetition of the type of misconduct, which resulted in the admonition, and to advise him/her of the consequences that may flow from a recurrence of that misconduct. An admonition may be oral or written and may be included in a reprimand.

b. Reprimand – is the act of formal censure by a commander, which reproves or rebukes the offender for his/her misconduct. It may be oral or written. Reprimand or admonition may be given administratively as a non-punitive measure to improve efficiency. For this purpose, the procedures contained in this regulation need not be followed. If, however, the commander elects to impose either a reprimand or an admonition as NJP under NYSML, Section 130.15, the punishment must be imposed in accordance with the procedures outlined in this regulation.

c. Withholding of privileges – shall only be executed while the offender is in a duty status.

d. Restriction to certain specified limits – shall only be executed while the offender is in a duty status, with or without suspension from performance of duty.

e. Extra duties:

(1) Shall only be executed while the offender is in a duty status.

(2) The performance of extra duties shall not exceed two hours per day, and may include holidays.

(3) Extra duties may include performance of any military duty except duty which:

(a) Demeans the grade or position of the offender in type of duty or manner of performance;

(b) Constitutes punishment not sanctioned by the customs of the military;

(c) Normally is intended as an honor; or

(d) Uses the offender as a personal servant.

(4) An inactive duty period may be extended beyond the normal four-hour period to accommodate the performance of the extra duties (see NYSML, Section 130.15(a)(2)(c)).

f. Confinement – is limited to those instances authorized in NYSML, Section 130.15 (a)(2)(E), and shall only be executed while the offender is in a duty status.

g. The punishment or withholding of privileges, restrictions to certain specified limits, extra duties and confinement shall be executed within sixty (60) days after the punishment is imposed.

h. Fine – may apply to pay or allowances as stated in NYSML, Section 130.15, subdivision (a)(1)(C), (a)(2)(F) and (f).

(1) Fines will be collected by the unit commander and deposited in the unit's State military fund account.

(2) In the case of AGR personnel, fines will be collected by the commander and remitted to the unit State military fund or in the case of assignment to another unit to the assigned unit's State military fund, e.g., STARC.

(3) A fine is collected by receipt of a check or money order made payable to "Division of Military and Naval Affairs," with a note on the check or money order "State Military Fund (20127)." The check or money order is then mailed to: Director of Management and Budget, NYARNG MNBF, DMNA, 330 Old Niskayuna Road, Latham, NY 12110. Include a copy of the completed DMNA 1057 without enclosures, without attachments, and or without classified information with the check or money order when mailed.

i. Reduction in grade – (herein meaning "pay grade")

(1) Only the commander with the authority to promote to the grade from which demoted may reduce a member in grade with the exception as indicated in paragraph i(3) below. See paragraph k herein for reduction of offenders in grades E-8 and E-9.

(2) An offender may be reduced only one grade in each NJP action.

(3) Reduction authority pertaining to AGR personnel is not delegated and rests with this Headquarters. Reduction actions will be implemented by completing and forwarding a copy of DMNA Form 1057 completed to part 5 to Headquarters, NYARNG, ATTN: MNHF-AGR after the imposing commander has completed conduct of the proceeding. Prior to any punishment being imposed this Headquarters will review and either approve or disapprove all punishments. Only then will the offender make an election to appeal in part 6. All appeals will then be routed to this command for legal review by MNLA in block 7, and then provided to the appellate authority within this headquarters to determine whether the appeal of the punishment is warranted by completing block 8. All AGR reduction orders will be processed by MNHF-AGR only.

j. Reduction in grade (herein meaning “pay grade”). This paragraph and paragraph i do not apply to commissioned officers and warrant officers (see paragraph 4-3b).

(1) Promotional authority. The grade from which reduced must be within the promotion authority of the imposing commander or of any officer subordinate to the imposing commander. For the purposes of this regulation, the imposing commander, or any subordinate commander, has “promotion authority”, if he or she has the general authority to appoint to the grade from which reduced or to any higher grade (AR 600-200).

(2) Lateral appointment or reduction of noncommissioned officer to specialist and a specialist to noncommissioned officer. A noncommissioned officer may not be laterally appointed to a specialist in the same pay grade under NYSML, Section 130.15. However, the noncommissioned officer may be reduced to a specialist or noncommissioned officer of a lower pay grade provided the latter grade is authorized in the member’s primary military occupational specialty (PMOS). A specialist may not be laterally appointed to a noncommissioned officer in the same pay grade but may be reduced to a specialist or noncommissioned officer of a lower pay grade provided the latter grade is authorized in the member’s primary MOS. For example, a sergeant may not be appointed to a specialist 5 but may be reduced to a specialist 4 or to a corporal. If reduction is included in the punishment, the imposing commander must determine whether the lower pay grade status of either specialist or noncommissioned officer is authorized in the member’s primary MOS. The commander will indicate upon announcement of the reduction which status within the pay grade is intended, e.g., “to be reduced to Specialist 4.”

(3) Date of rank. When a person is reduced in grade as a result of an unsuspended reduction, his or her date of rank in the grade to which reduced is the date the punishment or reduction was imposed. If the reduction is suspended either on or after the time the punishment was imposed, or if set aside or mitigated to forfeiture of pay, the date of rank in the grade held before the punishment was imposed remains unchanged. If a suspension of the reduction is vacated the date or rank in the grade to which reduced as a result of the action is the date the punishment was originally imposed, regardless of the date the punishment was suspended or vacated.

(4) Entitlement to pay. When a member is restored to a higher pay grade because of suspension or when a reduction is mitigated to a fine, entitlement or pay at the higher grade is effective on the date of suspension or mitigation. If, however, a reduction is set aside and all rights, privileges and property are restored; the member concerned will be entitled to pay as though the reduction had never been imposed.

(5) Void reduction. A reduction imposed as NJP by an imposing commander not having authority to do so is void and must be set aside. However, there is one exception, which clearly evidences a commander's intent to impose at least as authorized one grade reduction. This is a reduction to a lower specialist grade when reduction should have been to a lower noncommissioned officer grade (or vice versa). In this case, administrative action will be taken to place the offender in the proper rank for the MOS held in the reduced pay grade.

(6) Removal from Standing Promotion List. (See AR 600-200)

k. Reduction in grade of offenders in grades E-8 and E-9:

(1) Only a major commander, NYARNG, is authorized to impose a reduction, suspended for unsuspended, in a NJP action where the offender is in the grade of E-8 or E-9. Likewise, only a major commander, NYARNG, is authorized to vacate a suspended reduction of an offender in grades E-8 or E-9.

(2) All procedures previously described in this regulation apply to any action involving the reduction of an offender in grades E-8 or E-9 subject to the following:

(a) An NJP imposed on an offender in grades E-8 or E-9, not involving reduction, shall be imposed at the unit level by the commander authorized to impose such NJP on offenders in grades E-8 or E-9.

(b) If the commander authorized to non-judicially punish (other than reduction) such offenders "intends to impose reduction," paragraph 1(the notification of offense), DMNA Form 1057, shall state that the commander "intends to recommend to the (appropriate major commander) the imposition of NJP." However, this notification of offense shall not include a recommendation of the type of severity of punishment to be imposed.

(c) After all requirements in this regulation preliminary to the actual imposition of NJP are met, the commander who would have otherwise been authorized to impose the punishment shall by endorsement, forward the record to the 42d Infantry Division, Headquarters; Troop Command; Headquarters, 27th Brigade; STARC (if the action is not commenced by the Division Commander or Commander, Headquarters Troop Command) or Commander, 27th Brigade, through the JA (for preliminary legal sufficiency review for determination of imposition of NJP).

(d) When the major commander is forwarded the record to initially determine whether or not to impose NJP, he/she takes the place of the commander at the unit level with all his/her authority for NJP action (i.e., imposition of punishment, termination without punishment, or termination of action and processing by court-martial).

(3) If the major commander imposes a reduction (although he/she may impose any type of NJP he/she deems appropriate) only he/she, or his/her successor-in-command may suspend, vacate a suspension, mitigate or remit or set aside the reduction.

(a) Whatever remedial action the major commander takes, once the appellate process is completed, the record shall be maintained at the unit level, and the appropriate major commander shall be notified of any further misconduct committed by such offender in any suspension period.

(b) Any vacation shall be commenced by the unit commander recommending vacation action to the major commander and by mailing or delivering the notification to the offender in accordance with this regulation.

(4) A STARC SJA, NYARNG, shall review the record for legal sufficiency in all cases of reductions in grade of offenders in grades E-8 and E-9. All papers shall be forwarded to DMNA, ATTN: MNLA, 330 Old Niskayuna Road, Latham, New York 12110-2224.

4-3. Limitations and types of punishment.

a. In addition to, or in lieu of an admonition or reprimand, only one of the authorized punishments in NYSML, Section 130.15, may be imposed for each NJP action.

b. The punishments of confinement, extra duties, or reduction may not be imposed non-judicially on officers or warrant officers.

c. Punishment imposed may not be so grossly disproportionate to the offenses committed, so as to violate fundamental principles of fairness and justice.

4-4. Effective date and execution of punishment.

a. General. The date of imposition of NJP is the date items 1-3, DMNA Form 1057, as appropriate, are signed by the imposing commander. This action will normally be accomplished on the day punishment is imposed.

b. Unsuspended punishments. Unsuspended punishments of reduction and forfeiture take effect on the date imposed. Other unsuspended punishments take effect on the date they are imposed, unless the imposing commander prescribes otherwise. In those cases where the execution of the punishment must legitimately be delayed (e.g., the member is hospitalized, authorized emergency leave) the execution of punishment should begin immediately thereafter. The delay in execution of punishment should not exceed thirty 30-days. Once the member has submitted an appeal, including all pertinent attachments, such appeal normally should be decided within thirty calendar

days, excluding the submission date. If the appeal is not decided within this period, the performance of those punishments involving deprivation of liberty will be interrupted pending decision on the appeal.

c. Vacated, suspended reduction. Suspended reduction, later vacated, is effective on the date vacation is directed. Any commanding officer of the person to be punished may order the punishment to be executed and in such a manner and under such supervision as he or she may direct.

4-5. Announcement of punishment.

a. The punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision of the appeal. It also may be posted on the unit bulletin board. The purpose of announcing the results of punishment is to preclude perceptions of unfairness of punishment and to deter similar misconduct by other service members. An inconsistent or arbitrary policy regarding the announcement of punishment that might result in the appearance of vindictiveness or favoritism should be avoided. In deciding whether to announce punishment of members in the grade of E-5 or above, the following should be considered:

(1) The nature of the offense.

(2) The individual's military record and duty position.

(3) The deterrent effect.

(4) The impact on unit morale.

(5) The impact on any victim.

(6) The detrimental impact on the mission or leadership effectiveness of the individual concerned.

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PART V
NON-JUDICIAL PUNISHMENT (NJP) PROCEEDINGS

CHAPTER 5

SUSPENSION, VACATION, MITIGATION REMISSION AND SETTING ASIDE

5-1. Clemency.

a. General. The imposing commander, his or her successor-in-command, or the next superior authority may, in accordance with the time prescribed in the MCM:

(1) Remit or mitigate any part or amount of the unexecuted portion of the punishment imposed.

(2) Mitigate reduction in grade, whether executed or unexecuted, to fine, detention or pay.

(3) At any time, suspend probationally any part or amount of the unexecuted portion of the punishment imposed.

(4) Suspend probationally a reduction in grade or fine, whether or not executed. An uncollected fine of pay shall be considered unexecuted.

b. Meaning of successor-in-command. As used in MCM, paragraph 134, a successor-in-command is the officer who has authority to impose the same kind and amount of punishment of a member concerned that was initially imposed or was the result of a modification and who:

(1) Commands the unit to which the punished member is presently assigned, or

(2) Is the commander succeeding to the command occupied by the imposing commander, provided the member still is of that command?

c. Recording of action. Any action of suspension, mitigation, remission or setting aside, taken by an authority will be recorded according to DMNA Form, notes 9 and 10, or DMNA Form 1059 (Record of Supplementary Action under Article 15), Exhibit 3.

5-2. Suspension. Ordinarily, punishment is suspended to grant a probational period during which a member may show that he or she deserves a remission of the remaining suspended punishment. An executed punishment of reduction or fine may be

suspended only within a period of four (4) months after the date imposed. Suspension of punishment may not be for a period longer than six (6) months from the suspension date. Further misconduct by the member, within the period of suspension, may be grounds for vacation of the suspended portion of the punishment.

5-3. Vacation.

a. A commander may vacate any suspended punishment, provided the punishment is of the type and amount he or she could impose. There is no appeal from a decision to vacate a suspension. The following will be recorded according to DMNA Form 1057, notes 8 and 9:

(1) Action vacation a suspension, to include the basis for vacation.

(2) Whether or not the member appeared and was provided an opportunity to respond.

b. Unless the vacation is prior to the expiration of the stated period of suspension, the suspended punishment is automatically remitted without further action. The death, discharge, or separation from service of the member punished prior to the expiration of the suspension automatically remits the suspended punishment.

c. A specific act of misconduct resulting NYSML, Section 130.15, proceeding. If the suspended punishment is a reduction or fine, the member should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate the suspension to rebut the information upon which the proposed vacation is based. The member may be given the opportunity to appear in any case.

d. In cases involving punishments other than reduction and fine, the member will be informed of the basis of the proposed vacation and should be given an opportunity to respond, either orally or in writing. Failure to provide notification and an opportunity to appear or rebut the information may result in the record of punishment being inadmissible in a subsequent court-martial, but will not, by itself, render a vacation action void.

5-4. Mitigation.

a. General.

(1) Mitigation is a reduction in either the quantity or quality of punishment, e.g., a restriction for 14 days is reduced to five days.

(2) A fine may be mitigated to a lesser amount.

b. Appropriateness. Mitigation is appropriate when;

(1) The recipient has, by his or her subsequent good conduct, merited a reduction in the severity of punishment.

(2) The punishment imposed was disproportionate to the offense of the offender.

c. Limitation on mitigation.

(1) With the exception of reduction in grade, the power to mitigate exists only with respect to a punishment or portion thereof, which is unexecuted. A reduction in grade may be mitigated to a fine even though it has been executed.

(2) Although a suspended punishment may be mitigated to a punishment of a lesser quantity or quality (which is also suspended for a period not greater than the remainder of the period for which the punishment mitigated was suspended), it may not, unless the suspension is vacated, be mitigated to an unsuspended punishment. (See 5-6c for the time period within which reduction ordinarily may be mitigated, if appropriate, to a fine).

5-5. Remission. This is an action whereby any portion of the unexecuted punishment is cancelled. Remission is appropriate under the same circumstances as mitigation. An unsuspended reduction is executed upon imposition and thus cannot be remitted, but may be mitigated or set aside. The death, discharge, or separation from the service of a member punished merits any unexecuted punishment. A member punished under NYSML, Section 130.115, will not be held beyond his or her expiration of term of service to complete any unexecuted punishment.

5-6. Setting aside and restoration.

a. This is an action whereby the punishment or any part or amount, whether executed or unexecuted, is set aside and any rights, privileges or property affected by the portion of the punishment set aside is restored. The basis for this action is a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice. "Clear injustice" means that there exists evidence usually newly discovered, clearly exculpating the member. Normally the member's unsupported sworn statement will not constitute clearly exculpating evidence. The fact that the member's performance of service has been exemplary subsequent to the punishment does not constitute a "clear injustice."

b. In cases where administrative error results in incorrect entries on DMNA Form 1057, the appropriate remedy is generally an administrative correction of the form and not a setting aside of the punishment.

c. The power to set aside an executed punishment and to mitigate a reduction in grade to a fine, absent unusual circumstances, will be exercised only within four (4) months after the punishment has been executed. When a commander sets aside any portion of the punishment, he or she will record the basis for this action according to DMNA Form 1057, notes 8 and 9, or DMNA Form 1059.

PART V

NON-JUDICIAL PUNISHMENT (NJP) PROCEEDINGS

CHAPTER 6

APPEALS, MCM, PARAGRAPH 7, PART V

6-1. General.

a. Only one appeal is permissible under NYSML, Section 130.15 proceedings. There is no appeal from the imposition of the proceedings. The appeal is from the punishment. An appeal not made within a reasonable time may be rejected as untimely by the senior authority. A reasonable time will vary according to the situation; however, an appeal (including all documentary matters) submitted more than 30 days after the punishment is imposed will be presumed to be untimely, unless the superior authority, in his or her sound discretion for good cause shown, determines it to be timely.

b. If, at the time of imposition of punishment, the member indicates a desire not to appeal, the superior authority may reject a subsequent election to appeal, even though it is made within the 30-day period. Although a suspended punishment may be appealed, no appeal is authorized from the vacation of a suspended punishment.

c. When the member desires to appeal, the imposing commander, or his or her successor-in-command, will make available to the member reasonable assistance (to include JA counseling, if available) in preparing the appeal and will promptly forward the appeal to the appropriate senior authority.

6-2. Who may act on appeal?

a. The authority next senior to the commanding officer will act on an appeal if the member punished is still of the command of that officer at the time of appeal. If, at the time of appeal, the member is no longer of the imposing commander's command, the authority next senior to the member's present commanding officer (who can impose the same kind and amount of punishment as that imposed or resulting from subsequent modifications) will act upon the appeal.

b. The authority "next senior" to an imposing commander is normally the next senior in the chain of command, or such other authority as may be designated by competent authority as being next senior for the purposes of NYSML, Section 130.15, proceedings. A senior authority that exercises GCM jurisdiction, or is a general officer in command, may delegate those powers he or she has as senior authority to a commissioned officer in his or her command.

6-3. Procedure for submitting an appeal. All appeals will be made on DMNA Form 1057 and then forwarded to the imposing commander or successor-in-command or, when applicable, to the senior authority. The senior authority will act on the appeal unless otherwise directed by competent authority. The member is not required to state reasons for his or her appeal, however, the member may do so. For example, the person may state the following in the appeal:

a. Based upon the evidence he or she does not believe he or she is guilty.

b. The punishment imposed is excessive, or that a certain punishment should be mitigated or suspended.

6-4. Action by the imposing commander or the successor-in-command. The imposing commander or his or her successor-in-command may take any action on the appeal with respect to the punishment that the senior authority could have taken (MCM, Part V, paragraph 6, and this regulation, paragraph 6-5). If he or she suspends, mitigates, remits or sets aside any part of the punishment, this action will be recorded according to DMNA Form 1057, notes 8 and 9. The appellant will be advised and asked to state whether, in view of this action, he or she wishes to withdraw the appeal. Unless the appeal is voluntarily withdrawn, the appeal will be forwarded to the appropriate superior authority. An officer forwarding the appeal may attach any matter in rebuttal of assertions made by the member.

6-5. Action by the senior authority. Action by the senior authority on appeal will be entered in DMNA Form 1057, item 5. A senior authority will act on the appeal expeditiously, accordingly a reasonable decision period should not exceed 30 days absent extraordinary circumstances. A senior authority may conduct an independent inquiry into the case, if necessary or desirable. The senior authority must refer an appeal from a reduction or fine to a JA for consideration and advice before taking action; he or she may refer an appeal in any case. In acting on an appeal, the senior authority may exercise the same powers with respect to the punishment imposed as may be exercised by the imposing commander or his or her successor-in-command. A timely appeal does not terminate merely because a service member is discharged from the service. It will be processed to completion by the senior authority.

6-6. Action by a JA.

a. When an appeal is referred to a JA, the senior authority will be advised either orally or in writing of the JA's opinion on:

(1) The appropriateness of the punishment.

(2) Whether the proceedings were conducted in accordance with law and regulations.

b. If the advice is given orally, that fact and the name of the JA who rendered the advice will be recorded in DMNA Form 1057, item 7.

c. The JA is not limited to an examination of written matters of the record of proceedings and may make any inquiries that are necessary.

6-7. Action by senior authority regardless of appeal. Any senior authority may exercise the same powers as may be exercised by the imposing commander, or his or her successor-in-command, whether or not an appeal has been made from the punishment (MCM, Part V, paragraph 7(f)(1)). "Any senior authority" has the same meaning as that given to the term "authority next senior" in paragraph 6-2b, except that it also includes any authority senior to that authority. A service member has no right to petition for relief under this paragraph and any petition so made may be summarily denied by the superior authority to whom it is addressed.

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PART V

NON-JUDICIAL PUNISHMENT (NJP) PROCEEDINGS

CHAPTER 7

RECORDS OF PUNISHMENT, DMNA Form 1057

7-1. Disposition of DMNA Form 1057. Copies of written or other documentary evidence pertaining to the case which has been considered by the officer imposing the NJP or the commander on appeal are attached to DMNA Form 1057.

7-2. Distribution.

a. Original. Unit of assignment for filing in the military personnel records of the individual to be maintained for three years. If the case is appealed, original goes forward with the MPRJ to the next higher headquarters.

b. First copy. Member concerned.

c. Second copy. For commander's use.

d. Third copy. In the case of AGR personnel, this copy will be forwarded to MNHF-AGR, 330 Old Niskayuna Road, Latham, New York 12110-2224.

7-3. Disposition of all documents when action is appealed.

a. Action is set aside. All local records are destroyed if appeal by member is successful.

b. Action is under appeal. When a member receiving punishment under NYSML, Section 130.15, elects to appeal the same, materials relied on in support of the appeal are submitted in writing to the commander imposing punishment. This must be accomplished within 35 calendar days from the date of imposition of punishment, unless additional time is granted.

(1) Forwarding of the appeal. After making any comments necessary to rebut statement(s) furnished by the member initiating the appeal, the commander who initially imposed punishment will forward the member's MPRJ and all pertinent documents to the next higher headquarters for review.

(2) Action by reviewing authority. After reviewing the appeal, the officer concerned will accomplish one of the procedures below:

(a) If the NYSML, Section 130.15, action is set aside, the appeal and all pertinent documents are returned to the member's commander along with the MPRJ. The member's commander will ensure that all local records of the NYASML, Section 130.15, proceeding are destroyed.

(b) If the reviewing officer affirms the action, whether or not the punishment is modified, he/she will return the appeal with his/her decision to the commander. The decision will be accompanied by all documents and the MPRJ of the member concerned. The reviewing officer will maintain a record of the NYSML, Section 130.15, proceeding and will destroy the same upon expiration of the term of punishment.

PART V

SECTION B

NON-JUDICIAL PUNISHMENT (NJP) PROCEDURES

AIR NATIONAL GUARD

CHAPTER 1

WHO MAY IMPOSE NJP

1-1. General.

a. "Commander" includes the person duly appointed by superior authority as Commander of New York Air National Guard (NYANG) or of any NYANG wing, group, squadron or flight.

b. "Responsible commander" is the commander who intends to impose or who has imposed NJP or who has taken remedial action, in a given action, as the case may be.

c. "Members of his/her command" refers to the assigned members of the element or Organization commanded, and others on temporary duty with or otherwise attached to, the element, or Organization. An attachment on TDY orders for the specific purpose of exercising NJP authority is not necessary if the commander exercises the usual responsibilities and attributes of command over the member. In such cases, the commander has concurrent authority with the commander of the member's element or Organization of assignment. In the case of AGR members, commander includes the lowest level supervisor of an AGR member at his/her workstation who is a commissioned or warrant officer.

d. Any commander who is a commissioned or warrant officer may impose NJP on members of his/her command for minor offenses, subject to limitations on this authority by statute, regulation, or order by superior authority.

As used here, the term "minor offenses" refers to any act or omission that is considered an offense under the punitive articles of the Military Law. Some of the factors to be considered in deciding whether the offense is "minor' are: the nature of the offense, the circumstances surrounding its commission, contemporary military and civilian standards, and the age and prior service of the offender.

e. This authority may be delegated only to the officer who would assume command in the event of the death, disability, or absence of the commander. This delegation must be in writing and cited whenever exercised.

PART V

SECTION B

NON-JUDICIAL PUNISHMENT (NJP) PROCEDURES

AIR NATIONAL GUARD

CHAPTER 2

TYPES OF PUNISHMENT

2-1. Types of Punishment.

a. Admonition. This is a warning, reminder or reproof given by a commander to an offender to deter repetition of the type of misconduct, which resulted in the admonition, and to advise him/her of the consequences that may flow from a recurrence of that misconduct. An admonition may be oral or written and may be included in a reprimand.

b. Reprimand. A reprimand is the act of formal censure by a commander, which reproves or rebukes the offender for his/her misconduct. It may be oral or written.

Reprimand or admonition may be given administratively as a non-punitive measure to improve efficiency. For this purpose, the procedures contained in this regulation need not be followed. If, however, the commander elects to impose either a reprimand or an admonition as NJP under Military Law, Section 130.15, the punishment must be imposed in accordance with the procedures outlined in this regulation.

c. Withholding of privileges. This shall only be executed while the offender is in a duty status.

d. Restriction to certain specified limits. This shall only be executed while the offender is in a duty status, with or without suspension from performance of duty.

e. Extra duties.

(1) Shall only be executed while the offender is in a duty status.

(2) The performance of extra duties shall not exceed two hours per day, and may include holidays.

(3) Extra duties may include performance of any military duty except duty which:

(a) Demeans the grade or position of the offender in type of duty or manner of performance;

(b) Constitutes punishment not sanctioned by the customs of the military;

(c) Normally is intended as an honor; or

(d) Uses the offender as a personal servant.

(4) An inactive duty period may be extended beyond the normal four-hour period to accommodate the performance of the extra duties. (See NYSML, Section 130.15(a)(2)(C))

f. Confinement. Confinement is limited to those instances authorized in NYSML, Section 130.15(a)(2)(E), and shall only be executed while the offender is in a duty status.

g. The punishments of withholding of privileges, restrictions to certain specified limits, extra duties and confinement, shall be executed within 60 days after the punishment is imposed.

h. Fines. These may apply to pay or allowances as stated in NYSML, Section 130.15(a)(1)(C) and (a)(2)(F).

i. Reduction in grade (herein meaning "pay grade").

(1) Only the commander with the authority to promote to the grade from which demoted may reduce a member in grade. (See Chapter 7 herein for reduction of offenders in grades E-7, E-8 and E-9)

(2) An offender may be reduced only one grade in each NJP action.

2-2. Limitations on types of punishment.

a. In addition to, or in lieu of an admonition or reprimand, only one of the authorized punishments in NYSML, Section 130.15, may be imposed for each NJP action.

b. The punishments of confinement, extra duties, or reduction may not be imposed non-judicially on officers or warrant officers.

c. Punishments imposed may not be so grossly disproportionate to the offenses committed, so as to violate fundamental principles of fairness and justice.

2-3. Suspension, mitigation, remission and setting aside of punishment. The commander who imposed NJP, his/her successor-in-command, and superior authority have the power to thereafter suspend, vacate or extend a suspension, mitigate, remit or set aside all or any part or amount of the punishment and to restore all rights, privileges and property affected.

a. Suspension of punishment. This is to postpone application of all, or a portion of a punishment for a specified probationary period, with the understanding that the punishment will be automatically remitted at the end of that period if the offender has not been guilty of further misconduct.

(1) Any authorized punishment may be suspended.

(2) The purpose of suspending punishment is to grant a deserving individual a probationary period during which he/she may demonstrate that he/she is worthy of a "second chance" in that the offense for which NJP was imposed was a temporary lapse in an otherwise good service record.

(3) The commander suspending the punishment must indicate in the correspondence suspending the punishment that the punishment will automatically terminate at the end of a specified period, or on a specified date, if the offender has not been guilty of any subsequent offense punishable under the NYSML committed during the period of suspension.

(4) Punishment may not be suspended for a period longer than the earlier of six calendar months from the date of suspension, or beyond an enlistment or current term of service.

(a) Notwithstanding anything in this regulation to the contrary, the period of suspension may be extended by the commander who suspended the punishment by as many days as an offender is AWOL from duty during the suspension period, but in no event beyond an enlistment or current term of service. A day as used herein is any part of a day in which the offender was required to be in a duty status.

(b) This commander will mail or deliver to the offender written notice that his/her suspension period has been extended to a certain date and the basis therefore. (See DMNA Form 1069)

(c) All persons who have received or reviewed the record shall be sent the same notice.

(d) The procedures outlined in this regulation for notice, certificates of mailing or delivery, matters in extenuation, appeal or review, need not be followed when a suspension period is extended.

(e) The mere extension of a suspension period on a wing or group level is not subject to review, except for legal sufficiency. Such actions shall not be forwarded to HQ, NYANG.

(5) The date of suspension of a punishment should normally be the date of the imposition of the punishment, which is being suspended, but any part of the punishment, which remains unexecuted, may be suspended at any time.

(6) Reduction in grade or fine may be suspended whether or not executed, at any time within four moths after the date of imposition.

(a) If a fine has been executed, is later suspended and the suspension is thereafter automatically terminated, the money collected must be returned on the termination date, but without interest.

b. Mitigation. This is defined as a reduction in either the quantity or the quality of punishment, and is appropriate when the offender has demonstrated, subsequent to the imposition of his/her punishment, that his/her conduct merits a reduction in the severity of his/her punishment.

(1) Unexecuted portions of punishment may be mitigated at any time.

(2) Executed punishments may not be mitigated, except that an unsuspended reduction may be mitigated so long as the action is taken within a reasonable time after the punishment has been executed, normally not more than four months.

c. Remission is the action whereby any portion of the unexecuted punishment is cancelled, and is appropriate under the same circumstances as mitigation.

(1) At any time before the execution of the punishment is completed, the unexecuted portion.

(2) While a suspended reduction may be remitted, there can be no remission of an unsuspended reduction since that punishment is executed at the time it is imposed.

d. Setting aside. This is an action whereby the punishment or any part thereof, whether executed or unexecuted, is set aside and any rights, privileges, and property affected by the imposition of the punishment are restored.

(1) This action is used in extreme cases where the facts and circumstances of the original matter demonstrate that the punishment resulted in a clear injustice to the offender. Setting aside a punishment in its entirety restores the offender to the position he/she was in before the NJP action commenced, as if the action had never existed or the conduct providing the basis for the action had never occurred.

e. Any time a suspension occurs after the date punishment was imposed, a suspension period has automatically terminated, or a punishment has been mitigated, remitted or set aside, at the wing or group level, the responsible commander shall, by letter, inform the Commander, NYANG, of same, specifying the name and unit of the offender, the punishment date and the date and nature of the remedial action taken.

2-4. Effective date of punishment.

a. The effective date of an unsuspended punishment is the date the punishment is imposed. The effective date of a suspended punishment is the date of the suspension.

(1) Although a punishment may be imposed and suspended on the same date, sequentially punishment must come first.

(2) When a reduction is suspended, the offender is entitled to pay in the grade held immediately before the reduction, effective as of the date of suspension.

b. The effective date of a vacated suspension is the date of vacation. If a suspended reduction is vacated, the offender receives pay in the grade to which reduced when the punishment was imposed, effective on the date of vacation.

c. The effective date of a mitigated punishment is the date of mitigation. If a reduction is mitigated, the offender is entitled to pay in the restored grade effective as of the date of mitigation.

d. The effect of remitting or setting aside punishment is to cancel it effective as of the date punishment was imposed. If a reduction has been remitted or set aside, the offender is entitled to pay in the grade held immediately before the reduction, effective as of the date of imposition of punishment.

2-5. Date of Rank.

a. If the reduction is unsuspended, the date of rank in the reduced grade is the date the punishment was imposed.

b. If the reduction is suspended, remitted, or set aside, the date of rank in the grade held before the reduction remains unchanged.

c. If the reduction is mitigated, the date of rank in the restored grade is the date of the endorsement mitigating the punishment.

d. If a suspended reduction is vacated, the date of rank in the grade to which reduced before the suspension, is the date the original reduction was imposed.

PART V

SECTION B

AIR NATIONAL GUARD

CHAPTER 3

ADMINISTERING NON-JUDICIAL PUNISHMENT (NJP)

3-1. Administering NJP.

a. General.

(1) The initial determination to impose NJP punishment, the types and severity of the punishment to be imposed and for what class of offenses, as well as the initial determination to suspend, vacate a suspension, mitigate, remit or set aside punishment, should be based on information that the commander determines to be reliable. In making this determination, he/she is not bound by the Military Rules of Evidence or standards of proof applicable in a trial by court-martial. However, the commander's action must be temperate, well conceived, just and conducive to good discipline. The servicing JA has the responsibility to advise and help the commander evaluate the facts and determine what offense was committed, if any. However, the basic burden of decision remains with the commander.

(2) A person not authorized to impose NJP in a given case may recommend to a commander who is so authorized, the imposition of NJP on an offender if the recommendation is based upon the commission of an offense punishable under NYSML. Such recommendation may not include the nature or extent of punishment to be imposed, or any remedial action to be taken if punishment is imposed.

(3) If NJP action is to be brought, it should be commenced as soon as possible after a punishable offense has been committed, in order to promote swift corrective action and meaningful rehabilitation of the offender.

(4) The action is commenced on the date and time the notification that a punishable offense has been committed, is mailed or delivered to the offender.

(5) Any punishment imposed in the action is deemed to have included all offenses known to have been committed before the action commenced. Any offense known to have been committed before the first action has been commenced may not be

the basis of a separate NJP action commenced after the first action has been commenced. Once the first action has been commenced, offenses thereafter committed may be the basis of additional NJP actions in accordance with principles of fairness and justice. For example, assume a Notification of Intent to Impose/Recommend NJP is dated 10 June 2001, alleging the commission by SGT Jones of an AWOL offense for May 2001. If another Notification of Intent to Impose/Recommend NJP is dated 8 July 2001 alleging AWOL offenses by the same SGT Jones for unattended UTAs on 10 June 2001, a potential multiple offense problem arises. To avoid this problem (which at the time of the first notification, a 10 June 2001 AWOL may not have been anticipated), the approximate time of the commencement of the first action should be indicated on the notification under the commencement date section (see DMNA Form 1063). Also, the times or the numbers (UTA 1, 2, 3 or 4) of the UTA 9s) unattended because the offender was AWOL and which were on the same date in the second action as was the date of the first notification, should be stated in the "charge" block #1 of the second notification. Thus, all notifications should bear the time and date of commencement and, if an UTA - AWOL situation, the number of the UTA which is the basis of the AWOL.

(6) The severity of NJP once imposed for any offense may not thereafter be increased by the commander imposing the punishment, his/her successor in command, or superior authority, but may be suspended, mitigated, remitted or set aside by any of these persons as stated in paragraph 2-3 herein.

(7) An offender has no right to demand trial by court-martial in lieu of NJP. The commander authorized to impose the punishment may nevertheless, at any time, proceed by court-martial, even though he/she had initially elected to commence a NJP action. In this event, all requirements for court-martial authority apply.

(8) All correspondence concerning the processing of NJP actions should substantially conform to the applicable forms attached to this regulation.

(9) All correspondence and endorsements in the action must be dated or provide for a date, and at least one complete record submitted to the Commander, NYANG, through HQ, NYANG/SJA, must bear original signatures or reproductions thereof on those parts of the record that require signatures and have been signed. This does not apply where the offender has not signed, though required to do so.

(10) Where the offender has a right to submit matters in extenuation, mitigation, or defense before punishment may be imposed, or as part of an appeal, or has a right to appeal, only the reasonable commander may, upon timely request by the offender, grant reasonable extensions of time to submit such matters or exercise the right to appeal. "Timely request" means request submitted within the time stated to reply to the correspondence.

(a) Any replies to correspondence by the offender submitted late may not be considered, unless the offender shows good cause for the delay and the matters submitted are meritorious. No further opportunity to show god cause or merit need be provided to the offender. "Late" means beyond the time required without extensions having been graded.

(b) Whether or not the late matters are considered, the responsible commander will note the date the late matters were submitted and forward them through the unit JA for inclusion in the record, to the next superior authority or the Commander, NYANG, through HQ, NYANG/SJA, as appropriate.

(c) If the late matters are not to be considered, the responsible commander shall so state, including any comments he/she wishes to make.

(d) If the responsible commander finds good cause shown for the delay and that the matters submitted late have merit, he/she shall so state, including any comments he/she wishes to make, and he/she may use such as the basis for any otherwise permissible remedial action under this regulation, if the punishment has already been imposed.

(e) If NJP actions are commenced in cases where the same offense has been committed by two or more offenders at the same time, date, and place, the actions must be separate for each offender.

b. Notification of intent to impose/recommend NJP.

(1) The commander authorized to impose NJP or the person recommending the imposition of NJP, as the case may be, must mail or deliver to the offender written notification of the following: see DMNA Form 1063.

(a) The specific offense(s) alleged to have been committed, the time, date and place of commission, and the statute allegedly violated; and

(b) The intention to impose NJP or the intention to recommend the imposition of such punishment for such offense to the commander authorized to impose NJP.

(c) The right of the offender to submit any matter in extenuation, mitigation, or defense to the charges; but that the offender need not do so, since any statement made by him may be used as evidence against him in a trial by court-martial; and

(d) The directions to the offender to acknowledge receipt of notification of the intended action by signing, dating and returning it within a specified period (usually at least 10 days from the date of mailing or delivery) to decide whether or not to submit any matters in extenuation, etc., accompanied by any such matters; and the advice that the action may nevertheless proceed upon the failure to reply or submit matters within the required time.

c. Certificate of mailing or personal delivery. (See DMNA Form 1065)

(1) Personal delivery. The individual who personally delivers the correspondence will certify on DMNA Form 1065 that he/she has done so, and specify the date, place and person to whom delivered.

(a) Generally, to ensure that best efforts at notification were made, personal delivery to a person of suitable age and discretion other than the offender should only be made when delivery is at the last known residence of the offender and the offender is not present or will not accept delivery.

(b) If personal delivery was attempted at the last known residence of the offender, and neither the offender nor another person of suitable age and discretion thereat could or would accept delivery when it was attempted, the person attempting delivery may leave the correspondence in a place at such residence where it is reasonably likely to be found. He/she will also state on the certificate specifically where at the residence the correspondence was left.

(c) No other evidence of personal delivery is required, but it is recommended that any receipts returned or obtained be placed in the record of the punishment, which is to be ultimately placed in the field personnel record of the offender.

(2) Mailing. Any mailing under this regulation may be by ordinary mail. The person mailing the correspondence so that it should ultimately be delivered by the United States Postal Service to the last known residence of the offender, must certify on DMNA Form 1065 that the specific correspondence was mailed on a specific date. No other evidence of mailing is necessary.

(3) Last known address. In a NJP action, mailing of the correspondence to the last known address of the offender is sufficient. The person receiving such correspondence at such address need not be the offender.

(a) Where, during the processing of the action, correspondence is mailed or delivered to the offender at more than one address and there is no receipt by or delivery personally to the offender, the person making the certificate must indicate the reasons for mailing or delivering the correspondence to the different addresses.

d. Acknowledgment of receipt of notification. The acknowledgment shall be the first endorsement to the Notification of Intent to Impose/Recommend NJP. (See DMNA Form 1063) The offender must be given a clear choice of whether or not he/she wishes to submit matters in extenuation, mitigation or defense. If he/she chooses to submit such matters, he/she must include the statement that they are attached to the acknowledgment, or will be sent within the specified time to reply to the notification.

e. Imposition of punishment and notice of right to appeal. The punishment may not be imposed until the earlier of the three following dates: the reply date specified in the notification, the date the offender has actually replied, or the date the notification has been returned unclaimed, addressee unknown, etc. The imposition of punishment should be the second endorsement to the notification and includes DMNA Form 1064.

(1) A statement that either:

(a) The matters submitted in extenuation, mitigation, or defense were considered and are attached. (It is here that the commander imposing the punishment may state the reasons why notwithstanding the matters submitted, punishment will nevertheless be imposed); or

(b) No acknowledgment of receipt of the notification was timely received, or the notification was returned unclaimed, addressee unknown, etc., as of a certain date, or the notification was received on a certain date, but no matters in extenuation, mitigation, or defense have been timely submitted; and

(2) The punishment imposed. Include, if desired, any admonitions or reprimands in separately numbered paragraphs; and

(3) Any suspension, mitigation, remission, or setting aside of any specified portion or all of the punishment if done at this time, and a specified date for the termination of the suspension for that part, or all of the punishment if suspended at this time. (Any punishment imposed without remedial action taken at this time is deemed executed on the date of the punishment endorsement, for purposes of any remedial action which can be taken in the future); and

(4) If an unsuspended reduction is imposed, the new date of rank in the grade to which reduced; and

(5) Advice of right to appeal from the imposition of NJP in accordance with NYSML., Section 130.15(d), whether or not the punishment is suspended, mitigated, or remitted at this time, and the right to submit matters to be considered on an appeal; and

(6) The directions to acknowledge receipt of the punishment endorsement by signing, dating and returning it within a specified period (usually at least 10 days from the date the punishment endorsement was mailed or delivered), and to decide whether or not to appeal, accompanied by any matters to be considered on the appeal; and the advice that the action may nevertheless proceed upon the failure to reply or submit matters within the required time; and

(7) The commander may add a statement expressing his/her expectations that the offender's misconduct will not further occur, and that in the future, the offender will redeem this lapse in his/her conduct.

(8) The decision as to appropriate punishment should be discussed with the servicing JA after the member has had an opportunity to present matters in defense, mitigation or extenuation. This determination can never be made properly until after careful consideration of all matters, which the member presents. However, in the event that the military member does not present proper matter, it is proper, before imposing the NJP, to discuss appropriate punishment with the serving JA, based upon the available information.

f. Acknowledgment of receipt of punishment and notice of right to appeal endorsement. (DMNA Form 1064) The offender must be given a clear choice of whether or not he/she elects to appeal, and whether or not he/she desires to submit matters for consideration on an appeal. If he/she chooses to submit such matters, advise him/her they should be attached to the acknowledgment.

g. Certificate of mailing or personal delivery. Comply with the provisions of paragraph 3-1c herein (DMNA Form 1065).

h. Processing the action, with or without an appeal. The next endorsement on DMNA Form 1064 will depend on whether or not the offender has timely elected to appeal and submitted matters to be considered on the appeal.

(1) If the offender timely appeals and timely submits matters to be considered on the appeal, the officer who imposed the punishment, shall by endorsement, forward the record (including the matters submitted to be considered on appeal, and any written comments on said matters such officer wishes to make), to the next superior authority to decide the appeal.

(2) If the offender timely appeals, but does not timely submit matters to be considered on the appeal, whether or not he/she has indicated a desire to submit such matters on the acknowledgement of receipt of punishment and notice of right to appeal endorsement, the officer who has imposed the punishment shall state the lack of timely submission in hi/her endorsement, and proceed as in paragraph h(1).

(3) If no acknowledgement of receipt of punishment and notice of right to appeal endorsement has been timely received from the offender or, if such endorsement has been returned unclaimed, addressee unknown, etc., before the reply date or, if there is evidence the acknowledgement has been received by the offender, on a certain date but no appeal election and matters to be considered on the appeal have been timely submitted, or if the offender timely elects not to appeal, the officer who imposed punishment shall, by endorsement, forward the record together with an applicable statement why the punishment is not being appealed, to his/her servicing JA.

(4) The JA servicing the officer imposing punishment shall cause a review of the record to be made and if found free from defects shall affix to the record a certificate of legal sufficiency and forward two (2) copies of the record to the JA servicing the appellate authority for legal sufficiency review.

(5) The JA servicing the appellate authority shall log and cause a legal sufficiency review to be made of the record. If the action is not legally sufficient then it will be returned for corrective action. If the action is legally sufficient, then a certificate of legal sufficiency shall be affixed and a copy of the action with certificate shall be sent to the military member's CBPO through the JA servicing the officer imposing punishment and a copy shall be kept for the appellate authority records.

i. The appellate authority shall decide any appeal, may include reasons for his decisions, and shall return the record to the unit which forwarded the record, for further processing in accordance with this regulation, including directing the offender to acknowledge receipt of the decision on the appeal DMNA Form 1064).

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AIR NATIONAL GUARD

CHAPTER 4

TERMINATION OF ACTION WITHOUT PUNISHMENT

4-1. Termination of action without administering punishment. (See Note #5 to DMNA Form 1064)

a. Once the action has been commenced, only the commander authorized to impose NJP may terminate the action without imposing punishment.

b. The commander authorized to impose NJP in a given action must terminate the action without imposing punishment if no punishable offense has been proven to his/her satisfaction.

(1) Once the action is terminated without the imposition of punishment, the commander must, in accordance with the provisions of paragraph 3-1c herein, mail or deliver written notification of the termination of the action without imposition of punishment to:

(a) The individual formerly accused;

(b) Any person who recommended the imposition of NJP of the individual for the (unsatisfactorily proven) offense; and

(c) All immediate and intermediate commanders of the individual.

(2) The notification shall include the order to forthwith expunge from the individual's records all references to the alleged commission of the offense by the individual and to the commencement of the NJP action, and the commander shall place the notification in the individual's field personnel record.

(3) The effect of such order to terminate and expunge is to fully restore the individual to the status he/she was in before the alleged commission of the offense.

(4) No separate orders to expunge need be published, but the commander and the unit JA should maintain a record of the correspondence which terminated the action and expunged all references to the action from the individual's record.

(5) Although the unit JA is not required to review such a termination action for legal sufficiency, it is recommended the commander consult with his/her JA before terminating the action.

(6) This commander's decision to terminate the action and expunge is final, not reviewable, nor will it be sent to HQ, NYANG.

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CHAPTER 5

APPEALS

5-1. Appeals. (DMNA Form 1066)

a. An appeal under NYSML, Section 130.15, will be acted upon by the authority next superior to the officer who imposed the punishment, if the person punished is still of the command of the officer who imposed the punishment at the time he appeals. If the punishment has been imposed under a delegation of a superior officer's power to impose NJP, the appeal will be acted upon by the authority next superior to the officer who delegated the power. If, however, at the time he/she appeals from the punishment, the person punished is no longer of the command of the person who imposed the punishment, the appeal shall be acted upon by the authority next superior to that present commanding officer of the offender who can impose the same kind and amount of punishment as that imposed in the case or that resulting from any modification by other competent authority. The authority "next superior" to a particular commanding officer is the authority normally next superior in the chain of command or such other authority as may be designated as being next superior for the purposes of NYSML, Section 130.15, by higher authority. A superior authority who is a commanding officer exercising GCM jurisdiction or who is a general officer in command may delegate those powers he/she has, as superior authority under NYSML, Section 130.15(d), to a commissioned officer of his/her command exercising the function of deputy or assistant commander.

b. Officers delegated the authority to impose certain types of NJP (e.g., reductions) stand in the place of the delegating authority. Thus, the next superior authority in such actions is that authority next superior to the delegating authority, and his/her decision on the appeal is final.

c. An unsuspended punishment imposed shall be executed and not stayed, pending a decision on an appeal.

d. The record shall not be forwarded from the officer who imposed the punishment to the next superior authority until the election of whether or not to appeal has been received (including returned unclaimed, addressee unknown, etc.) or the reply time has expired, whichever comes first.

e. The right to appeal is from the imposition of punishment whether on that date it was suspended, unsuspended, mitigated, remitted or set aside. If the punishment is later suspended, and the suspension is vacated, or if the punishment is later mitigated, remitted, or set aside, there is no right to appeal from such later actions.

f. On appeals, the appellate authority may refer the record to the servicing JA for recommendation and review (DMNA Form 1066).

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CHAPTER 6

VACATION OF SUSPENSION

6-1. Vacation of Suspension.

a. Generally.

(1) Only the commander who imposed the punishment and suspended it, his/her successor-in-command, or superior authority may vacate a suspension.

(2) Suspension of punishment may be vacated only if the offender commits an offense punishable under NYSML after the date of suspension and before the suspension has automatically terminated. The newly committed offense may, but need not also be the subject of a separate NJP action.

(3) A single offense should be the basis for both vacation action and a new NJP action only when the new offense warrants substantial additional punishment. Separate actions must be initiated in such event.

(4) In a suitable case, the original punishment may be continued in a suspended status and a separate action commenced and punishment imposed for the new offense. (See paragraph 2-4a(4))

(5) A vacation of suspension action must be in writing, and is commenced when the notification of intent to vacate (recommend vacation of) the suspension of punishment is mailed or delivered to the offender (DMNA Form 1067).

(6) The vacation action need not be entirely completed during the suspension period if during the suspension period the offender has been properly notified of the intent to vacate. Once the suspension period has terminated, a vacation action can no longer be commenced even though based on the alleged commission of an offense before the suspension has terminated. However, this offense may be the basis of a new NJP action.

(7) The commencement of a vacation action automatically extends the suspension period until the vacation action is decided.

(8) There is no right to appeal a vacation action; however, the offender has the right to submit matters in extenuation, mitigation or defense.

(9) The vacation action will be processed in the same manner regarding legal sufficiency review by the unit JA and forwarded to the Commander, NYANG, as the original NJP action.

b. Notification, certificates of mailing or personal delivery, acknowledgements of receipt of notification of vacation action, vacation of suspension.

(1) All procedures in administering NJP (paragraph 3-1), except concerning appeal, shall be followed in a vacation action.

(2) The person authorized to vacate the suspension or the person recommending the vacation action, as the case may be, must include the following in the notification:

(a) The specific offenses alleged to have been committed, the time, date and place of commission and the statute allegedly violated; and

(b) The date and nature of the original punishment imposed, the person imposing it and for what offense; and

(c) The date and portion of the punishment suspended and the termination date of the suspension; and

(d) The intention to vacate the suspension or to recommend same, as the case may be; and

(e) The right of the offender to submit any matter in extenuation, mitigation, and defense to the charges, but that the offender need not do so, since any statement made by him may be used as evidence against him in a further NJP action, or in a trial by court-martial; and

(f) The directions to acknowledge receipt of the notification, by signing, dating and returning it within a specified period (usually at least 10 days from the date of mailing or delivery), and to decide whether or not to submit matters in extenuation, etc., accompanied by any such matters; and the statement that the action may nevertheless proceed if the offender fails to respond or submit matters within the required time.

(3) The certificates of mailing or delivery of the notification of vacation action are the same in this action as in the original NJP action.

(4) The acknowledgement of receipt of notification is the same as in the original NJP action.

(5) The suspension may not be vacated until the earlier of the following three dates: the date specified in the notification for a response, the date the offender has actually responded, or the date the notification is returned unclaimed, addressee unknown, etc. The vacation of suspension includes:

(a) The same alternative statements as used for the imposition of punishment (see paragraphs 3-1e(1)(a) and (b)); and

(b) The action taken, referring to the nature and date of the punishment imposed, and the execution date of the punishment; and

(c) If a suspended reduction is being vacated, the new date of rank and new rank; and

(d) The direction to acknowledge receipt of the vacation action by dating, signing and returning it (DMNA Form 1068).

(6) The vacation of suspension is effective on the date of vacation. No reply from the offender is required to further execute the punishment. The acknowledgement is further proof of the offender's notification of the vacation.

(7) At any time before the suspension is vacated, the person authorized to vacate, hi/her successor-in-command, or superior authority may terminate the action without vacation under circumstances in accordance with procedures specified in paragraph 4-1 herein. (See Note 3 to DMNA Form 1068)

(8) In determining whether to vacate a suspension, the commander shall adhere to the same standard of proof and guidelines as in an NJP action. (See paragraph 4-1b).

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CHAPTER 7

REDUCTION OF OFFENDERS IN GRADES E-7, E-8 and E-9

7-1. Reduction of offenders in grades E-7, E-8 and E-9.

a. Only the Commander, NYANG, is authorized to impose a reduction, suspended or unsuspended, in a NJP action where the offender is in the grades of E-7, E-8 and E-9. Likewise, only the Commander, NYANG, is authorized to vacate a suspended reduction of an offender in grades E-7, E-8 and E-9.

b. All procedures previously described in this regulation apply to any action involving the reduction of an offender in grades E-7, E-8 or E-9, subject to the following:

(1) Any NJP imposed on an offender in grades E-7, E-8 or E-9, not involving reduction, shall be imposed at the unit level by the commander authorized to impose such NJP on offenders in grades E-7, E-8 or E-9.

(2) If the commander authorized to NJP (other than reduction) such offenders, intends to impose reduction, the notification of offense from such commander to the offender shall state that he/she "intends to recommend to the Commander, NYANG, the imposition of NJP." The notification of offense shall not include a recommendation of the type or severity of punishment to be imposed.

(3) The notification of offense shall direct that all replies and matters in extenuation, mitigation or defense be submitted to the commander who mailed or delivered the notification of offense.

(4) After all requirements in this regulation preliminary to the actual imposition of NJP are met, the commander who would have otherwise been authorized to impose the punishment shall, by endorsement, forward the record through the wing or group commander (if the action is not commenced by the wing or group commander) and the unit JA for preliminary legal sufficiency review to the Commander, NYANG, for determination of imposition of NJP.

(5) The wing or group commander should indicate his/her approval or disapproval of the recommendation if he/she has not commenced the action, but shall not recommend the type or severity of punishment to be imposed in his/her forwarding endorsement to the Commander, NYANG.

(6) If the wing or group commander commences the action he/she shall, by endorsement, forward the record through the unit JA to Commander, NYANG, with no recommendation of type or severity of punishment as stated above.

(7) After the notification of offense is mailed or delivered and before the record is forwarded to the Commander, NYANG, the commander authorized to NJP (other than reduction) these offenders, may terminate the action without imposition of any type of punishment, if the offense has not been satisfactorily proven to him/her, or he/she may impose a type of punishment other than reduction, if he/she determines that the initially intended reduction is no longer warranted.

(8) In either of these events, the action shall be further processed as stated in this regulation for actions that are terminated at the unit level, or for actions where punishment is imposed at the unit level, as the case may be.

(9) Where the Commander, NYANG, is forwarded the record to initially determine whether or not to impose NJP, he/she takes the place of the commander at the unit level with all his/her authority for NJP actions (i.e., imposition of punishment, termination without punishment, or termination of action and processing by court-martial).

(10) If Commander, NYANG, imposes a reduction (although he/she may impose any type of NJP he/she deems appropriate) only he/she, his/her successor-in-command, or superior authority may suspend, vacate a suspension, mitigate, remit or set aside the reduction.

(a) Whatever remedial action the Commander, NYANG, takes, once the appellate process is completed, the record shall be maintained at the unit level, and the Commander, NYANG, shall be notified of any further misconduct committed by such offender during any suspension period.

(b) Any vacation action shall be commenced by the unit commander or wing or group commander recommending the vacation action to the Commander, NYANG, and mailing or delivering the notification to the offender in accordance with this regulation.

(11) All appeals from punishment imposed by Commander, NYANG, are to be forwarded through DMNA/MNLA to The Adjutant General who is the appellate authority.

(12) Whether or not the offender appeals from punishment imposed by the Commander, NYANG, the SJA, NYANG, shall review the record for legal sufficiency.

(13) Once the appeal has been decided by The Adjutant General, the record shall be forwarded through the Commander, NYANG, back to the wing or group commander who will further process the record pursuant to this regulation.

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CHAPTER 8

ENDORSING FORMS AND CORRESPONDENCE

Normal endorsements using normal correspondence principles shall apply.

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CHAPTER 9

COPIES

a. Prepare enough copies of all correspondence and forms to provide one for the offender, plus one for each level of command that handles the action. The unit JA shall retain a record of the action in his/her file.

b. The commander must furnish the required number of copies to the unit JA for processing under paragraph 10-1.

c. Each copy must be signed and dated, or be reproduced from the signed original.

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CHAPTER 10

ACTION TAKEN ON RECORDS OF PUNISHMENTS, INCLUDING VACATION, SUSPENSION, MITIGATION, REMISSION AND SET ASIDE ACTIONS

10-1. Action taken on records of punishments, including vacation, suspension, mitigation, remission and set aside actions.

a. The commander who imposed the punishment or who took the vacation, suspension, mitigation, remission or set aside action, forwards the record to the servicing JA with the number of copies specified in paragraph 9-1. This commander shall be responsible for forwarding at least one copy of the complete record for review to the next superior authority.

b. When the punishment is appealed, the servicing JA shall:

(1) Be responsible for forwarding the record through channels to the appropriate appellate authority.

(2) After the offender has acknowledged action on the appeal, his/her immediate commander shall return the record to the servicing JA who shall distribute copies of the record as provided in paragraph 9-1.

c. The unit JA will ensure that all records are complete including all receipts of mailing returned, and matters submitted by the offender, whether or not submitted late.

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CHAPTER 11

EFFECT OF ERRORS

A failure to comply with any of the procedural provisions of this regulation shall not invalidate a punishment imposed under NYSML, Section 130.15.

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CHAPTER 12

DISPOSITION OF RECORDS

a. The disposition of documents of NJP actions is governed by applicable ANG documents of AF regulations.

b. The unit CBPO will retain the record of the NJP action as part of the member's permanent record.

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CHAPTER 13

SUPPLEMENTS

Supplements to this regulation may be issued only by a wing or group headquarters and must be submitted in writing to HQ, NYANG, for written approval before publication.

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REFERENCES

NEW YORK STATE MANUAL FOR COURTS-MARTIAL
2021 LISTING OF FORMS

DMNA FORM NO.	DATE	TITLE
1050	12/85	Charge Sheet
1051	12/86	Investigating Officer's Report
1052	12/86	Subpoena
1053	12/86	Subpoena Duces Tecum
1054	12/86	Attachment Against Witness for Failure to Appear Waiver/
1055	12/86	Withdrawal of Appellate Rights
1056	12/86	Record of Trial SCM
1057	09/21	Army National Guard Record of Proceedings under Section 130.15 – NJP
1058	09/21	Request to Superior to Exercise Non-Judicial Punishment Proceedings under section 130.15 of NYSML
1059	12/86	Army National Guard Record of Supplementary Action under NYSML, Section 130.15
1060	12/86	Affidavit of Service
1061	12/86	Procedural Rights Warning Form
1062	12/86	Warrant of Apprehension
1063	12/86	Air National Guard Notification of Intent to Impose/ Recommend NJP
1064	12/86	Air National Guard Punishment and Notice of Right to Appeal

DMNA FORM NO.	DATE	TITLE
1065	12/86	Certificate of Mailing or Personal Delivery
1066	12/86	Air National Guard Action on Appeal from NJP
1067	12/86	Air National guard Notification of Intent to Vacate Suspended NJP
1068	12/86	Suspension
1069	12/86	Air National Guard Extension of Suspension
1070	12/86	Suspension, etc., of NJP Imposed
1071	12/86	Warrant of Confinement
1076	09/21	Rights Warning Procedure/Waiver Certificate
1078	09/21	Privacy Act Statement

APPENDIX 1

CHARGE SHEET

I. PERSONAL DATA

---

1. NAME OF ACCUSED (LAST, FIRST, MI) **2.** SSN: **3.** GRADE/RANK **4.** PAY GRADE

---

5. UNIT OR ORGANIZATION **6.** CURRENT SERVICE
a. INITIAL DATE **b.** TERM

---

7. PAY PER MONTH
a. BASIC **b.** SEA/FOREIGN c. TOTAL **8.** NATURE OF RESTRAINT OF ACCUSED **9.** DATE(S) IMPOSED

II. CHARGES AND SPECIFICATIONS

---

10. CHARGE: New York State Military Law, Section

SPECIFICATION:

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI**)** **b.** GRADE **c.** ORGANIZATION OF ACCUSER

---

d. SIGNATURE OF ACCUSER **e.** DATE

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this _____ day of _____, ____, and signed the foregoing charge(s) and specification(s) under oath that he/she is a person subject to the State Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Typed Name of Officer

Organization of Officer

Grade

Official Capacity to Administer Oath
(See R.C.M. 307(b) - must be commissioned officer)

Signature

DMNA Form 1050, Dec 85

12. On , the accused was informed of the charges against

Typed Name of Immediate Commander | Organization of Immediate Commander

---

Grade | Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

---

13. The sworn charges were received at hours, at

FOR THE COMMANDER:

Typed Name of Officer | Official Capacity of Officer Signing

Grade | Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY **b.** PLACE **c.** DATE

Referred for trial to the court-martial convened by notation on this charge sheet 20 , subject to the following instructions:

Typed Name of Officer | Official Capacity of Officer Signing

Grade | Signature

---

15. On , 20__, I served a copy hereof on the above named accused.

Typed Name of Trial Counsel | Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1. When an appropriate commander signs personally, inapplicable fords are stricken.

2. See R.C.M. 601(e) concerning instructions. If none, so state.

APPENDIX 2

INVESTIGATING OFFICER'S REPORT
(Of Charges Under ML Sect 130.32 and R.C.M. 405, Manual for Courts-Martial)

1a. FROM:	**b.** GRADE: MAJ	**c.** ORGANIZATION:	**d.** DATE OF REPORT:
Adamson, Adam A.		1 Bn, 69th IN, NYARNG	1 Sep 01

2a. TO**:**	**b.** TITLE:	**c.** ORGANIZATION:
Harrison, Harry A.	Commanding Officer	1 Bn, 69th IN, NYARNG 68 Lexington Ave, NY, NY

3a. NAME OF ACCUSED:	**b.** GRADE:	**c.** SSN**:**	**d.** ORGANIZATION:	**e.** DATE OF CHARGES:
BENSON, Ben B.	PVT	111-11-1111	Co A, 1 Bn, 69 IN, NYARNG	24Aug01

(Mark an X in the appropriate box)	YES	NO
4. In accordance with ML Sec 130.32 and R.C.M. 405, Manual for Courts-Martial, I have investigated the charges appended hereto (Exhibit 1).		
5. The accused was represented by counsel (if not, see 9 below)		
6. Counsel who represented the accused was qualified under R.C.M. 405(d), 502(d)		

7a. NAME OF DEFENSE COUNSEL:	**b.** GRADE:	**8a.** NAME OF ASSISTANT DEFENSE COUNSEL (If any):	**b.** GRADE:
CARLSON, CARL C.	CPT		

c. ORGANIZATION (If appropriate):	**d.** ORGANIZATION (If appropriate):
42d IN Div, NYARNG 137 Glenmore Rd Troy, NY 12180-8398	

9. (To be signed by accused if accused waives counsel. If accused does not sign, Investigating Officer will explain in detail in Item 21.)

a. PLACE: **b.** DATE:

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED:

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF:

(Mark an X in the appropriate box)	YES	NO
a. The Charge(s) Under Investigation	X	
b. The Identity of the Accuser	X	
c. The Right Against Self-Incrimination	X	
d. The Purpose of the Investigation	X	
e. The Right to be Present Throughout the Taking of Evidence	X	
f. The Witnesses and Other Evidence Known to me Which I Expect to Present	X	
g. The Right to Cross-Examine Witnesses	X	
h. The Right to have Available Witnesses and Evidence Presented	X	
i. The Right to Present Anything in Defense, Extenuation or Mitigation	X	

DMNA Form 1051, DEC 86

11a. The accused and accused's counsel were present throughout the presentation of evidence. (If the accused or counsel were absent during part of the presentation of evidence, complete "b" below.

YES	NO
X	

b. State the circumstances and describe the proceedings conducted in absence of accused or counsel.

NOTE: If additional space is required for any item, enter the additional material in item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (example: "7c"). Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate box)

NAME	GRADE	ORGANIZATION/ADDRESS	YES	NO
DOTSON, DOD D.	CPT	Co A, 1 Bn, 69th IN, NYARNG	X	
EVANSON, EVAN E.	SGT	Co A, 1 Bn, 69th IN, NYARNG	X	
FORDSON, FORD F.	SGT	1 Bn, 101st Cav, NYARNG	X	

b. The substance of the testimony of these witnesses has been reduced to writing and is attached. X

13a. The following statements, documents, or matters were considered; the accused was permitted to examine each.

DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)
Statement of	

b. Each item considered, or a copy of recital or the substance or nature thereof, is attached. X

14. There are grounds to believe that the accused was not mentally responsible for the offense(s) or not competent to participate in the defense. (See R.C.M. 909, 916k)

15. The defense did request objections to be noted in this report. (If yes, specify in Item 21 below)

16. All essential witnesses will be available in the event of trial.

17. The charges and specifications are in proper form.

18. Reasonable ground exist to believe that the accused committed the offense(s) alleged.

19. I am not aware of any grounds which would disqualify me from acting as Investigating Officer (See R.C.M. 405(d)(1)) X

20. I RECOMMEND:
a. TRIAL BY _____ SCM _____ SPCM _X___ GCM _____
b. OTHER _____ (Specify in item 21 below)

REMARKS (Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.) Examples of other matters which may be discussed here are: (1) Discussion of evidence, credibility of witnesses and sufficiency of proof; (2) Recommendations to dismiss or change any specification; (3) Statement of any anticipated offenses or of any anticipated difficulties in proving any specification on which trial is recommended; (4) Any other matter which should be known to the convening authority or subsequent reviewing authorities.

21 a. TYPED NAME OF INVESTIGATING OFFICER **b.** GRADE **c.** ORGANIZATION

d. SIGNATURE OF INVESTIGATING OFFICER **e.** DATE

APPENDIX 3

STATE OF NEW YORK
DIVISION OF MILITARY AND NAVAL AFFAIRS
330 Old Niskayuna Road
Latham, New York 12110-2224

GEORGE E. PATAKI
GOVERNOR
COMMANDER IN CHIEF

THOMAS P. MAGUIRE, JR.
MAJOR GENERAL
THE ADJUTANT GENERAL

Special Courts-Martial
Convening Order No. 1-01

DATE

Pursuant to the authority contained in Section 130.19 of the New York State Military Law a SPCM is hereby convened. It may try such persons as may properly be brought before it and shall meet at the Headquarters, New York Army National Guard, 330 Old Niskayuna Road, Latham, New York 12110-2224 at Room 417, unless otherwise directed. The courts-martial will be constituted as follows:

MEMBERS

Name of Member	Social Security Number	Unit	Trial Counsel
Name of Member	Social Security Number	Unit	Military Judge
Name of Member	Social Security Number	Unit	Defense Counsel
Name of Member	Social Security Number	Unit	Member
Name of Member	Social Security Number	Unit	Member
Name of Member	Social Security Number	Unit	Member
Name of Member	Social Security Number	Unit	Alternate Member
Name of Member	Social Security Number	Unit	Alternate Member
Name of Member	Social Security Number	Unit	Alternate Member

All cases referred to the SPCM convened by Order No. 1-01, this office, dated (whatever date is on the convening order), in which the proceedings have not begun, will be brought to trial before the court-martial hereby convened.

FOR THE ADJUTANT GENERAL:

XXXXXXXXXXX
XXXXXXXXXXX
XXXXXXXXXXX

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APPENDIX 4

SUBPOENA TO TESTIFY BEFORE MILITARY COURT

THE PEOPLE OF THE STATE OF NEW YORK

TO: JOHN DOE

You and each of you are hereby commanded to be and appear in person before a BCD SPCM of the State Military Forces at 125 West 14th Street in the City of New York on the 1st day of March 2001, at 0900 in the forenoon to testify and give evidence as a witness in a case then and there to be tried between the People of the State of New York and SSG Robert I. Missing on the part of said People and for failure to obey you will be deemed guilty of an offense against the State and may be punished by such court-martial as provided by law.

Witness my hand, this 27th day of February 2001.

_____
SIGNATURE

_____
GRADE, BRANCH AND UNIT

[President of said Court
[or Summary Court Officer

INSTRUCTIONS: A subpoena may be served by any person eighteen years of age and upwards. Service is made by showing the original subpoena to the witness and delivering a copy thereof to him together with witness fees. (See NYRCM 703(e))

The affidavit should state the place of service by giving house number and name or number of the street and name of city, town or village where service is made.

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APPENDIX 5

SUBPOENA DUCES TECUM

THE PEOPLE OF THE STATE OF NEW YORK

TO: JOHN DOE

You and each of you are hereby commanded to be and appear in person before a

(1) BCD SPCM of the State

Military Forces at (2) 125 West 14th Street, in the City of New York, State of New York,

on the 1st day of March 2001 , at 0900 in the forenoon to testify and give evidence as a witness in a

case then and there to be tried between The People of the State of New York and (3) ~~SSG Robert I.~~ Missing

on the part of said (4) People

and you are required to bring with you and there produce (5) (specify documents

required).

and for a failure to obey you will be deemed guilty of an offense against the State and

may be punished by such court-martial as provided by law.

WITNESS MY HAND this 27th day of March 2001.

(6) _____
Signature

(7) _____
Grade, Branch and Unit

(8) (President of said Court or
(Summary Court Officer

Notes: (1) "GCMl," "SPCM," or "SCM." (2) "The Armory, 107th IN, 643 Park Avenue" or other exact location. (3) Grade, name and Organization of the accused. (4) Description of books, papers or documents required. (5) Signature of President of Court or Summary Court Officer. (6) Grade and Organization of the President or Summary Court. (7) "President" or "Summary Court Officer." Strike out one.

Instructions: A subpoena duces tecum may be served by any person eighteen years of age or upwards. Service is made by showing the original subpoena duces tecum to the witness and delivering a copy thereof to him, together with witness fees,. (See NYRCM 703(e))

The affidavit should state the place of service by giving house number and name or number of the street and name of city, town or village where service is made.

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APPENDIX 6

ATTACHMENT AGAINST WITNESS FOR FAILURE TO APPEAR

THE PEOPLE OF THE STATE OF NEW YORK

TO: (1) The Sheriff of the County of Albany Greeting:

WHEREAS, proof has been made to the satisfaction of a (2) SPCM duly appointed by (3) Special Order No. 1-01, (4) HQ, HHD STARC-NY, NYARNG, dated 27 February 2001 that a subpoena duly issued from said court was duly and personally served on (5) John Doe requiring him to attend before said court at a time and place in said subpoena named, to testify and give evidence as a witness in a case then and there to be tried between The People of the State of New York and (6) Robert I. Missing, and that said (5) John Doe is a necessary and material witness at said trial and that he has failed and neglected to attend as so required.

Now, you are hereby commanded to attach said (5) John Doe and bring him forthwith before the said (2) SPCM I at (7) 330 Old Niskayuna Road, in the Village of Latham, State of New York to testify and give evidence as a witness in the above-named case and to answer all other matters that may be brought against him for not obeying said subpoena, and have you then and there this writ.

Given under my hand this ——— day of ———, 20 ——.

(8) _____
Signature

(9) _____
Grade, Branch and Unit
(10) President of said Court or
Summary Court Officer

Notes: (1) "John Doe, a marshal of the court below named," or "the sheriff of the City of New York or county of ———" or "any police officer, constable or marshal or other peace officer of the city, town or village of _____," (2) "GCM" "SPCM" or "SCM." (3) "General" or "Special," (4) Description of Headquarters of Convening Authority. (5) name of witness. (6) Grade, name and unit of accused. (7) Place of trial, such as armory, 107th IN, 643 Park Avenue, in the City of New York. (8) Signature of President of Summary Court Officer. (9) His grade, branch and unit. (10) Strike one.

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APPENDIX 7

GUIDE FOR GCM AND SPCM

[Note 1. This guide outlines the sequence of events ordinarily followed in GCM and SPCM, and suggests ways to conduct various procedures prescribed in the Rules for Courts-Martial. The guide is not mandatory; it is intended solely as an aid to users of the Manual for Courts-Martial.]

Section I. Opening Session Through Pleas.

[Note 2. See N.Y.R.C.M. 901-911.]

[Note 3. When a military judge has been detailed, the proceedings outlined in this section will be conducted at a Section 130.39(a) session. See R.C.M. 901(e). In SPCM without a military judge, these procedures should be followed in general; the president of a SPCM without a military judge should also carefully examine pertinent Rules for Courts-Martial.

Session called to order

MJ: This Section 130.39(a) session is called to order. (Be seated.)

Convening orders and referral of charges

TC: The court-martial is convened by (general) (special) court-martial convening order(s) number _____, (HQ, _____) (USS _____) (_____), (as by _____) copies of which have been

furnished the military judge counsel, and the accused, (and to the reporter for insertion at this point in the record) (and which will be inserted at this point in the record). (Copies of any written orders detailing the military judge and counsel will be inserted at this point in the record.)

[Note 4. When detailed, the reporter records all proceedings verbatim. See R.C.M. 502(e)(3)(B), 808 and 1103. The reporter should account for all parties to the trial and keep a record of the hour and data of each opening and closing of the session, whether a recess, adjournment, or otherwise, for insertion in the record. See R.C.M. 8139(b) and 1103. See also Appendices 13 and 14.]

[Note 5. The military judge should examine the convening order and any amending orders.]

TC: The charges have been properly referred to this court-martial for trial and were served on the accused on _____.

[Note 6. In time of peace, if less than 5 days have elapsed since service of the charges in a GCM (3 days in case of a SPCM), the military judge should inquire whether the accused objects to proceeding. If the accused objects, the military judge must grant a continuance. See R.C.M. 901(a).]

TC: The following corrections are noted in the convening orders: _____.

[Note 7. Only minor changes, such as typographical errors or changes of grade due to promotion, may be made. Any correction which affects the identity of the individual concerned must be made by an amending or correcting order.]

Accounting for parties

[Note 8. See R.C.M. 813.]

TC: The accused and the following persons detailed to this court-martial are present: _____.

Reporter detailed

[Note 9. When a reporter is detailed, the following announcement will be made. See R.C.M. 813(a)(8).]

TC: _____ has been detailed reporter for this court-martial and (has previously been sworn) (will now be sworn).

[Note 10. See R.C.M. 807(b)(2) Discussion (D) concerning the oath to be administered the reporter.]

Detail of trial counsel

TC: ((I) (All members of the prosecution) have been detailed to this court-martial by _____.)

Qualification of prosecutions

TC: (I am) (All members of the prosecution are) qualified and certified under NYSML 130.42. (_____.)

TC: (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (him) (or) (her) in this court-martial. (_____.)

Detail of defense counsel

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____.)

Qualifications of defense counsel

DC: (All detailed members of the defense are) (I am) qualified and certified under NYSML, Section 130.27, and sworn under NYSML, Section 130.42. (_____.)

DC: (I have not) (no member of the defense has) acted in any manner which might tend to disqualify (me) (him) (or) (her) in this court-martial. (_____.)

Qualifications of individual counsel when present

IDC: My qualifications are _____. I have not acted I have not acted in any manner which might tend to disqualify me in this court-martial.

[Note 11. If it appears that any counsel may be disqualified, the military judge must decide the matter and take appropriate action. See R.C.M. 901(d)(3).]

Rights to counsel

[Note 12. See R.C.M. 506]

MJ: _____, you have the right to be represented in this court-martial by _____ (and _____), your detailed defense counsel, or you may be represented by military counsel of your own selection, if the counsel you request is reasonably available. If you are represented by military counsel of your own selection, you would lose the right to have _____ (and _____) your detailed counsel continue to help in your defense. However, you may request that _____ (and _____) (and _____), or one of them), your detailed counsel, continues to act as associate counsel with the military counsel you select, and _____, the convening authority, may approve such a request. Do you understand?

ACC: _____.

MJ: In addition, you have the right to be represented by civilian counsel, at no expense to New York State. Civilian counsel may represent you alone or along with your military counsel. Do you understand?

[Note 13. If two or more accused in a joint or common trial are represented by the same counsel, or by civilian counsel who are associated in the practice of law, the military judge must inquire into the matter. See R.C.M. 901(d)(4)(D)

MJ: Do you have any questions about your rights to counsel?

ACC: _____.

MJ: Whom do you want to represent you?

ACC: _____.

[Note 14. If appropriate, the court-martial should be continued to permit the accused to obtain individual military or civilian counsel.]

MJ: Counsel for the parties have the necessary qualifications, and have been sworn (except _____, who will now be sworn).

MJ: I have been detailed to this court-martial by _____.

[Note 15. See R.C.M. 807(b)(2) Discussion (C) concerning the oath to be administered to counsel.]

General nature of charges

TC: The general nature of the charge(s) in this case is _____. The charges were preferred by _____. forwarded with recommendations as to disposition by _____ (and investigated by _____). (_____ is also an accuser in this case.)

Challenge of military judge

[Note 16. See R.C.M. 902]

TC: Your honor, are you aware of any matter which may be granted for challenge against you?

MJ: (I am aware of none.) (_____.)

TC: (The State has no challenge for cause against the military judge.) (_____.)

DC: (The defense has no challenge for cause against the military judge.) (_____.)

Accused's elections on composition of court-martial

[Note 17. See R.C.M. 903. See also R.C.M. 501(a) and 503(b)]

MJ: _____, do you understand that you have the right to be tried by a court-martial composed of members (including, if you request in writing, at least one-third enlisted persons) and that, if you are found guilty of any offense, those members would determine a sentence?

ACC: _____.

MJ: Do you also understand that you may request in writing or orally here in the court-martial trial before me alone, and that if I approve such a request, there will be no members and I alone will decide whether you are guilty and, if I find you guilty, determine a sentence?

ACC: _____.

MJ: Have you discussed these choices with your counsel?

ACC: _____.

MJ: By which type of court-martial do you choose to be tried?

ACC: _____.

[Note 18. See R.C.M. 903(a) concerning whether the accused may defer a decision on composition of court-martial.]

[Note 19. If the accused chooses trial by court-martial composed of members proceed with the arraignment below. Any request for enlisted members will be marked as an Appellate Exhibit and inserted in the record of trial. See R.C.M. 1103(b)(2)(D)(iii). In a SPCM without a military judge, the members should be sworn, and the challenge procedure conducted at this point. See Notes 38-47 below.]

Election to be tried by military judge alone

[Note 20. A request for trial by military judge alone must be written and signed by the accused and should identify the military judge by name or it may be made orally on the record. A written request will be marked as an Appellate Exhibit and inserted in the record of trial. See R.C.M. 1103(b)(2)(D)(iii)]

MJ: (I have Appellate Exhibit _____, a request for trial before me alone.) (I am (COL (CPT) (_____) (_____.) have you discussed this request and the rights I just described with your counsel?

ACC: _____.

MJ: If I approve your request for trial by me alone you give up your right to trial by a court-martial composed of members (including, if you requested, enlisted members). Do you wish to request trial before me alone?

ACC: _____.

MJ: (Your request is approved. The court-martial is assembled.) (Your request is disapproved because _____.)

[Note 21. See R.C.M. 903(c)(2)(B) concerning approval or disapproval. See R.C.M. 911 concerning assembly of the court-martial.]

Arraignment

[Note 22. See R.C.M. 904]

MJ: The accused will now be arraigned.

TC: All parties and the military judge have been furnished a copy of the charges and specifications. Does the accused want them read?

DC: The accused (waives reading of the charges) (wants the charges read).

MJ: (The reading may be omitted.)

TC: (_____.)

TC: The charges are signed by _____, a person subject to the code, as accuser; are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths, and are properly referred to this court-martial for trial by _____, the convening authority.

MJ: _____, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

[Note 23. See R.C.M. 801(e), 905-907 concerning motions.]

DC: The defense has (no) (the following) motion(s). (_____.)

[Note 24. After any motions are disposed of pleas are ordinarily entered. See R.C.M. 910]

DC: _____ pleads _____.

[Note 25. If the accused enters any pleas of guilty proceed with the remainder of Section 1. If no pleas of guilty are entered, proceed to Section II if trial is before members, or Section III if trial is before military judge alone.]

[Note 26. If trial is before members in a contested case, the military judge should examine the copy of the charge(s) to be provided the members, discuss any preliminary instructions with the parties, and determine whether other matters should be addressed before the Section 130.39(a) session is ended.]

Guilty plea inquiry

[Note 27. See R.C.M. 910(c) , (d), (e) and (f). If a conditional guilty plea is entered, see R.C.M. 910(a)(2).]

Introduction

MJ: _____, your plea of guilty will not be accepted unless you understand its meaning and effect. I am going to discuss your plea of guilty with you now. If you have any questions, please say so. Do you understand?

ACC: _____.

MJ: A plea of guilty is the strongest form of proof known to the law. On your plea alone, without receiving any evidence, this court-martial could find you guilty of the offense(s) to which you are pleading guilty. Your plea will not be accepted unless you understand that by pleading guilty you admit every element to each offense and you are pleading guilty because you really are guilty. If you do not believe that you are guilty, you should not plead guilty for any reason. Do you understand that?

ACC: _____.

Waiver of rights

MJ: By your plea of guilty you waive, or in other words, you give up certain important rights. (You give up these rights only as to the offense(s) to which you have pleaded not guilty.) The rights you give up are:

First, the right against self-incrimination, that is the right to say nothing at all about (this) (these) offense(s). Second, the right to a trial of the facts by the court-martial, that is, the right to have this court-martial decide whether or not you are guilty based on evidence presented by the prosecution and, if you chose to do so, by the defense. Third, the right to be confronted by the witnesses against you, that is to see and hear the witnesses against you here in the court-martial and to have them cross-examined, and to call witnesses in your behalf. Do you understand these rights?

ACC: _____.

MJ: If you plead guilty, there will not be a trial of any kind as to the offense(s) to which you are pleading guilty, so by pleading guilty you give up the rights I have just described. Do you understand that?

ACC: _____ .

Maximum penalty

MJ: Defense counsel, what advice have you given _____ as to the maximum punishment for the offense(s) to which the accused pleaded guilty?

DC: _____.

MJ: Trial counsel, do you agree with that?

TC: _____ .

[Note 28. If there is a question as to the maximum punishment, the military judge must resolve it. If the maximum punishment may be subject to further dispute, the military judge should advise the accused of the alternative possibilities and determine whether this affects the accused's decision to plead guilty.]

MJ: _____ , by your plead of guilty this court-martial could sentence you to the maximum authorized punishment, which is _____ . Do you understand that?

ACC: _____.

MJ: Do you feel you have had enough time to discuss your case with your counsel _____?

ACC: _____.

MJ: _____, do you feel that you have had enough time to discuss the case with your client?

DC: _____ .

MJ: _____, are you satisfied with _____ (and _____), your defense counsel, and do you believe (his) (her) (their) advice has been in your best interest?

ACC: _____ .

MJ: Are you pleading guilty voluntarily?

ACC: _____ .

MJ: Has anyone tried to force you to plead guilty?

ACC: _____.

Factual basis for plea

[Note 29. The accused will be placed under oath at this point. See R.C.M. 910(e). The military judge may inquire whether there is a stipulation in connection with the plea, and may inquire into the stipulation at this point. See R.C.M. 811]

TC: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: _____.

MJ: I am going to explain the elements of the offense(s) to which you have entered pleas of guilty. By "elements" I mean the facts which the Government would have to prove by evidence beyond a reasonable doubt before you could be found guilty if you pleaded not guilty. When I state each of these elements ask yourself if it is true, and whether you want to admit that its true. Then be ready to talk about these facts with me.

MJ: Please look at your copy of the charges and specifications. You have pleaded guilty to Charge _____, Specification _____, a violation of Section _____ of the State Code of Military Justice. The elements of that offense are _____.

[Note 30. See subparagraph b of the appropriate paragraph in Part IV. The description of the elements should be tailored to the allegations in the specification. Legal terms should be explained.]

MJ: Do you understand those elements?

ACC: _____.

MJ: Do the elements correctly describe what you did?

ACC: _____.

Accused's description of offense(s)

[Note 31. The military judge should elicit from the accused facts supporting the guilty plea by questioning the accused about the offense(s). The questioning should develop the accused's description of the offense(s) and establish the existence of each element of the offense(s). The military judge should be alert to discrepancies in the accused's description, or between the accused's description and any stipulation. If the accused's discussion or other information discloses a possible defense, the military judge must inquire into the matter, and may not accept the plea if a possible defense exists. The military judge should explain to the accused the elements of a defense when the accused's description raises the possibility of one. The foregoing inquiry should be repeated as to each offense to which the accused has pleaded guilty.]

Identification of accused

MJ: Do you admit that you are _____, the accused in this case?

ACC: _____.

Jurisdiction

MJ: On (date of earliest offense), 20__, were you a member of the New York (Army) (Air) (National Guard) (Guard) (Naval Militia)?

ACC: _____.

Warnings to accused

[Note: If the court-martial is going to be adjourned for any reason, e.g., where the accused has not been served with the charges previously, then the military judge will advise the accused of his/her right to be present at the court-martial and that he/she will be tried in absentia if he/she should fail to appear upon any adjourned date.]

MJ: You have a right to be present at the trial or any further proceedings on the charges preferred against you. If you fail to appear for trial or at any further proceedings, the court-martial will proceed in your absence.

Pretrial agreement

MJ: Is there a pretrial agreement in this case?

TC or DC: _____.

[Note 33. If the answer is yes proceed to Note 35; if the answer is no, proceed as follows.]

MJ: _____ are you pleading guilty because of any promise by the State that you will receive a sentence reduction or other benefit from the State if you plead guilty?

ACC: _____.

[Note 34. If the answer is no, proceed to acceptance of the plea. If the answer is yes, the military judge should determine from the accused and

counsel whether any agreement exists. If so, the plea agreement inquiry should continue. If not, then the military judge should clarify any misunderstanding the accused may have, and ascertain whether the accused still wants to plead guilty. Once any issue is resolved, if the accused maintains the plea of guilty, proceed to acceptance of the plea.]

[Note 35. If there is a pretrial agreement, the military judge must: (1) ensure that the entire agreement is presented, provided that in trial by military judge alone the military judge ordinarily will not examine any sentence limitation at this point; (2) ensure that the agreement complies with R.C.M. 705; and (3) inquire to ensure that the accused understands the agreement and that the parties agree to it. See R.C.M. 910(f)). If the agreement contains any ambiguous or unclear terms, the military judge should obtain clarification from the parties.]

[Note 36. The agreement should be marked as an Appellate Exhibit. If the agreement contains a sentence limitation and trial is before military judge alone, the sentence limitation should be marked as a separate Appellate Exhibit, if possible.]

[Note 37. The language below is generally appropriate when trial is before military judge alone. It should be modified when trial is before members.]

MJ: _____, I have here Appellate Exhibit _____, which is part of a pretrial agreement between you and _____, the convening authority. Is this your signature which appears (on the bottom of page _____) (_____), and did you read this part of the agreement?

ACC: _____.

MJ: Did you also read and sign Appellate Exhibit _____, which is the second part of the agreement?

ACC: _____.

MJ: Do you believe that you fully understand the agreement?

ACC: _____.

MJ: I don't know, and I don't want to know at this time the sentence limitation you have agreed to. However, I want you to read that part of the agreement over to yourself once again.

MJ: [After accused has done so.]
Without saying what it is, do you understand the maximum punishment the convening authority may approve?

ACC: _____.

MJ: In a pretrial agreement, you agree to enter a plea of guilty to (some of) the charge(s) and specification(s), and in return, the convening authority agrees to (approve no sentence greater than that listed in Appellate Exhibit _____, which you have just read) (_____). [In addition, (you have just read) (_____).] [In addition, (you have agreed to testify against _____) (the convening authority has agreed to withdraw Charge _____ and its specification) (_____).] Do you understand that?

ACC: _____.

MJ: If the adjudged by this court-martial is greater than the one provided in the agreement, the convening authority would have to reduce the sentence to one no more severe than the one in your agreement. On the other hand, if the sentence adjudged by this court-martial is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC: _____.

[Note 38. The military judge should discuss the agreement with the accused, and explain any terms which the accused may not understand. If the accused does not understand a term, or if the parties disagree as to a term, the agreement should not be accepted unless the matter is clarified to the satisfaction of the parties. If there are any illegal terms, the agreement must be modified in accordance with R.C.M. 705. The trial counsel should be granted a recess on request to secure the assent of the convening authority to any material modification in the agreement.]

MJ: _____is this agreement, Appellate Exhibit(s) _____ (and _____) the entire agreement between you and the convening authority? In other words, it is correct that there are no other agreements promises in this case.

ACC: _____.

MJ: Do counsel agree?

TC: _____.

DC: _____.

MJ: _____, do you understand your pretrial agreement?

ACC: _____.

MJ: Do counsel disagree with my explanation or interpretation of the agreement in any respect?

TC: _____.

DC: _____.

MJ: (To DC), did the offer to make a pretrial agreement originate with the defense?

DC: _____.

MJ: _____, are you entering this agreement freely and voluntarily?

ACC: _____.

MJ: Has anyone tried to force you to enter this agreement?

ACC: _____.

MJ: Have you fully discussed this agreement with your counsel, and are you satisfied that (his) (her) advice is in your best interest?

ACC: _____.

MJ: _____, although you believe you are guilty, you have a legal and a moral right to plead not guilty and to require the Government to prove its case against you, if it can, by legal and competent evidence beyond a reasonable doubt. If you were to plead not guilty, then you would be presumed under the law to be not guilty, and only by introducing evidence and proving your guilt beyond a reasonable doubt can the Government overcome that presumption. Do you understand?

ACC: _____.

MJ: Do you have any questions about your plea of guilty, your pretrial agreement, or anything we have discussed?

ACC: _____.

Acceptance of guilty plea

MJ: Do you still want to plead guilty?

ACC: _____.

MJ: I find that the accused has knowingly, intelligently, and consciously waived (his) (her) rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against (him) (her); that the accused is, in fact, guilty; and (his) (her) plea of guilty is accepted.

MJ: _____, you may request to withdraw your plea of guilty any time before the sentence is announced in your case and if you have a good reason for your request, I will grant it. Do you understand?

ACC: _____.

Announcement of findings based on guilty plea

[Note 39. Findings of guilty may, and ordinarily should be entered at this point except when the plea is a lesser included offense and the prosecution intends to proceed to trial on the offense as charged. See R.C.M. 910(g)(1). See also R.C.M. 910(g)(2) in SPCM without a military judge alone, when some offenses are to be contested, the military judge may elect to defer entry of any findings until the end of trial on the merits.]

[Note 40. See R.C.M. 922 and Appendix __ concerning forms of findings.]

MJ: _____, in accordance with your plea(s) of guilty, this court-martial finds you (of all charges and specifications) (of Specification _____ of Charge _____ and Charge _____): Guilty.

[Note 41. If trial is before members, and no offenses remain to be contested on the merits, this may be an appropriate point for the military judge to inform the accused of the rights to allocution under R.C.M. 1001(a)(3). See Note 88 below. In addition, other issues relating to the information or evidence to be introduced on sentencing should ordinarily be resolved at this point. If other offenses remain to be contested, the military judge should consider, and solicit the views of the parties, whether to inform the members only of the offenses to which the accused pleaded not guilty. The copy of the charges presented to the members should reflect this decision. See also Note 26.]

Section II. Trial with Members; Preliminary Session.

[Note 42. The following procedure is suggested for a trial with members after completion of the Section 130.39(a) session.

Before calling the court-martial to order, the military judge should examine the convening order and any amending orders and ensure that all members required to be present are present. Witnesses should be excluded from the courtroom except when they testify.

When the court-martial is ready to proceed the military judge should direct the bailiff, if any, or the trial counsel to call the members. Whenever the members enter the courtroom, all persons present except the military judge and reporter should rise.

The members are seated alternatively to the right and left of the president according to rank.]

MJ: The court-martial will come to order. You may be seated.

TC: This court-martial is convened by (GCM) (SPCM) convening order number _____ (HQ _____) (USS _____) (_____) amended by _____, a copy of which has been furnished to each member.

TC: The accused and the following persons named in the convening orders are present.

TC: The following persons named in the convening orders are absent: _____ _____.

[Note 43. Persons who have been relieved (viced) by written orders need not be mentioned. The reason for any other absences should be stated.]

TC: The prosecution is ready to proceed with the trial in the case of People of State of New York v. (who is _____ present).

Oath of members

MJ: The members will now be sworn.

TC: All persons please rise.

"Do you [name(s) of member(s)] (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a

member of this court-martial; that you can faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court-martial (upon a challenge or) upon the findings in due course of law, (so help you God)?"

Each Member: I do.

Assembly/preliminary instructions

MJ: Be seated please. The court-martial is assembled.

[Note 44. See R.C.M. 911 concerning assembly.]

[Note 45. At this point, the military judge may give the members preliminary instructions. These may include instructions on the general nature of the member's duties (see R.C.M. 502(a)(2) and Discussion, 922, 1006), the duties of the military judge (see R.C.M. 801,920, 1005; Mil R. Evid. 103, and the duties of the counsel (see R.C.M. 502(d)(5) and (6)), on voir dire and possible grounds for challenge (see R.C.M. 912); on the procedures for questioning witnesses (see Mil. R. Evid. 611, 614); on taking notes; and such other matters as may be appropriate. The military judge may elect to defer giving instructions on some of these matters until after voir dire, or until another appropriate point in the proceedings.]

General nature of charges

[Note 46. Trial counsel should distribute copies of the charges and specifications to the members.]

TC: The general nature of the charge(s) in this case (is) (are) _____. The charge(s) were preferred by _____; forwarded with recommendations as to disposition by (and investigated by _____.

TC: If any member is aware of any matter which may be a ground for challenge by any party, the member should so state.

[Note 47. In case of a negative response, trial counsel should announce "Apparently not."]

[Note 48. The military judge and, if permitted by the military judge, counsel may examine the members on voir dire. See R.C.M. 912(d) and Discussion. The parties may present evidence relating to challenges for cause. See R.C.M. 912(e). Upon completion of voir dire and taking evidence, if any, the parties will be called upon to enter challenges for cause. Ordinarily trial counsel enters challenges for cause, the parties may be called upon to enter peremptory challenges. Ordinarily trial counsel enters challenges for cause before defense counsel. After any challenge for cause, the parties may be called upon to enter peremptory challenges. Ordinarily trial counsel enters a peremptory challenge before the defense. The parties must be permitted to

enter challenges outside the presence of members. See R.C.M. 912(f) and (g). In SPCM without a military judge, see R.C.M. 912(h). See NYSML, Section 130.41]

[Note 49. If any members are successfully challenged, they should be excused in open session in the presence of the parties. The record should indicate that they withdrew from the courtroom. The members who remain after challenges should be reseated according to rank, as necessary.]

[Note 50. The military judge should ensure that a quorum remains and, if the court-martial is composed with enlisted persons, that at least one-third of the remaining members are enlisted persons. See R.C.M. 912(g)(2) Discussion.]

[Note 51. If the members have not yet been informed of the plea(s), this should now be done.]

MJ: Members of the court-martial, at an earlier session the accused was arraigned and entered the following pleas: _____.

[Note 52. In a SPCM without a military judge, the accused should now be arraigned. See Notes 22-39.]

[Note 53. If the military judge entered findings based on pleas of guilty and no offenses remain to be contested, the military judge should give the following instruction and proceed to Section IV, below.]

MJ: Members, you will not be required to reach findings regarding Charge (_____) and Specification(s) (_____) (and _____) (and _____). Findings will be required, however, as to Charge (_____) and Specification(s) (_____) (and _____) (and _____), to which the accused has pleaded guilty to (one) (some) (offense(s) in any way in deciding whether the accused is guilty of the offense(s) to which (he) (she) has pleaded not guilty.

[Note 55. If the accused has pleaded guilty to a lesser included offense and the prosecution intends to prove the greater offense, the military judge should instruct as follows.]

MJ: The accused's plea of guilty to the lesser included offense of _____ admits some of the elements of the offense charged in (the) Specification (_____) of (the) Charge (_____). These elements are therefore established by the accused's plea without need of further proof. However, the accused's plea of guilty to this lesser included offense provides no basis for a finding of guilty to this lesser included offense provides no basis for a finding of guilty as charged, because there still remains in issue the elements of _____. No inference of guilt of such remaining elements may be drawn from the accused's plea. Before the accused may be found guilty of the offense charged, the prosecution must provide the remaining element(s) beyond a reasonable doubt.

[Note 56. The military judge may give such additional preliminary instructions as may be appropriate at this point.]

Section III. Trial.

[Note 57. See R.C.M. 913.]

MJ: Will the prosecution make an opening statement?

TC: (No) (Yes. _____.)

MC: Will the defense make an opening statement?

DC: (No) (The defense will make its statement after the prosecution has rested.) (Yes. _____.)

TC: The prosecution calls as its first witness _____.

Oath of witness

[Note 58. See R.C.M. 807.]

TC: Do you (swear) (affirm) that the evidence you give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (so help you God)?

WIT: _____

Preliminary questions

TC: (Are you (state name, grade, Organization, station, and armed force) (state name and address, if civilian)? (Please state your name (grade, Organization, station, and armed force) (and address).

WIT: _____

[Note 59. The address of witnesses should be omitted in appropriate cases, as where it might endanger the witness.]

[Note 60. Except when an identification is inappropriate (e.g., when the witness is a laboratory technician) or where a foundation must be laid, trial counsel ordinarily should ask the witness to identify the accused.]

TC: Do you know the accused?

WIT: _____

[Note 61. If the witness answers affirmatively:]

TC: Please point to the accused and state (his) (her) name.

WIT: _____

TC: Let the record show that the witness pointed to the accused when stating (his) (her) name.

Testimony

[Note 62. Trial counsel should now conduct direct examination of the witness. See Mil. R. Evid. 611.]

TC: No further questions.

MJ: _____, you may cross-examine.

[Note 63. Defense counsel may cross-examine the witness.]

DC: No (further) questions.

[Note 64. The parties should be permitted to conduct such redirect and recross-examination as may reasonably be necessary. See Mil. R. Evid. 611. After the parties have completed their questioning, the military judge and members may ask additional questions. See Mil R. Evid. 614. The members should be instructed on the procedures for questioning. Each member's questions will be collected by the bailiff, if any, or trial counsel, marked as an Appellate Exhibit, examined by counsel for each side, and given to the military judge. If there are any objections, they should be raised at a Section 130.39(a) session or at a side-bar conference.]

[Note 65. After questioning of a witness is completed, the military judge should determine whether the witness will be excused temporarily or permanently. The military judge should advise the witness as follows.]

MJ: _____, thank you. You are (temporarily) excused. (Please wait (in the waiting room) (_____)). (You are free to go.) As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone except counsel. If anyone else tries to talk to you about the case, stop them and report the matter to one of the counsel.

[Note 66. The witness will withdraw from the courtroom. See Mil R. Evid. 615.]

TC: The prosecution calls as its next witness _____.

[Note 67. Trial counsel continues to present the prosecution's case. If exhibits were admitted at an Article 30(a) session, trial counsel may, with the permission of the military judge, read or present the evidence to the court-martial.]

Recess, adjournment, or Section 130.39(a) session

[Note 68. In the event of a recess, continuance, adjournment, or Section 130.39(a) session the military judge should announce when the court-martial will reconvene, and should instruct or remind the members not to discuss the case with anyone, not to consult legal references, and to avoid exposure to matters relating to the case.]

Reopening

[Note 69. When the court-martial is reopened, the following announcement is appropriate.]

MJ: The court-martial will come to order.

TC: The members, the parties, and the military judge are all present.

[Note 70. A motion for a finding of not guilty may be raised at this point. See R.C.M. 917. Any such motion should be made outside the presence of the members. If a motion is made in the presence of members, and is denied, the military judge should instruct the members that the military judge applies a different standard in ruling on the motion than they must apply in reaching their findings, and that the denial must have no effect on their deliberations and findings.]

Presentation of evidence by defense

[Note 71. Defense counsel may make an opening statement if one was not made previously.]

DC: The defense calls as its first witness _____.

[Note 72. Trial counsel administers the oath to each witness. Defense counsel conducts direct examination, and trial counsel cross-examination of each witness. Redirect and recross-examination may be conducted as appropriate. The military judge and members may question each witness. See Note 64.]

[Note 73. Defense counsel continues to present the defense case. If exhibits were admitted at a Section 130.39(a) session, defense counsel may, with the permission of the military judge, read or present the evidence to the court-martial.]

DC: The defense rests.

Rebuttal and surrebuttal

[Note 74. The parties may present evidence in rebuttal and surrebuttal. See R.C.M. 913(c)(1). After the parties complete their presentations, additional evidence may be presented when the military judge so directs. See R.C.M. 810(c), 913(c)(1)(F).]

[Note 75. When a witness is recalled, the following is appropriate.]

TC: Are you the same _____ who testified earlier in this court-martial?

WIT: I am.

TC: You are reminded that you are still under oath.

[Note 76. If trial is by military judge alone, counsel should be permitted to make closing arguments. See R.C.M. 919. After arguments, proceed to announcement of findings.]

Out of court hearing on findings instructions

[Note 77. Ordinarily the military judge will conduct a Section 130.39(a) session to discuss findings instructions and examine the findings worksheet.

See R.C.M. 920, 921(d). If such instructions are discussed at a conference, see R.C.M. 802.]

Closing arguments

[Note 78. See R.C.M. 919.]

TC: _____.

DC: _____.

TC: _____.

[Note 79. See R.C.M. 920.]

MJ: _____.

MJ: Does any member have any questions concerning these instructions?

MEMBERS: _____ .

MJ: Does counsel have any objections to these instructions not previously raised?

TC: _____.

DC: _____.

[Note 80. See R.C.M. 920(f).]

[note 81. Any exhibit which the members are to consider should be given to the president before the court-martial closes.]

Closing

MJ: The court-martial is closed.

[Note 82. While the members are deliberating, the military judge may take up certain matters which may arise if the accused is found guilty of any offense. The admissibility of evidence during sentencing proceedings and advice to the accused about allocution rights may be considered at a Section 130.39(a) session at this point. See R.C.M. 1001. See Note 88 below concerning allocution advice.]

After findings reached

MJ: The court-martial will come to order.

TC: All parties and members and the military judge are present.

MJ: (To president) _____ have the members reached findings?

PRES: _____.

MJ: Are the findings on Appellate Exhibit _____?

PRES: Yes.

MJ: Would (the bailiff) (trial counsel), without examining it please bring me Appellate Exhibit _____?

MJ: I have examined Appellate Exhibit _____. It appears to be in proper form. Please return it to the president.

[Note 83. See R.C.M. 921(d) concerning a findings worksheet, and the procedure to be followed if any problems are indicated. See R.C.M. 924 if reconsideration of a finding may be necessary.]

Announcement of findings

MJ: _____, would you and your counsel stand up please (and approach the president).

MJ: _____, announce the findings please.

PRES: _____, this court-martial finds you _____.

MJ: Please be seated.

[Note 84. If the accused is found not guilty of all charges and specifications, the court-martial is ordinarily adjourned at this point.]

Section IV. Pre-sentencing Procedure.

[Note 85. If the accused pleaded guilty to some specification and the members have not yet been informed of these, the members should now be given copies of these specifications and be informed of the accused's plea to them. See text following Note 51.]

Date from charge sheet

[Note 86. See R.C.M. 10019b)(1).]

MJ: The court-martial will not hear the data concerning the accused shown on the charge sheet.

TC: _____.

Matters presented by prosecution

MJ: Does the prosecution have other matters to present?

[Note 87. The prosecution may present certain matters from the accused's personnel records, evidence of previous convictions, evidence in aggravation, and evidence of rehabilitative potential. See R.C.M. 1001(b)(2) through (5).]

TC: The prosecution has nothing further.

Matters presented by defense

[Note 88. If the accused has not previously been advised in accordance with R.C.M. 1001(a)(3), such advice should not be given. In trial before members, this advice should be given at a Section 130.39(a) session.]

MJ: _____, you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself which you want the court-martial to consider in deciding a sentence. Included in your right to present evidence are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify, you may be cross-examined by the trial counsel and questioned by me (and the members). If you decide to make an unsworn statement, you may not be cross-examined by trial counsel or questioned by me (or the members). You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these ways. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your rights?

ACC: _____.

.

MJ: which of these rights do you want to exercise?

ACC: _____.

[Note 89. The defense may present matters in rebuttal and extenuation of mitigation. See R.C.M. 1001(c).]

DC: The defense has nothing further.

Rebuttal

[Note 90. The parties may present additional matters in rebuttal, as appropriate. See R.C.M. 1001(a)(1)(C).]

Out of court hearing on sentencing instructions

[Note 91. If trial by military judge alone, counsel should be permitted to make arguments on sentencing. After arguments proceed to announcement of the sentence.]

[Note 92. Ordinarily the military judge will conduct a Section 130.39(a) session to discuss sentencing instructions and examine the sentence worksheet. See R.C.M. 1005. If such instructions are discussed at a conference, see R.C.M. 802.]

Closing arguments

[Note 93. See R.C.M. 1001(g).]

TC: _____.

DC: _____.

[Note 94. See R.C.M. 1005.]

MJ: _____.

MJ: Does any member have any questions concerning these instructions?

MEMBERS: _____.

MJ: Does counsel have any objections concerning these instructions not previously raised?

TC: _____.

DC: _____.

[Note 95. See R.C.M. 1005(f).]

[Note 96. Any exhibits which the members are to consider should be given to the president before the court-martial closes.]

Closing

MJ: The court-martial is closed.

After sentence reached

MJ: The court-martial will come to order.

TC: All parties and members and the military judge are present.

MJ: (To president) _____, have the members reached a sentenced?

PRES: _____.

MJ: Is the sentence on Appellate Exhibit _____?

PRES: Yes.

MJ: Would (the bailiff) (trial counsel), without examining it, please bring me Appellate Exhibit _____?

MJ: I have examined Appellate Exhibit _____. It appears to be in proper form. Please return it to the president.

[Note 97. See R.C.M. 1005(e) concerning a sentence worksheet, and the procedure to be followed if any problems are indicated. See R.C.M. 1008 if reconsideration of the sentence may be necessary.]

Announcement of sentence

MJ: _____, would you and your counsel stand up please (and approach the president)?

MJ: _____, would you announce the sentence please?

PRES: _____, this court-martial sentences you to: _____.

MJ: Please be seated.

[Note 98. In trial before members, ordinarily the members should be excused at this point. If no other matters remain to be considered, the court-martial

should be adjourned. If there are additional matters to be considered (e.g., punishment limitation in a pretrial agreement in a trial by military judge alone, see R.C.M. 910(f)(3) or, if the accused was represented by more than one counsel, which counsel will prepare any response to the post-trial review) these matters should be addressed before the court-martial is adjourned.]

advice of post-trial and appellate rights

[Note 99. The military judge must advise the accused of the accused's post-trial and appellate rights. See R.C.M. 1009.]

MJ: _____ I will explain to you your post-trial and appellate rights.

MJ: After the record of trial is prepared in your case, _____ the convening authority will act on your case. The convening authority can approve the sentence (adjudged) (provided in your pretrial agreement), or (he) (she) can approve a lesser sentence or disapprove the sentence entirely. The convening authority cannot increase the sentence. The convening authority can also disapprove (some or all of) the findings of guilty. The convening authority is not required to review the case for legal errors, but may take action to correct legal errors. Do you understand?

ACC: _____.

Advice in GCMs and SPCMs in which BCD adjudged

(Note 100. In GCM and in SPCM in which a BCD has been adjudged or any court-martial which adjudged confinement, the following advice should be given. In other cases, proceed to Note 104.]

MJ: You have the right to submit matters to the convening authority (he) (she) takes action on your case. These matters must be submitted to the convening authority within 30 days of today or within 7 days after you or your counsel receive a copy of the record of trial, whichever is later. The convening authority may extend these periods for good cause. Do you understand?

ACC: _____.

MJ: Before the convening authority takes action, the (SJA) (legal officer) will submit a recommendation to the convening authority. This recommendation will be sent to your defense counsel before the convening authority takes action, and you may submit matters in response to the recommendation within 5 days of receiving it. The convening authority may extend this period for good cause. Do you understand?

ACC: _____.

[Note 101. Using the following in cases subject to review by a Board of Military Review. (See NYSML , Section130.65(b)) Otherwise proceed to Note 102.

MJ: After the convening authority takes action, unless you waive appellate review, your case will be reviewed by the Board of Military Review. You are entitled to be represented by counsel before such court. Military counsel will be appointed to represent you at no cost to you, and if you choose, you may be represented by civilian counsel at no expense to the State of New York. Do you understand?

ACC: _____.

MJ: The Board of Military Review will review your case for any legal errors, and for factual sufficiency. It will also consider whether the sentence is appropriate. Do you understand?

ACC: _____.

MJ: After the Board of Military Review completes its review, and subject to approval by the The Adjutant General, your case could be reviewed, on your request or otherwise by the Governor and, if it were reviewed by the Governor, by the _____. You would have the same rights to counsel before him as you have before the Board of Military Review. Do you understand?

ACC: _____.

[Note 102. Use the following in general courts-martial which are subject to examination by the State JA. (NYSML, Section 130.68)]

MJ: After the convening authority takes action, unless you waive further review, your case will be forwarded to the State JA for examination. The record will be examined in the office of the State JA for any legal errors and concerning the appropriateness of the sentence, and the State JA may take corrective action, if appropriate. Do you understand?

ACC: _____.

[Note 103. Use the following in all GCM and all SPCM in which a bad conduct discharge has been adjudged.]

MJ: If you waive appellate review, you give up the rights I have just described. Do you understand?

ACC: _____.

MJ: If you do not waive appellate review, you may withdraw your case from appellate review at a later time, before such review is completed. Do you understand?

ACC: _____.

MJ: If you do waive, or later withdraw your case from appellate review, you cannot change your mind later. Once you file a waiver or withdrawal, your decision is final and appellate review is barred. Do you understand?

ACC: _____.

MJ: If you waive or withdraw appellate review, your case will be reviewed by a JA for legal error. You may suggest, in writing, possible errors for the JA to consider. The JA's conclusions will be sent to the GCM convening authority for final approval of the Governor. Do you understand?

ACC: _____.

MJ: After review by the JA and action by the GCM convening authority is completed, you may request the State JA to take corrective action in your case. Such a request must be filed within two years after the convening authority takes action unless you can show good cause for filing later. Do you understand?

ACC: _____.

MJ: You have the right to the advice and assistance of counsel in exercising your post-trial and appellate rights and in making any decision to waive them. Do you understand?

ACC: _____.

MJ: Do you understand your post-trial and appellate rights?

ACC: _____.

MJ: The court-martial is adjourned.

[Note 104. In SPCM in which a bad conduct discharge was not adjudged, the following advice should be given.]

MJ: You have the right to submit matters to the convening authority before (he) (she) takes action on your case. These matters must be submitted to the convening authority within 20 days of today or within 7 days after you or your counsel receive a copy of the record, whichever is later. The convening authority may extend these periods for good cause. Do you understand?

ACC: _____.

MJ: After the convening authority takes action, your case will be reviewed by the Board of Military Review if confinement is approved, or otherwise by a JA for certain legal errors. You may submit, in writing, suggestions of legal error for consideration by the JA and he or she must file a written response to each. Do you understand?

ACC: _____.

MJ: After review by the Board of Military Review or by the JA, and completion of any action by the GCM convening authority, if required, you

may request the State JA to take corrective action in your case. Such a request must be filed within two years after the convening authority takes action unless you can show good cause for filing later. Do you understand?

ACC: _____.

MJ: You have the right to the advice and assistance of counsel in the exercise of your post-trial rights. Do you understand?

ACC: _____.

MJ: Do you understand post-trial rights?

ACC: _____.

MJ: The court-martial is adjourned.

APPENDIX 8

WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN GCM AND SPCM SUBJECT TO EXAMINATION IN THE OFFICE OF THE SJA

I have read the attached action, dated _____.

I have consulted with _____, my associate defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review --

a. My case will be examined in the Office of the State JA to determine whether the findings and sentence are legally correct and whether the sentence is appropriate.

b. After examination in the Office of the State JA and final action in my case, I may petition the State JA for review under NYSML, Section 130.68(b). Such a petition must be filed within two years after the convening authority took action in my case, unless I can show good cause for filing later.

2. If I waive or withdraw appellate review --

a. My case will not be examined in the Office of the State JA.

b. My case will be reviewed by a JA for legal error, and I may submit, in writing, allegations of legal error for consideration by the JA.

c. After review by the JA and final action in my case, I may petition the State JA for review under NYSML, Section 130.68(b). Such a petition must be filed within two years after the convening authority took action in my case, unless I can show good cause for filing later.

d. A waiver or withdrawal, once filed, may not be revoked.

3. Understanding the above, I hereby waive my rights to appellate review. I make this decision freely and voluntarily. No one has made any promises that I would receive any benefits from this waiver and no one has forced me to make it.

_____ _____

Typed Name of Accused Rank of Accused

_____ _____

Signature of Accused Date

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APPENDIX 9

GUIDE FOR SCM

[General Note to SCM: It is not the purpose of this guide to answer all questions which may arise during a trial. When this guide, Chapter 13 of the Rules for Courts-Martial, and other legal materials available fail to provide sufficient information concerning law or procedures, the SCM should seek advice on these matters from a JA. See N.Y.R.C.M., Section 130-1(e). The SCM should examine the format for record of trial at Appendix 10. It may be useful as a checklist during the proceedings to ensure proper preparation after trial. The SCM should become familiar with this guide before using it. Instructions for the SCM are contained in brackets, and should not be read aloud. Language in parentheses reflects optional or alternative language. The SCM should read the appropriate language aloud.]

Preliminary proceeding

Identity of SCM

SCM: I am _____. I have been detailed to conduct a SCM (by SCM Convening Order Number _____) Headquarters, _____, dated _____. [See convening order, or if you have been detailed by Part V of the Charge Sheet, reference that document.]

Referral of charges

Charges against you have been referred to me for trial by SCM by (name and title of convening authority) on (date of referral) [See Block IV on page 2 of charge sheet.]

[Note 1. Hand copy of charge sheet to the accused.]

Providing the accused with charge sheet

I suggest that you keep this copy of the charge sheet and refer to it during the trial. The charges are signed by (see first name at top of page 2 of charge sheet), a person subject to the State Code of Military Justice, as accuser, and are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths. (_____ ordered the charges to be preferred.) The charges allege, in general, violation of NYSML, Section _____, in that you _____ (and NYSML, Section _____, in that you _____). I am now going to tell you about certain rights you have in this trial. You should carefully consider each explanation because you will soon have to decide whether to object to trial by SCM. Until I have completed my explanation, do not say anything except to answer the specific questions which I ask you. Do you understand that?

ACC: _____.

Duties of SCM

SCM: As SCM it is my duty to obtain and examine all the evidence concerning any offense(s) to which you plead not guilty, and to thoroughly and impartially inquire into both sides of the matter. I will call witnesses for the prosecution and question them, and I will help you in cross-examining those witnesses. I will help you obtain

evidence and present the defense. This means that one of my duties is to help you present your side of the case. You may also represent yourself and, if you do, it is my duty to help you. You are presumed to be innocent until your guilt has been proved by legal and competent evidence beyond a reasonable doubt. If you are found guilty of an offense, it is also my duty to consider matters which might affect the sentence, and then adjudge an appropriate sentence. Do you understand that?

ACC: _____.

Right to object to SCM (only applies to enlisted personnel)

SCM: You have the absolute right to object to trial by SCM. If you object, the appropriate authority will decide how to dispose of the case. The charges may be referred to a SPCM or GCM, or they may be dismissed, or the offenses charged may be disposed of by NJP or administrative measures. Do you understand that?

ACC: _____.

Right to inspect allied papers and personnel records

SCM: You inspect the allied papers and personnel records. [Hand those documents which are available to the accused for examination in your presence.] (You may also inspect [identify personnel records or other documents which are not present] which are located at _____. You may have time to examine these if you wish.)

Witnesses/other evidence for the Government

SCM: The following witnesses will probably appear and testify against you: _____. The following documents and physical evidence will probably be introduced: _____.

Right to cross-examine

SCM: After these witnesses have testified in response to my questions, you may cross-examine them. If you prefer, I will do this for you after you inform me of the matters about which you want the witness to be questioned. Do you understand that?

ACC: _____.

Right to present evidence

SCM: You also have the right to call witnesses and present other evidence. This evidence may concern any or all of the charges. (I have arranged to have the following witnesses for you present at the trial.) I will arrange for the attendance of other witnesses and the production of other evidence requested by you. I will help you in any way possible. Do you understand that?

ACC: _____.

Evidence to be considered

SCM: In deciding this case, I will consider only evidence introduced during the trial. I will not consider any other information, including any statements you have made to me, which is not introduced in accordance with the Mil. R. of Evid. during the court-martial. Do you understand that?

ACC: _____.

Right to remain silent

SCM: You have the absolute right during this trial to choose not to testify and to say nothing at all about the offense(s) with which you are charged. If you do not testify, I will not hold it against you in any way. I will not consider it as an admission that you are guilty. If you remain silent, I am not permitted to question you about the offense(s).

Right to testify concerning the offense(s)

However, if you choose, you may be sworn and testify as a witness concerning the offense(s) charged against you. If you do that, I will consider your testimony just like the testimony of any other witness.

[Note 2. Use the following if there is only one specification.]

If one specification

If you decide to testify concerning the offense, you can be questioned by me about the whole subject of the offense. Do you understand that?

ACC: _____.

[Note 3. Use the following if there is more than one specification.]

If more than one specification

SCM: If you decide to testify, you may limit your testimony to any particular offense charged against you and not testify concerning any other offense(s) charged against you. If you do this, I may question you about the whole subject of the offense about which you testify, but I may not question you about any offense(s) concerning which you do not testify. Do you understand that?

ACC: _____.

Right to testify, remain silent or make an unsworn statement in extenuation and mitigation.

SCM: In addition, if you are found guilty of an offense, you will have the right to testify under oath concerning matters regarding an appropriate sentence. You may, however, remain silent, and I will not hold your

silence against you in any way. You may, if you wish, make an unsworn statement about such matters. This statement may be oral, in writing, or both. If you make an unsworn statement, however, I am not permitted to question you about it, but I may receive evidence to contradict anything contained in the statement. Do you understand that?

ACC: _____.

Maximum punishment

SCM: If I find you guilty (of the offense) (of any of the offenses charged), the maximum sentence which I am authority to impose is:

--confinement with hard labor for not exceeding twenty-five days; fines not exceeding twenty-five dollars; confinement with hard labor in lieu of fines imposed not exceeding one day for each dollar of fine imposed; forfeiture of pay and allowances not exceeding twenty-five dollars reprimand; reduction of noncommissioned officers to an inferior grade; and to combine any two or more of such punishment in the sentences imposed.

SCM: Do you understand the maximum punishment which this court-martial is authorized to adjudge?

ACC: _____.

Pleas options

SCM: If you believe you are guilty of an offense, you may, but are not required to, plead guilty to that offense. If you plead guilty of an offense, you are admitting that you committed that offense, and this court-martial could find you guilty of that offense without hearing any evidence, and could sentence you to the maximum penalty I explained to you before. Do you understand that?

ACC: _____.

Lesser included offenses

SCM: [Examine the list of lesser included offenses under each punitive article alleged to have been violated. See Part IV of N.Y.R.C.M. If a lesser included offense may be an issue, give the following advice.] You may plead not guilty to Charge _____ Specification _____, as it now reads, but plead guilty to the offense of _____, which is included in the offense charged. Of course, you are not required to do this. If you do, then I can find you guilty of this lesser offense without hearing evidence on it. Furthermore, I could still hear evidence on the greater offense for purposes of deciding whether you are guilty of it. Do you understand that?

ACC: _____.

SC: Do you need more time to consider whether to object to trial by SCM or to prepare for trial?

ACC: _____.

SCM: [If time is requested or otherwise appropriate.] We will convene the court-martial at _____. When we convene, I will ask you whether you object to trial by SCM. If you do not object, I will then ask your pleas to the charge(s) and specification(s), and for you to make any motions you may have.

[Note 4. Trial Proceedings.]

Convene

SCM: This SCM is now in session.

Objection/consent to trial by SCM

SCM: Do you object to trial by SCM?

ACC: _____.

Warnings to accused

[Note 5. If the SCM is going to be adjourned for any reason, e.g., where the accused has not been served with the charges previously, then the Summary Court Officer will advise the accused of his/her right to be present at the court-martial and that he/she will be tried in absentia if he/she should fail to appear upon any adjourned date.

SCM: You have a right to be present at the trial or any further proceedings on the charges preferred against you. If you fail to appear for trial or at any further proceedings, the court-martial will proceed in your absence.

Entries on record of trial

(Note 6. If there is an objection, adjourn the court-martial and return the file to the convening authority. If the accused does not object, proceed as follows. The accused may be asked to initial the notation on the record of trial that the accused did or did not object to trial by SCM. However, this is not required.]

Reading of the charges

SCM: Look at the charge sheet. Have you read the charge(s) and specifications?

ACC:

SCM: Do you want me to read them to you?

ACC: _____.

[If the accused requests, read the charge(s) and specification(s).]

Arraignment

SCM: How do you plead? Before you answer that question, if you have any motion to dismiss (the) (any) charge or specification, or for other relief, you should make it now.

ACC: _____

Motions

[Note 7. If the accused makes a motion to dismiss or to grant other relief, or such a motion is raised by the SCM, do not proceed with the trial until the motions have been decided. After any motions have been disposed of and if termination of the trial has not resulted, have the accused enter pleas and proceed as indicated below.]

Pleas

ACC: I plead: _____.

[Note 8. If the accused refuses to plead to any offense charged, enter pleas of not guilty. If the accused refuses to enter any plea, evidence must be presented to establish that the accused is the person named in the specification(s) and is subject to court-martial jurisdiction.]

[Note 9. If the accused pleads not guilty to all offenses charged, proceed to the section entitled "Procedures-Not Guilty Pleas."]

[Note 10. If the accused pleads guilty to one or more offenses, proceed as follows.]

Procedures-guilty pleas

SCM: I will now explain the meaning and effect of your pleas, and question you so that I can be sure you understand. Refer to the charges(s) and specification(s). I will not accept your pleas of guilty unless you understand their meaning and effect. You are legally and morally entitled to plead not guilty even though you believe you are guilty, and to require that your guilt be proved beyond a reasonable doubt. A plea of guilty is the strongest form of proof known to the law. On your pleas of guilty alone, without receiving any evidence, I can find you guilty of the offense(s) to which you have pleaded guilty. I will not accept your pleas unless you realize that by your pleas you admit every element of the offense(s) to which you have pleaded guilty, and that you are pleading guilty because you really are guilty. If you are not convinced that you are in fact guilty, you should not allow anything to influence you to plead guilty. Do you understand that?

ACC: _____.

SCM: Do you have any questions?

ACC: _____.

SCM: By your pleas of guilty you give up three very important rights. (You keep these rights with respect to any offense(s) to which you have pleaded not guilty.) The rights which you give up when you plead guilty are:

First, the right against self-incrimination. This means you give up the right to say nothing at all about (this) (these) offense(s) to which you

have pleaded guilty. In a few minutes I will ask you questions about (this) (these) offense(s), and you will have to answer my questions for me to accept your pleas of guilty.

Second, the right to a trial of the facts by this court-martial. This means you give up the right to have me decide whether you are guilty based upon the evidence which would be presented.

Third, the right to be confronted by and to cross-examine any witnesses against you. This means you give up the right to have any witnesses against you appear, be sworn and testify, and to cross-examine them under oath.

SCM Do you understand these rights?

ACC: _____.

SCM: Do you understand that by pleading guilty you give up these rights?

ACC: _____.

SCM: On your pleas of guilty alone you could be sentenced to: _____.

[Note 11. Re-read the appropriate sentencing section at Notes 4 or 5 above unless the SCM is rehearing a new or other trial.]

SCM: Do you have any questions about the sentence which could be imposed as a result of your pleas of guilty?

ACC: _____.

SCM: Has anyone made any threat or tried in any other way to force you to plead guilty?

ACC: _____.

Pretrial agreement

SCM: Are you pleading guilty because of any promises or understandings between you and the convening authority or anyone else?

ACC: _____.

[Note 12. If the accused answers yes, the SCM must inquire into the terms of such promises or understandings of plea.]

[Note 13. If the accused has pleaded guilty to a lesser included offense, also ask the following question.]

Effect of guilty pleas to lesser included offenses

SCM: Do you understand that your pleas of guilty to a lesser included offense of _____ confess all the elements of the offense charged except _____, and that no proof is necessary to establish those elements admitted by your pleas.

ACC: _____.

SCM: The following elements state what would have to be proved beyond a reasonable doubt before the court-martial could find you guilty if you had pleaded not guilty. As I read each of these elements to you, ask yourself whether each is true and whether you want to admit that each is true, and then be prepared to discuss each of these elements with me when I have finished.

The elements of the offense(s) which your pleas of guilty admit are _____.

[Note 14. Read the elements of the offense(s) from the appropriate punitive article. This advice should be specific as to names, dates, places, amounts, and acts.]

SCM: Do you understand each of the elements of the offense(s)?

ACC: _____.

SCM: Do you believe, and admit, that taken together these elements correctly describe what you did?

ACC: _____.

[Note 15. The SCM should now question the accused about the circumstances of the offense(s) to which the accused has pleaded guilty. The accused will be placed under oath for this purpose. See oath below. The purpose of these questions is to develop the circumstances in the accused's own words, so that the SCM may determine whether each element of the offense(s) is established.]

Oath to accused for guilty plea inquiry

SCM: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: _____.

SCM: Do you have any questions about the meaning and effect of your pleas of guilty?

ACC: _____.

SCM: Do you believe that you understand the meaning and effect of your pleas of guilty?

ACC: _____.

Determination of providence of pleas of guilty

[Note 16. Pleas of guilty may not be accepted unless the SCM finds that they are made voluntarily and with understanding of their meaning and effect, and that the accused has knowingly, intelligently, and consciously waived the rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses. Pleas of guilty may be improvident when the accused makes statements at any time during the trial which indicate that there may be a defense to the offense(s), or which are otherwise inconsistent with an admission of guilty. If the accused makes such statements and persists in them after questioning, then the SCM must reject the accused's guilty pleas and enter pleas of not guilty for the accused. Turn to the section entitled "Procedures-Not Guilty Pleas" and continue as indicated. If (the) (any of the) accused's pleas of guilty are found provident, the SCM should announce findings as follows.]

Acceptance of guilty pleas

SCM: I find that the pleas of guilty are made voluntarily and with understanding of their meaning and effect. I further specifically find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, I find the pleas are provident, and I accept them. However, you may ask to take back your pleas at any time before the sentence is announced. If you have a sound reason for your request, I will grant it. Do you understand that?

ACC: _____.

If any not guilty pleas remain

[Note 17. If no pleas of not guilty remain, go to Note 26. If the accused has changed pleas of guilty to not guilty, if the SCM has entered pleas of not guilty to any charge(s) and specification(s), or if the accused has pleaded not guilty to any of the offense(s) or pleaded guilty to a lesser included offense, proceed as follows.]

Witnesses for the accused

SCM: If there are witnesses you would like to call to testify for you, give the name, rank, and Organization or address of each, and the reason you think they should be here, and I will arrange to have them present if their testimony would be material. Do you want to call witnesses?

ACC: _____.

[Note 18. The SCM should estimate the length of the case and arrange for the attendance of witnesses. The prosecution evidence should be presented before evidence for the defense.]

Calling witnesses

SCM: I call as a witness _____.

Witness oath

SCM: [To the witness, both standing.] Raise your right hand.

Do you swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (so help you God)? [Do not use the phrase, "so help you God," if the witness prefers to affirm.]

WIT: _____.

SCM: Be seated. State your full name, rank, Organization, and armed force, or if a civilian witness state full name, address, and occupation.

WIT: _____.

[Note 19. The SCM should question each witness concerning the alleged offense(s). After direct examination of each witness, the accused must be given an opportunity to cross-examine. If the accused declines to cross-examine the witness, the SCM should ask any questions that he/she feels the accused should have asked. If cross-examination occurs, the SCM may ask questions on redirect examination and the accused may ask further questions in recross-examination.]

[Note 20. After each witness has testified instruct the witness as follows.]

SCM: Do not discuss this case with anyone except the accused, counsel, or myself until after the trial is over. Should anyone else attempt to discuss this case with you, refuse to do so and report the attempt to me immediately. Do you understand this?

WIT: _____.

SCM: [To the witness.] You are excused.

Recalling witnesses

[Note 21. Witnesses may be recalled if necessary. A witness who is recalled is still under oath and should be so reminded.]

[Note 22. After all witnesses against the accused have been called and any other evidence has been presented, the SCM will announce the following.]

SCM: That completes the evidence against you. I will now consider the evidence in your favor.

Presentation of defense case

[Note 23. Witnesses for the accused should now be called to testify and other evidence should be presented. Before the defense case is terminated the SCM should ask the accused if there are other matters the accused wants presented. If the accused has not testified, the SCM should remind the accused of the right to testify or to remain silent.]

Closing argument

SCM: I have now heard all of the evidence. You may make an argument on this evidence before I decide whether you are guilty or not guilty.

Deliberations on findings

[Note 24. The court-martial should normally close for deliberations. If the SCM decides to close, proceed as follows.]

SCM: The court-martial is closed so that I may review the evidence. Wait outside the courtroom until I recall you.

[Note 25. The SCM should review the evidence and applicable law. It must acquit the accused unless it is convinced beyond a reasonable doubt by the evidence it has received in court in the presence of the accused that each element of the alleged offense(s) has been proved beyond a reasonable doubt. See R.C.M. 918. It may not consider any facts which were not admitted into evidence, such as a confession or admission of the accused which was excluded because it was taken in violation of Military R. Evid. 304. The SCM may find the accused guilty of only the offense(s) charged, a lesser included offense, or of an offense which doe s not change the identity of any offense charged or a lesser included offense thereof.]

Announcing the findings

[Note 26. The SCM should recall the accused, who will stand before the court-martial when findings are announced. All findings including findings of guilty resulting from guilty pleas, should be announced at this time. The following forms should be used in announcing findings.]

Not guilty of all offense(s)

SCM: I find you of (the) (all) Charge(s) and Specification(s): Not Guilty.

Guilty of all offense(s)

I find you of (the) (all) Charge(s) and Specification(s): Guilty.

Guilty of some but not all offense(s)

I find you of (the) Specification (_____) of (the) Charge (_____): Not Guilty; of (the) Specification (_____) of (the) Charge (_____): Guilty; of (the) Charge (_____): Guilty.

Guilty of lesser included offense or with exceptions and substitutions

I find you of (the Specification (_____) of (the) Charge (_____): Guilty, except the words _____ and _____ (substituting therefor, respectively, the words _____ and _____) of the excepted words: Not Guilty; (of the substituted words: Guilty) of the Charge: (Guilty) (Not Guilty, but Guilty of a violation of Article _____, UCMJ, a lesser included offense).

Entry of findings

[Note 27. The SCM shall note on the record of trial.]

Procedure if total acquittal

[Note 28. If the accused has been found not guilty of all charges and specifications, adjourn the court-martial, excuse the accused, complete the record of trial, and return the charge sheet, personnel records, allied papers and record of trial to the convening authority.]

Procedure if any findings of guilty

[Note 29. If the accused has been found guilty of any offense, proceed as follows.]

Pre-sentence procedure

SCM: I will now receive information in order to decide on an appropriate sentence. Look at the information concerning you on the front page of the charge sheet. It is correct?

[Note 30. If the accused alleges that any of the information is incorrect, the SCM must determine whether it is correct and correct the charge sheet, if necessary.]

[Note 31. Evidence from the accused's personnel records, including evidence favorable to the accused, should now be received in accordance with N.Y.R.C.M. 1001. These records should be shown to the accused.]

SCM: Is there any reason why I should not consider these?

ACC: _____.

[Note 32. The SCM shall resolve objections.]

Extenuation and mitigation

SCM: In addition to the information already admitted which is favorable to you, and which I will consider, you may call witnesses who are reasonably available, you may present evidence, and you may make a statement. This information may be to explain the circumstances of the offense(s), including any reasons for committing the offense(s) regardless of the circumstances. You may show particular acts of good conduct or bravery, and evidence of your reputation in the service for efficiency, fidelity, obedience, temperance, courage, or

any other trait desirable in good service member. You may call available witnesses or you may use letters, affidavits, certificates of military and civil officers, or other similar writings. If you introduce such matters, I may receive written evidence for the purpose of contradicting the matters you presented. If you want me to get some military records that you would otherwise be unable to obtain, give me a list of these documents. If you intend to introduce letters, affidavits, or other documents, but you do not have them, tell me so that I can help you get them. Do you understand that?

ACC: _____.

Rights of accused to testify, remain silent, and make an unsworn statement

SCM: I informed you earlier of your right to testify under oath, to remain silent, and to make an unsworn statement about these matters.

SCM: Do you understand these rights?

ACC: _____.

SCM: Do you wish to call witnesses or introduce anything in writing?

ACC: _____.

[Note 33. If the accused wants the SCM to obtain evidence, arrange to have the evidence produced as soon as practicable.]

[Note 34. The SCM should now receive evidence favorable to the accused. If the accused does not produce evidence, the SCM may do so if there are matters favorable to the accused which should be presented.]

SCM: Do you wish to testify or make an unsworn statement?

ACC: _____.

Questions concerning pleas of guilty

[Note 35. If as a result of matters received on sentencing, including the accused's testimony or an unsworn statement, any matter is disclosed which is inconsistent with the pleas of guilty, the SCM must immediately inform the accused and resolve the matter. See Note 16.]

Argument on sentence

SCM: You may make an argument on an appropriate sentence.

ACC: _____.

Deliberations prior to announcing sentence

(Note 36. After receiving all matters relevant to sentencing, the SCM should normally close for deliberations. If the SCM decides to close, proceed as follows.]

Closing the court-martial

SCM: This court-martial is closed for determination of the sentence. Wait outside the courtroom until I recall you.

[Note 37. See Appendix 11 concerning proper form of sentence. Once the SCM has determined the sentence, it should reconvene the court-martial and announce the sentence as follows.]

Announcement of sentence

SCM: Please rise. I sentence you to _____.

[Note 38. If the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to request in writing that [name of convening authority] defer your sentence to confinement. Deferment is not a form of clemency and is not the same as suspension of a sentence, it merely postpones the running of a sentence to confinement.

[Note 39. Whether or not the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to submit in writing a petition or statement to the convening authority. This statement may include any matters you feel the convening authority should consider, a request for clemency, or both. This statement must be submitted within 7days unless you request, and the convening authority approves, an extension of up to 10 days. After the convening authority takes action, your case will be reviewed by a JA for legal error. You may suggest, in writing, legal errors for the JA to consider. If, after final action has been taken in your case, you believe that there has been a legal error, you may request review of your case by the State JA of _____. Do you understand these rights?

ACC: _____.

Adjourning the court-martial

SCM: This court-martial is adjourned.

Entry on charge sheet

[Note 40. Record the sentence in the record of trial, inform the convening authority of the findings, recommendations for suspension, if any, and any deferment request. If the sentence includes confinement, arrange for the delivery of the accused to the accused's commander, or someone designated by the commander, for appropriate action. Ensure that the commander is informed of the sentence. Complete the record of trial and forward to the convening authority.]

APPENDIX 10

RECORD OF TRIAL BY SCM

1a. NANE OF ACCUSED *(Last, First, MI)* b. GRADE c. UNIT OR ORGANIZATION OF ACCUSED d. SSN

DMNA Form 1056 (We may have this form)

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APPENDIX 11

FORMS OF SENTENCES

1. Announcement of sentence.

See R.C.M. 1007.

In announcing the sentence, the president, or, in cases tried by military judge alone, the military judge should announce:

"(Name of accused), this court-martial sentences you _____."

The sentence should now be announced following one of the forms contained in b below or any necessary modification or combination thereof. Each of the forms of punishment prescribed in b are separate, that is, the adjudging of one form of punishment is not contingent upon any other punishment also being adjudged. The forms in c, however, may be combined and modified so long as the punishment adjudged is not forbidden by the code and does not exceed the maximum authorized by NYSML, Sections 130.18, 130.19 and 130.20(c), in the particular case being tried. In announcing a sentence consisting of combined punishments, the president or military judge may, for example, state:

"To be dishonorably discharged from the service, to be confined for one year, to forfeit all pay and allowances, and to be reduced to private E-1; or

"To be discharged from the service with a bad conduct discharge, to be confined for six months, and to forfeit $35.00 pay per month for six months; or

"To be dismissed from the service, to be confined for one year, and to forfeit all pay and allowances; or

"To perform hard labor without confinement for one month and to forfeit $25.00 pay per month for one month."

2. Single punishment forms.

[Note: The following may, in combination with the format for announcing the sentence in a above, be used as a format for a sentence worksheet, appropriately tailored for the specific case.]

a. To no punishment.

Reprimand

b. To be reprimanded.

Forfeitures, etc.

c. to forfeit $ _____ pay per month for _____ (months) (years).

d. To forfeit all pay and allowances.

e. To pay the State of New York a fine of $_____.

Reduction of Enlisted Personnel

f. To be reduced to _____.

Restraint and Hard Labor

g. To be restricted to the limits of _____ for (days) (months).

h. To perform hard labor without confinement for (days) (months).

i. To be confined for _____ (days) (months) (years) (the length of your natural life).

Punitive Discharge

j. To be discharged from the service with a bad conduct discharge (enlisted personnel only).

k. To be dishonorably discharged from the service (enlisted personnel and warrant officers only).

l. To be dismissed from the service (commissioned officers only).

APPENDIX 12

SAMPLE LETTER OF TRANSMITTAL

SUBJECT: Letter of Transmittal

Commander
Division
Street Address
City, State Zip Code

1. Transmitted herewith is the Charge Sheet for 1LT John Doe, social security number 000-00-0000, HHC, 1st Battalion, 69th Infantry, New York Army National Guard, involving alleged violations of the New York State Code.

2. After reviewing the Report of Investigation and Charge Sheet (copies of both are enclosed), it is my recommendation that the charges be referred to GCM, so that proper punishment may be administered.

3. 1LT Doe has been a substandard performer in this battalion for the past two years. For every position he has held, he has required more than average supervision.

4. 1LT Doe has no military awards.

5. 1LT Doe has made complete restitution of the property in question, and has cooperated completely with the investigating authorities in this matter.

Signature Block
Commander

Instructions for Transmittal of Charges
Letter of Transmittal

A letter of transmittal is used to forward Charge Sheet and allied papers to a superior commander for disposition when the recommended disposition is a GCM or SPCM. This letter is usually a local form which contains information about the accused and the commander's specific recommendation for disposition of the charges. The commander makes a personal recommendation as to the type of court-martial, keeping in mind the punishment authorized by the type of court-martial recommended. When making a recommendation for the deposition of the charges, the commander should consider and relate in the letter of transmittal information concerning the accused's background and character of military service, and a description of any unusual circumstances in the case. The commander should also include consideration of the nature of the offenses, and whether the accused should be eliminated from the service. When making a recommendation as to disposition, the commander must keep in mind that charges against an accused should be tried by the lowest court which has power to adjudge an appropriate and adequate punishment. The commander must personally sign the letter of transmittal and attach one copy to each set of the Charge Sheet and allied papers.

APPENDIX 13

GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GCM AND BY SPCM WHEN A VERBATIM RECORD IS NOT REQUIRED

a. Record of trial.

Note. See first three notes at beginning of Appendix 14. If a verbatim record is not required [see N.Y.R.C.M. 1103(b)(2)(C)(2)], a summarized report of testimony, objections and other proceedings are permitted. In the event of an acquittal of all charges and specifications, or termination of the proceedings prior to findings by withdrawal, mistrial, or dismissal, the record may be further summarized and need only contain sufficient information to establish lawful jurisdiction over the accused and the offenses. [See N.Y.R.C.M. 1103(e)]

This appendix is to be used as a general guide, the actual record may depart from it as appropriate. The manner of summarizing several items of procedure is shown in Appendix 14a.

Title

RECORD OF TRIAL
of

_____
(Name - Last, First, Middle Initial) (Service No.) (Grade)

_____
(Organization and Armed Force) (Station or Ship)

by
_____ COURT-MARTIAL

Convened by _____
(Title of Convening Authority)

_____
(Command of Convening Authority)

Tried at

_____ on _____, 20___
(Place or Places of Trial) (Date or Dates of Trial)

Copies of Record

Copies of record _____ copy of record furnished the accused as per attached certificate or receipt.
_____ copy(s) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD

Receipt for record

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at _____ this _____day of _____, 20__.

(Signature of accused or defense counsel)
(Name of accused or defense counsel)

Note: See N.Y.R.C.M. 1104(b)(1) concerning service of record on the accused or defense counsel.

CERTIFICATE

_____ _____ __, 20__
(Date) (Place)

Certificate in lieu of receipt

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused.

_____, at _____, by
(Name of Accused) (Place of Delivery)

_____
(Means of effecting delivery, i.e., mail messenger, etc.)

and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

(Signature of trial counsel)
(Name of trial counsel)

Note. If the accused's defense counsel receives the record, the trial counsel must attach an explanation of the record. See N.Y.R.C.M. 1104(b)(1)(C). The following format may be used.

The accused's defense counsel was served the accused's copy of the record because (the accused so requested in a written request, which is attached) (the accused so requested on the record at the court-martial) (the accused was transferred to _____) (the accused is absent without authority) (_____).

(Signature of trial counsel)
(Name of trial counsel)

Note. If the accused cannot be served and has no counsel to receive the record, an explanation for failure to serve the record will be attached to the record. See N.Y.R.C.M. 1104(b)(1)(C). The following format may be used:

The accused was not served a copy of this record because the accused (is absent without authority) (_____). Accused has no defense counsel to receive the record because (defense counsel has been excused under N.Y.R.C.M. 505(d)(2)(B)) (_____).

(Signature of trial counsel)
(Name of trial counsel)

Section 130.39(a)

PROCEEDINGS OF A _____ COURT-MARTIAL SECTION 130.39(a) SESSION. The summarized record of a Section 130.39(a) session should proceed as follows:

Note. If trial was before a SPCM without a military judge, there will have been no Section 130.39(a) session. However, generally the same sequence will be followed except as noted below. In SPCM without a military judge, substitute "president" for "military judge" when it appears, and "court-martial" for "Section 130.39(a) session."

Convening orders

The military judge called the Section 130.39(a) session to order (at) (on board) _____, at ____ hours, _____, 20__, pursuant to the following orders:

Note. Here insert a copy of the convening orders detailing the military judge and counsel which will be attached. Any request of an enlisted accused for enlisted members will be inserted immediately following the convening orders, together with any declaration of the non-availability of such enlisted persons. Any written request for trial by the military judge alone will also be inserted at this point. See N.Y.R.C.M. 503(a)(2) and 903.

Time of session

Note. The reporter should note and record the time and date of the beginning and ending of each session of the court-martial. For example:

The session was called to order at ____ hours, _____, 20__.
The session (adjourned) (recessed) at ____ hours, 20__.

PERSONS PRESENT

Military judge, counsel and members present and absent

Note. Here list the names of the military judge, counsel, accused, and members if present.

PERSONS ABSENT

Note. The names of the members need not be listed if members are not present. The absence of other detailed persons should be noted. The record should include any reasons given for the absence of detailed persons. If the accused was questioned about the absence of any detailed defense counsel, this inquiry should be summarized at the point in the record at which such inquiry occurred.

Accused and defense counsel present

The accused and the following (detailed) defense counsel and associate or assistant defense counsel) (civilian or individual military counsel) were present:

Swearing reporter

The following detailed (reporter) (and) (interpreter) (was) (were) (had previously been) sworn:

Note. Applicable only when a reporter or interpreter is used.

Qualification of trial counsel

The trial counsel announced the legal qualifications and status as to oaths of all members of the prosecution (and that (he) (she) (they) had been detailed by _____).

Prior participation of trial counsel

The defense counsel further stated that no member of the prosecution had acted in a manner which might tend to disqualify (him) (her) except as indicated below.

Note. If a member of the prosecution is unqualified or disqualified under N.Y.R.C.M. 502(d) that will be shown, together with the action taken under N.Y.R.C.M. 901(d). Any inquiry or hearing into the matter should be summarized.

Qualification of defense counsel

The detailed defense counsel announced the legal qualifications and status (_____) had been detailed by _____.

Note. Legal qualifications of any civilian or individual military counsel will be shown.

Prior participation of defense counsel

The defense counsel stated that no member of the defense had acted in a manner which might tend to disqualify (him) (her) except as indicated below.

Note. If a member of the defense is unqualified or disqualified under N.Y.R.C.M. 502(d), the record will show that fact and the action taken under N.Y.R.C.M. 901(d). Any inquiry or hearing into the matter should be summarized.

Inquiry concerning Section 130.38(b)

The military judge informed the accused of the rights concerning counsel as set forth in Section 130.38(b) and N.Y.R.C.M. 901(d).

The accused responded that he/she understood the rights with respect to counsel, and that he/she chose to be defended by _____.

Personnel sworn	The military judge and the personnel of the prosecution and defense who were not previously sworn in accordance with Section 130.42(a) were sworn. The prosecution and each accused were extended the right to challenge the military judge for cause.
Challenge: military judge	The military judge was (not) challenged for cause (by _____) (on the ground that _____).
	Note. The record should show the grounds for the challenge, a summary of evidence presented, if any, and the action taken.
Request for trial by military judge alone	The military judge ascertained that the accused had been advised of his/her right to request trial by military judge alone and that the accused did (not) desire to submit such a request.
	Note. If the accused requests trial by the military judge alone, any written request will be included in the record. The action on the request, whether oral or written, should be indicated as follows:
	After ascertaining that the accused had consulted with defense counsel and had been informed of the identity of the military judge and of the right to trial by members, the military judge (approved) (disapproved) the accused's request for trial by military judge alone.
	Note. If the military judge announced at this point that the court-martial was assembled, the record should so reflect. If assembly was announced at a different point it should be so shown in the record.
	Note. If the military judge disapproved the accused's request, this fact and any reasons given for the disapproval should be summarized.
	Note. If the accused did not submit, or the military judge disapproved, a request for trial by military judge alone, and if the accused is an enlisted person, the following should be included:
Request for enlisted member	The trial counsel announced that the accused had (not) made a request in writing that the membership of the court-martial include enlisted persons. The defense counsel announced that the accused had been advised of the right to request enlisted members and that the accused did (not) want to request enlisted members.
	Note. If the accused did request enlisted members, the written request will be included in the record.
Convening authority identified	(Name, rank and Organization of convening authority) convened the court-martial and referred the charges and specifications to it.
	Note. In a SPCM without a military judge, ordinarily the examination and challenges of members would occur at this point. The format used below for examination and challenges may be inserted here as appropriate.

Arraignment

The accused was arraigned on the following charges and specifications:

Note. Here insert the original charge sheet. If there are not enough copies of the charge sheet to insert in each copy of the record, copy verbatim from the charge sheet the charges and specifications, and the name of the accuser, the affidavit, and the reference to the court-martial for trial.

Motions

Note. If any motions were made at arraignment, the substance of the motion, a summary of any evidence presented concerning it, and the military judge's ruling will be included in the record. Motions or objections made at other times in the court-martial should be similarly treated at a point in the record corresponding to when they were raised.

Pleas

The accused pleaded as follows:

To all the Specifications and Charges: (Not Guilty) (Guilty).
To Specification 1 of Charge 1: (Not Guilty) (Guilty).
To Specification 2 of Charge 1: (Not Guilty) (Guilty).
To Charge 1: (Not Guilty) (Guilty).

Note. If the accused pleads guilty the plea inquiry should be summarized. The following may be used as a guide.

Guilty plea inquiry

The military judge inquired into the providence of the accused's pleas of guilty. The military judge informed the accused of: the right to counsel [if the accused had no counsel]; of the right to plead not guilty and to be tried by court-martial and that at such court-martial the accused would have the right to confront and cross-examine witnesses against the accused and the right against self-incrimination; that by pleading guilty the accused waived the rights to trial of the offense(s), to confront and cross-examine witnesses, and against self-incrimination; and that the military judge would question the accused, under oath, about the offense(s) to which the accused pleaded guilty and that if the accused answered those questions under oath, on the record, and in the presence of counsel, the accused's answers could be used against the accused in a prosecution for perjury of false statement. The accused stated that he/she understood these rights.

The military judge questioned the accused and determined that the plea(s) of guilty (was) (were) voluntary and not the result of force or threats or of promises (other than those in the pretrial agreement). The military judge informed the accused of the elements of the offense(s) and the maximum punishment which could be imposed for (this) (these) offense(s). The accused stated that he/she understood.

The military judge asked the accused about the offense(s) to which the accused pleaded guilty. Under oath the accused stated as follows:

Note. Here summarize the accused's description of the offense(s).

The military judge ascertained that there was (not) a pretrial agreement in the case.

Note. If there was a pretrial agreement, the military judge's inquiry into it should be summarized. The following may be used as a guide.

The pretrial agreement was marked as Appellate Exhibit(s) _____ .

.

(The military judge did not examine Appellate Exhibit _____ at this time.) The military judge inquired and ensured that the accused understood the agreement and that the parties agreed to its terms.

Note. If there was a question or dispute as to the meaning of any term in the agreement, the resolution of that matter should be described.

Note. If the accused entered a conditional guilty plea [see N.Y.R.C.M. 901(a)(2), this will be included in the record.

The military judge found the accused's pleas of guilty provident and accepted them.

Note. If the findings were entered [see N.Y.R.C.M. 910(g)] on any charges and specifications at this point, the record should so reflect. See FINDINGS below for format.

Note. If the accused pleaded not guilty to any charge(s) and specification(s) which were not dismissed or withdrawn, in trial before military judge alone, proceed with PRESENTATION OF PROSECUTION CASE. If the accused pleaded guilty to all charge(s) and specification(s) in trial before military judge alone, proceed with SENTENCING PROCEEDINGS below. If trial was before members proceed with INITIAL SESSION WITH MEMBERS below.

Note. If the court-martial recessed, closed, or adjourned, or if a Section 130.39(a) session terminated and a session of the court-martial begins, the record should indicate the time of the recess, closing, or adjournment, and the time of reopening, using the following formats: For example:

The Section 130.39(a) session terminated at _____ hours, _____, 20__. The court-martial (recessed) (adjourned) (closed) at _____hours, _____, 20__.

Note. Whenever the court-martial reopens after a recess or adjournment, or after being closed, the record should indicate whether any party, member, or the military judge previously present was absent or, if not previously present, was now present. Persons present for the first time should be identified by name. For example:

The military judge and all parties previously present were again present. (The following members were also present _____.) The members were (not) present.

The military judge and all parties previously present were again present, except CPT Smith, detailed by defense counsel who had been excused by _____, CPT John T. Brown, JAGC, U.S. Army appointed in accordance with Section 130.27(b) was present as individual military counsel, and was previously sworn.

INITIAL SESSION WITH MEMBERS

Note. Except in a SPCM without a military judge, ordinarily members will be first present at this point. In a SPCM without a military judge, ordinarily the members will be sworn and examined immediately after the accused has been afforded the opportunity to request enlisted members. In such cases, the following matters should be inserted at the appropriate point in the record.

Members sworn

The members of the court-martial were sworn in accordance with N.Y.R.C.M. 807.

Note. If the military judge announced at this point that the court-martial was assembled, the record should so reflect. If assembly was announced at a different point, it should be so shown in the record.

Note. If the military judge gave preliminary instructions to members, this should be stated at the point at which they were given.

Preliminary instructions

The military judge instructed the members concerning their duties, the conduct of the proceedings, (_____).

Note. If counsel examined the members concerning their qualifications, the record should so state. If any member was challenged for cause, the grounds for challenge should be summarized. In addition, when a challenge is denied, the challenged member's statements concerning the matter in question should be summarized in the record. For example:

Trial and defense counsel examined the members concerning their qualifications. MAJ James, member, was questioned concerning her attitude about the offense charged, and stated, under oath, as follows:

The offense charged is, in my opinion, very serious, and worthy of a punitive discharge. My mind is not made up. I would consider all the evidence and the instructions of the military judge before deciding on an appropriate sentence.

The defense challenged MAJ James for cause. The challenge was denied. Neither side had any further challenges for cause. The trial counsel challenged CPT Green peremptorily. The defense counsel challenged MAJ James peremptorily (and stated that it would have challenged another member had the challenge of MAJ James for cause been sustained). MAJ James and CPT Smith were excused and withdrew from the courtroom.

Note. If any part of the examination of members is done outside the presence of other members, this should be stated in the record. If challenges are made at a Section 130.39(a) session this should be stated in the record.

Note. If the accused was arraigned at a Section 130.39(a) session, ordinarily the military judge will have announced at this point to the members how the accused pleaded to the charges and specifications, and the record should so state. If the pleas were mixed and the members were not made aware at this point of the offense(s) to which the accused pleaded guilty the record should so state.

Announcement of pleas

The military judge informed the members that the accused had entered pleas of (Not Guilty) (Guilty) to (the) (all) Charge(s) and Specification(s). (_____).

PRESENTATION OF PROSECUTION CASE

Opening statement

The trial counsel made (an) (no) opening statement. The defense counsel made (an) (no) opening statement at this time.

Note. The record will contain a summary of the testimony presented. An example of the manner in which testimony may be summarized follows:

Testimony

The following witnesses for the prosecution were sworn and testified in substance as follows:

SGT Richard Roe, Co C, 1st Bn, 31st IN, Fort Sill, Oklahoma.

DIRECT EXAMINATION

I know the accused, Sam Snooker, who is in the military service and a member of my company. We both sleep in the same barracks. When I went to bed on the night of October 7, 2001, I put my wallet under my pillow. The wallet had $7.00 in it; a $5.00 bill and two $1.00 bills. Sometime during the night something woke me up but I turned over and went to sleep again. When I woke up in the morning, my wallet was gone.

CROSS-EXAMINATION

I don't know the serial numbers on any of the bills. One of the $1.00 bills was patched together with scotch tape and one of the fellows told me that the accused had used a $1.00 bill just like that in a poker game the day after my wallet was missing.

Objection and ruling

Upon objection by the defense so much of the answer of the witness as pertained to what he had been told was stricken.

Stipulation

The trial counsel offered in evidence a stipulation of fact entered into between the trial counsel, defense counsel, and the accused. The military judge ascertained that the accused understood and consented to the stipulation. It was admitted as Prosecution Exhibit 1.

PRESENTATION OF DEFENSE CASE

Opening statement

The defense counsel made (an) (no) opening statement. The following witnesses for the defense were sworn and testified in substance as follows:

EVIDENCE IN REBUTTAL, SURREBUTTAL

WITNESSES CALLED BY THE COURT-MARTIAL

Closing argument

The trial counsel made (an) (no) argument. The defense counsel made (an) (no) argument. The trial counsel made (an) (no) argument in rebuttal.

Instructions

The military judge instructed the members in accordance with N.Y.R.C.M. 920, including the elements of each offense, (and of the lesser included offense(s) of _____), (the defense(s) of _____), (the following evidentiary matters _____), the presumption of innocence, reasonable doubt, and burden of proof as required by Section 130.51(c), and on the procedures for voting on the findings worksheet. (The members were given Appellate Exhibit _____, findings worksheet.) (The members were given Appellate Exhibit _____, a copy of the military judge's instructions.) (There were no objections to the instructions or requests for additional instructions.)

Note. If any party requested instructions which were not given, or objected to the instructions given, these matters should be summarized in the record.

Closing

The court-martial closed at _____hours, _____, 20__.
The court-martial reopened at _____ hours, _____, 20__.

Note. If the military judge examined a findings worksheet and gave additional instructions, these should be summarized.

FINDINGS

Findings by members

The president announced that the accused was found:

Of all Charges and Specifications:
(Not Guilty) (Guilty)
Of Specification 1 of Charge I:
(Not Guilty) (Guilty)
Of Specification 2 of Charge I:
(Not Guilty) (Guilty)
Of Charge 1: (Not Guilty) (Guilty)
Of the Specification of Charge II:
(Not Guilty)
Of Charge II: (Not Guilty), etc.

Findings by military judge alone

Note. In trial by the military judge alone there would be no instructions given, but the military judge may make general and special findings. Any request for special findings should be summarized, and if submitted in writing, the request

should be attached as an appellate exhibit. The general findings must be announced in open session with all parties present and may be recorded in the record in the following form, together with any special findings announced at that time.

Announcement

The military judge announced the following general (and special) findings (and directed that _____ be appended to the record as Appellate Exhibit _____) (and stated that the special findings would be furnished to the reporter prior to authentication for insertion in the record as Appellate Exhibit _____:)

Of all the Specifications and Charges: Guilty

or

Of the Specification of Charge I: Guilty
Of Charge I: Guilty
Of the Specification of Charge II: Not Guilty
Of Charge II: Not Guilty

Note. All general findings should be recorded as indicated above. Special findings delivered orally should be summarized. Any written findings, opinion or memorandum of decision should be appended to the record as an appellate exhibit and copies furnished to counsel for both sides.

Note. If the accused was acquitted of all charges and specifications, proceed to adjournment.

SENTENCING PROCEEDINGS

Data as to service

The trial counsel presented the data as to pay, service and restraint of the accused as shown on the charge sheet. There were no objections to the data.

Introduction of exhibits

The trial counsel offered Prosecution Exhibits 1, 2 and 3 for identification, matters from the accused's personnel records. (The defense did not object.) (The defense objected to Prosecution Exhibit 3 for identification on grounds that it was not properly authenticated.) (The objection was (overruled) (sustained).) Prosecution Exhibits 1, 2 and 3 were (not) received in evidence.

Note. If the prosecution presented evidence in aggravation or of the accused's rehabilitative potential, this evidence should be summarized here in the same way as evidence on the merits above.

Inquiry of accused

The military judge informed the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or an unsworn statement or to remain silent. In response to the military judge the accused stated that he/she chose to (testify) (make an unsworn statement) (remain silent).

Note. If the defense calls witnesses in extenuation and mitigation, the testimony should be summarized in the record. If the accused makes an oral unsworn statement, personally or through counsel, this should be shown and the matters contained in the statement summarized.

Argument — The prosecution made (an) (no) argument on sentence. The defense made (an) (no) argument on sentence.

Instructions — The military judge instructed the members that the maximum punishment which could be adjudged for the offense(s) of which the accused had been found guilty was: _____.
The military judge also instructed the members concerning the procedures for voting, the responsibility of the members, and the matters the members should consider, in accordance with N.Y.R.C.M. 1005(e). (The members were given Appellate Exhibit _____, a copy of the military judge's instructions.) (There were no objections to the instructions or requests for additional instructions.)

Note. If any party requested instructions which were not given, or objected to the instructions given, these matters should be summarized in the record.

Note. If, in trial before military judge alone, the military judge announces what the military judge considers to be the maximum punishment, the stated maximum should be recorded.

Closing — The court-martial closed at _____ hours, _____. 20__.

Reopening — The court-martial reopened at _____ hours, _____, 20__.

Note. If the military judge examined a sentencing worksheet and gave additional instructions, these should be summarized.

Announcement — The (military judge) (president) announced the following sentence:
_____.

Note. If trial was by military judge alone and there was a pretrial agreement, ordinarily the military judge will examine any sentence limitation after announcing the sentence. Any inquiry conducted at this point should be summarized.

Pretrial agreement — The military judge examined Appellate Exhibit _____. The military judge stated that, based on the sentence adjudged, the convening authority (was obligated, under the agreement to approve no sentence in excess of _____) (could approve the sentence adjudged if the convening authority so elected) (_____).

Note. The military judge must inform the accused of the accused's post-trial and appellate rights. See N.Y.R.C.M. 1010. The following is an example:

Advice concerning post-trial and appellate rights — The military judge informed the accused of: the right to submit matters to the convening authority to consider before taking action; (the right to have the case examined in the office of the SJA and the effect of waiver or withdrawal of such right); the right to apply for relief from the SJA; and the right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

Adjournment — The court-martial adjourned at _____ hours, _____, 20__.

b. Examination of record by defense counsel.

Note. When the defense counsel has examined the record of trial before authentication the following form is appropriate:

_____, 20__

Form — "I have examined the record of trial in the foregoing case.

_____

(CPT) (LT) _____, Defense Counsel"

Note. If the defense counsel was not given the opportunity to examine the record before authentication, the reasons should be attached to the record. See N.Y.R.C.M. 1103(i)(1)(B).

c. Authentication of record of trial.

_____, 20__

Military judge — (1) By GCM or SPCM with members and a military judge _____

_____

(CPT) (COL) _____.
military judge [or (LTJG) (1LT) _____
trial counsel, because of (death) (disability) (absence) of the military judge] [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the military judge and of (death) (disability) (absence) of the trial counsel.]

Military judge — (2) By GCM or SPCM consisting of only a military judge

_____

(CPT) (COL) _____, Military Judge
[or (LTJG) (1LT) _____, Trial Counsel, because of (death) (disability) (absence) of the military judge] [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the trial counsel].

President (3) By SPCM without a military judge

_____
(CDR) (LTC) _____, President [or (LTJG) (1LT) _____ , Trial Counsel, because of (death) (disability) (absence) of the president] [or (LT) (CPT) _____, a member in lieu of the president and the trial counsel because of (death) (disability) (absence) of the trial counsel].

Note. If the rank of any person authenticating the record has changed since the court-martial the current rank should be indicated, followed by "formerly _____."

d. Exhibits. See N.Y.R.C.M. 1103(b)(2)(D).

Note. Following the end of the transcript of the proceedings, insert any exhibits which were received in evidence or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

e. Attachments.

Note. Attach to the record the matters listed in N.Y.R.C.M. 1103(b)(3).

f. Certificate of correction.

Note. See Appendix 14f.

APPENDIX 14

GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GCM AND BY SPCM WHEN A VERBATIM RECORD IS REQUIRED

a. Record of trial.

Note. Erasures or interlineations should be initialed by those who authenticate the record.

Pages will be numbered at the bottom, margins of 1 1/2 inches will be left at the top to permit binding, and 1 inch at the bottom and left side of each page, using 8 1/2 x 11 inch paper.

Words on the margins of this appendix are not part of the form of record.

As a general rule, all proceedings in the case should be recorded verbatim. (See N.Y.R.C.M. 1103)

This appendix is not a complete record of trial. It is to be used by the reporter and trial counsel as a guide in the preparation of the completed record of trial in all GCM and SPCM cases in which a verbatim record is required.

RECORD OF TRIAL
of

_____
(Name - Last, First, Middle Initial) (Service No.) (Rank or Grade)

_____
(Organization and Armed Force) (Station or Ship)

by
_____COURT-MARTIAL

Convened by _____
(Title of Convening Authority)

_____
(Command of Convening Authority)

_____ on _____, 20___
(Place of Places of Trial) (Date or Dates of Trial)

Note. The title should be followed by an index. The form for this index will be as prescribed in publications of the secretary concerned. However, it should cover important phases of the trial, witnesses who testified, and exhibits that are appended to the record.

Copies of Record

Copies of record

_____ copy of record furnished the accused as per attached certificate or receipt.

_____ copy(ies) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD

Receipt for record

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at _____ this _____ day of _____, 20 ___.

(Signature of accused or defense counsel)
(Name of accused or defense counsel)

CERTIFICATE

_____, _____, 20__.
(Place) (Date)

Certificate in lieu of receipt

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused, _____
(Name of accused)
at _____, by _____
(Place of delivery) (Means of effecting delivery, i.e.,

_____
mail messenger, etc.)

and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

(Signature of trial counsel)
(Name of trial counsel)

Note. If the accused's defense counsel receives the record, the trial counsel must attach an explanation of the record. See N.Y.R.C.M. 1104(b)(1)(C). The following format may be used.

The accused's defense counsel was served the accused's copy of the record because (the accused so requested in a written request, which is attached) (the accused so requested on the record at the court-martial) (the accused was transferred to _____) (the accused is absent without authority) (_____).

(Signature of trial counsel)
(Name of trial counsel)

Note. If the accused cannot be served and has no counsel to receive the record, an explanation for failure to serve the record will be attached to the record. See N.Y.R.C.M. 1104(b)(1)(C). The following format may be used:

The accused was not served a copy of this record because the accused (is absent without authority) (_____). Accused has no defense counsel to receive the record because (defense counsel has been excused under N.Y.R.C.M. 505(d)(2)(B)) (_____).

(Signature of trial counsel)
(Name of trial counsel)

Convening orders

Proceedings of a _____ court-martial which met (at) (on board) _____, at _____ hours, _____, 20__. pursuant to the following orders:

Note. Here insert a copy of the orders convening the court-martial and copies of any amending orders. Copies of any written orders detailing the military judge and counsel will be inserted here. See N.Y.R.C.M. 503(b) and (c). Any request of an enlisted accused for enlisted court members will be inserted immediately following the convening orders, together with any declaration of the non-availability of such enlisted persons. See N.Y.R.C.M. 503(a)(2), 903. Any written request for trial by military judge alone (N.Y.R.C.M. 903) or statement that a military judge could not be obtained (N.Y.R.C.M. 201(f)(2)(b)(ii) will be inserted at this point.

PERSONS PRESENT

PERSONS ABSENT

Accounting for personnel

Note. List military judge, if any, and all members of the court-martial, prosecution, and defense as present or absent, as announced by the trial counsel. The record of a Section 130.39a Session or trial by the military judge alone need only reflect that the members are absent and need not list the absent members by name. Only rank or grade and name should be shown unless service number is necessary to distinguish between two persons.

Presence of accused

The following named accused (was) (were) present:
_____.

Swearing reporter

The detailed reporter, _____, (was sworn) (had previously been sworn).

Note. The remainder of the record of trial follows the actual proceedings in court-martial. The reporter records all the proceedings verbatim.

Time of session

Note. The reporter should note the time and date of the beginning and ending of each session of the court, including the opening and closing of the court-martial during trial. For example:

The (court-martial) (session) was called to order at _____ hours, _____, 20__.

The (court-martial) (session) was (adjourned) (recessed) at _____ hours, _____, 20__.

The court-martial (closed) (opened) at _____ hours, _____, 20__.

Administration of oaths

Note. It is not necessary to record verbatim the oath actually used, whether it be administered to a witness, the military judge, counsel, or the members. Regardless of the form of oath, affirmation, or ceremony by which the conscience of the witness is bound (N.Y.R.C.M. 807), only the fact that a witness took an oath or affirmation is to be recorded. However, if preliminary qualifying questions are asked a witness prior to the administration of an oath, the questions and answers should be recorded verbatim. These preliminary questions and answers do not eliminate the requirement that an oath be administered. The following are examples of the recording of the administration of various oaths:

The detailed interpreter, _____, (was sworn) (had previously been sworn).

The military judge and the personnel of the prosecution and defense (were sworn) (had previously been sworn).

The members were sworn.

Accounting for personnel during trial

Note. After the reporter is sworn, the reporter will record verbatim the statements of the trial counsel with respect to the presence of personnel of the court-martial, counsel, and the accused. The reporter should note whether, when a witness is excused, the witness withdraws from the court from the courtroom or, in the case of the accused, whether the accused resumes a seat at counsel table. Similarly, if the military judge excuses a member as a result of challenge and the member withdraws, the reporter should note this fact in the record. In a SPCM without a military judge, if a challenged member withdraws from the court-martial while it votes on a challenge, and then is excused as a result of challenge or resumes a seat after the court-martial has voted on a challenge, the reporter should note this fact in the record. Examples of the manner in which such facts should be recorded are as follows:

The (witness withdrew from the courtroom) (accused resumed his/her seat at the counsel table).

_____, the challenged member withdrew from the courtroom.

_____, resumed his/her seat as a member of the court-martial.

Arraignment

Note. The original charge sheet or a duplicate should be inserted here. If the charges are read, the charges should also be transcribed as read.

Recording

Note. The testimony of a witness will be testimony recorded verbatim in a form similar to that set forth below for a prosecution witness.

_____ was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. State your full name, etc: _____.

A. _____.

Q. _____?

A. _____.

CROSS-EXAMINATION

Questions by the defense:

Q. _____?

A. _____.

REDIRECT EXAMINATION

Questions by the prosecution::

Q. _____?

A. _____.

RECROSS-EXAMINATION

Questions by the defense:

Q. _____?

A. _____.

EXAMINATION BY THE COURT-MARTIAL

Questions by (military judge) (member's name):

Q. _____?

A. _____.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. _____?

A. _____.

RECROSS-EXAMINATION

Q. _____?

A. _____.

Out-of-court hearings and Section 130.39(a) sessions

Note. Out-of-court hearings and Section 130.39(a) sessions should be recorded and incorporated in the record of trial. See N.Y.R.C.M. 803.

b. Examination of record by defense counsel.

Note. When the defense counsel has examined the record of trial prior to its being forwarded to the convening authority, the following form is appropriate:

Form

"I have examined the record of trial in the foregoing case.

_____

(CPT) (LT) _____ , Defense Counsel"

Note. If defense counsel was not given the opportunity to examine the record before authentication, the reasons should be attached to the record. See N.Y.R.C.M. 1103(i)(1)(B).

c. Authentication of record of trial.

_____, 20__

(1) By GCM or SPCM with members and a military judge

Military judge

_____

(CPT) (COL) _____, Military Judge [or (LTJG) (1LT)

_____, Trial Counsel, because of (death) (disability) (absence) of the military judge] [or (LCDR) (MAJ) _____, a member in lieu of the military judge and the trial counsel because of (death) (disability) (absence) of the trial counsel].

(2) By GCM consisting of only a military judge.

Military judge _____

(CPT) (COL) _____, Military Judge [or (LTJG) (1LT) _____, Trial Counsel, because of (death) (disability) (absence) of the military judge] [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the military judge, and of (death) (disability) (absence) of the trial counsel].

(3) By SPCM without a military judge.

President _____

(CDR) (LTC) _____, President [or (LTJG) (1LT) _____, Trial Counsel, because of (death) (disability) (absence) of the president] [or (LT) (CPT) _____. a member in lieu of the president and (death) (disability) (absence) of the trial counsel].

Note. If the rank of any person authenticating the record has changed since the court-martial the current rank should be indicated followed by "formerly _____ ."

d. Exhibits. See N.Y.R.C.M. 1103(b0(2)(D).

Note. Following the end of the transcript of the proceedings, insert any exhibits which were received in evidence or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence, and any appellate exhibits.

e. Attachments.

Note. Attach to the record the matters listed in N.Y.R.C.M. 1103(b)(3).

f. Certificate of correction. See N.Y.R.C.M. 1104(d).

_____, 20__

State of New York

v.

_____

_____

The record of trial in the above case, which was tried by the _____ court-martial convened by the _____ court-martial convened by _____, dated _____, 20__, (at) (on board) _____, on _____, 20__, is corrected by the insertion on page _____, immediately following line, of the following:

"The detailed reporter, _____, was sworn."

This correction is made because the reporter was sworn at the time of trial but a statement of that effect was omitted, by error, from the record.

N.Y.R.C.M. 1104(d) has been complied with.

Note. The certificate of correction is authenticated as indicated above for the record of trial in the case.

Copy of the certificate received by me this _____, day of _____, 20__.

(Signature of accused)
(Name of accused)

Note. The certificate of correction will be bound at the end of the original record immediately before the action of the convening authority.

g. Additional copies of record.

An original and four copies of a verbatim record will be prepared. In a joint or common trial, an additional copy of the record must be prepared for each accused. See N.Y.R.C.M. 1103(g)(1)(A).

APPENDIX 15

SUGGESTED GUIDE FOR CONDUCT OF ARMY NATIONAL GUARD NJP PROCEEDINGS

Section1. Notification.

(If the notification of punishment is to be accomplished by other than the imposing commander, the procedures under this provision should be appropriately modified [see note 10d below]).

CO: As your commander, I have disciplinary powers under Section 130.15 of the State Military Code. I have received a report that you violated the State Military Code, and I am considering imposing NJP. This is not a formal trial like a court-martial. As a record of these proceedings I will use DMNA Form 1057. I now hand you this form. Read items 1 and 2. Item 1 states the offense(s) you are reported to have committed and item 2 lists the rights you have in these proceedings. You are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it may be used against you in these proceedings or in a trial by court-martial. You have the right to consult with a lawyer as stated in item 2.

1. Note for CO:

Wait for the member to read items 1 and 2 of DMNA Form 1057. Allow him or her to retain a copy of the form until the proceedings are finished and you have either imposed punishment or decided not to impose it.

CO: Do you understand item 1? Do you understand the offense(s) you are reported to have committed?

M (Member): (Yes) (No)

2. Not for CO:

If the member does not understand the offense(s), explain the offense(s) to him or her.

CO: Do you understand item 2? Do you have any questions about your rights in these proceedings?

M: (Yes) (No)

3. Not for CO:

If the member does not understand his or her rights, explain them in greater detail. If the member asks a question you cannot answer, recess the proceedings. You probably can find the answer in one of the following sources:

---

*This guide is designed to ensure that the proceedings comply with all legal requirements. It contemplates a three-step process, conducted in the presence of the member, consisting of (1) notification, (2) hearing (that may be omitted if the member admits guilt), and (3) imposition of punishment (if the findings result in a determination of guilt).

a. Article 15, UCMJ.

b. Part V, NYMCM.

If you cannot find the answer in one of these sources, contact your JA office.

CO: There are some decisions you have to make:

a. You must decide whether you want to present witnesses or submit other evidence in defense, extenuation and/or mitigation.

(1) Evidence in defense are facts showing that you did not commit the offense(s) stated in item 1. Even if you cannot present evidence in defense, you can still present evidence in extenuation or mitigation.

(2) Evidence in extenuation are circumstances surrounding the offense, showing that the offense was not very serious.

(3) Evidence in mitigation are facts about you, showing that you are a good solider and that you deserve light punishment.

b. You can make a statement and request to have a spokesperson appear with you and speak on your behalf. I will interview any available witness and consider any evidence you think I should examine.

c. Finally, you must decide whether you wish to request that the proceedings be open to the public. Do you understand the decisions you have to make?

M: (Yes) (No)

CO: If after you have presented your evidence, I am convinced that you committed the offense, I could then punish you. The maximum punishment I could impose on you would be _____.

4. Note to CO:

See Table 4-1, Part V, NYMCM for maximum punishments.

CO: As item 2 points out, you have a right to talk to an attorney before you make your decisions. A military lawyer whom you can talk to free of charge is located at _____. Would you like to talk to an attorney before you make your decisions?

M: (Yes) (No)

5. Note to CO:

If the member desires to talk to an attorney, arrange for the member to consult an attorney. The member should be encouraged to consult the attorney promptly. Inform the member that consultation with an attorney may be by telephone. The member should be advised that he or she is to notify you if any difficulty is encountered in consulting an attorney.

CO: You now have 48 hours to think about what you should do in this case. You may advise me of your decision at any time within the 48-hour period. If you refuse to sign that part of DMNA Form 1057 indicating your decision on these matters, I can proceed to impose punishment upon you without your consent. You are dismissed.

6. Note to CO:

At this point, the proceedings should be recessed unless the service member affirmatively indicates that he or she has made a decision and does not want additional time or to consult with an attorney. In the event the member does not make a decision within the specified time or refuses to complete or sign item 3 of DMNA Form 1057, see paragraph 3-6f. When you resume the proceedings begin at item 3, DMNA Form 1057.

CO: An open proceeding means that the proceeding is open to the public. If the hearing is closed, only you, I, designated members of the chain of command, available witnesses and a spokesperson if designated, will be present. Do you request an open proceeding?

M: (Yes) (No)

CO: Initial block 3(a) or (b) indicating your decision. Do you want to submit any evidence showing that you did not commit the offense(s), or explaining why you committed the offense(s), or any other information about yourself that you would like me to know? Do you wish to have any witnesses testify, including witnesses who would testify about your good past military record or character?

M: (Yes) (No)

CO: Now initial block 3(c) indicating your decision, and sign and date the form in the space provided under that item.

7. Note to CO:

a. Wait until the member initials the blocks and signs and dates the form. If the answers to all the questions are no, you may proceed to impose punishment.

b. If the answer regarding witnesses and evidence is yes, and the member is prepared to present his or her evidence immediately, proceed as follows. Consider the evidence presented. If the evidence persuades you that you should not punish the member, terminate the proceedings, inform the member, and destroy all copies of DMNA Form 1057. If you are convinced beyond a reasonable doubt that the member committed the offense(s) and deserves to be punished, proceed to impose punishment.

c. If the member needs additional time to gather his or her evidence, give the member a reasonable period of time to gather the evidence. Tell the member when the proceedings will resume and recess the proceedings.

d. If someone else conducted the notification proceedings, the imposing commander should conduct the remainder of the proceedings. When you resume the proceedings, consider the member's evidence. Ensure that the member has the opportunity he or she deserves to present any evidence. Ask the member, "Do you have any further evidence to present?" If the evidence persuades you that you should not punish the member, terminate the proceedings, inform the member of your decision, and destroy all copies of DMNA Form 1057. If you are still convinced that the member committed the offense(s) and deserves to be punished, impose punishment.

Section II. Imposition of Punishment.

CO: I have considered all the evidence. I am convinced that you committed the offense(s). I impose the following punishments: (Announce punishment).

8. Note to CO:

After you have imposed punishment, complete items 4 and 5 in DMNA Form 1057 and sign the blank item 5.

Section III. Appellate Advice.

9. Note to CO:

Hand the DMNA Form 1057 to the member.

CO: Read item 4 which lists the punishment I have just imposed on you. Now read item 5 which points out that you have a right to appeal this punishment to (title and Organization of next superior authority). You can appeal, if you believe that you should not have been punished at all, or that the punishment is too severe. Any appeal should be submitted within 30 days. An appeal submitted after that time may be rejected. Even if you appeal, the punishment is effective today (unless the imposing commander sets another date). Once you submit your appeal it must be acted upon by (title and Organization of next superior) expeditiously. Otherwise, any punishment involving deprivation of liberty (correctional custody, restriction or extra duty) will be interrupted pending the decision on the appeal. Do you understand your right to appeal?

M: (Yes) (No)

CO: Do you desire to appeal?

M: (Yes) (No)

10. Note to CO:

If the answer is yes, go to Note 12. If the answer is no, continue as follows.

CO: If you do not want to appeal, initial block a in item c and sign the blank below item 6.

11. Note to CO:

Now give the member detailed orders as to how you want him or her to carry out the punishments.

CO: You are dismissed.

12. Note to CO:

If the answer is yes, continue as follows.

CO: Do you want to submit any additional matters to be considered in an appeal?

M: (Yes) (No)

13. Note to CO:

If the answer is yes, go to Note 14. If the answer is no, continue as follows.

CO: Initial block b in item 6 and sign the blank below item 6. I will notify you when I learn what action has been taken on your appeal. You are dismissed.

14. Note to CO:

If the answer is yes, continue as follows.

CO: If you intend to appeal and do not have the additional matters with you, item 6 will not be completed until after you have obtained all the additional material you wish to have considered on appeal. When you have obtained this material, return with it by _____. (Specify a date 30 days from the date punishment is imposed) and complete item 6, by initialing the box and signing the blank below. After you complete item 6, I will send DMNA Form 1057 and the additional matters you submit to (title and Organization of next superior authority). Remember that the punishment will not be delayed (unless the imposing commander sets another date). You are dismissed.

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APPENDIX 16

Clear Form

ARMY NATIONAL GUARD RECORD OF PROCEEDINGS UNDER SECTION 130.15 OF THE NEW YORK STATE MILITARY LAW

WARNING: YOU THE HAVE RIGHT TO BE PRESENT AT NON-JUDICIAL PUNISHMENT PROCEDDINGS UNDER MILITARY LAW SECTION 130.15. HOWEVER, IF YOU FAIL TO APPEAR AT SUCH PROCEEDINGS, YOU WILL BE DEEMED TO HAVE WAIVED YOUR RIGHT TO BE PRESENT AND THE PROCEEDING WILL TAKE PLACE WITHOUT YOU.

Name	SSN / DODI	Unit	Grade

PART 1 - Initial Action

1. I am considering whether you should be punished under section 130.15 of the New York State Military Law for the following misconduct: 2/

☐ See Continuation Sheet

Charge 1:

Charge 2:

Charge 3:

Charge 4:

2. You have several rights under this Section 130.15 procedure. First, I want you to understand that I have not yet made a decision whether or not you will be punished, and I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense. You may ordinarily have a public hearing before me. You may bring a person to speak in your behalf. You may present witnesses and other evidence to show why you should not be punished at all (matters in defense) or why punishment should be very light (matters in extenuation and mitigation). I shall consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. You are not required to make any statements at all, but if you do, they may be used against you in this Section 130.15 Proceeding. You have the right to consult with counsel, you may elect to consult with military counsel or you may elect to consult with civilian counsel at your own expense.

Trial Defense Services can be reached at phone number: _____, or email: _____

You now have _____ days to decide what you want to do. 3/

Date | Name, Grade & Organization of Commander | Signature

3. In the Section 130.15 proceedings:

a. An open hearing is ☐ is not ☐ requested

b. A person to speak on my behalf will ☐ will not ☐ accompany me.

c. Matters in defense and/or extenuation: ☐ are not presented ☐ are attached hereto ☐ will be presented in person. 4/

_____

Dated:

4. I have considered all matters presented in defense and/or extenuation and mitigation. The following punishment(s) (is) (is not) imposed: 5/6/

NO PUNISHMENT CAN BE DECIDED (written or typed) UNTIL AFTER RESPONSE PERIOD ENDS

5. You are advised of your right to appeal this punishment to _____, the next superior authority. An appeal made more than 15 days after the punishment was imposed may, in the absence of unusual circumstances, be considered as not being made within a reasonable time and be rejected. The next senior authority will decide whether an appeal is timely or not.

Date | Name, Grade & Organization of Commander | Signature

PART II- APPELLATE ACTION

6.

☐ I do not appeal

☐ I appeal and do not submit matters for consideration by the next superior authority.

☐ I appeal and submit the matter attached hereto for consideration by the next superior authority. 7/

Date	Name & Grade of Soldier	Signature

7. This appeal, controlled by DMNA 27-2, was reviewed and it is my opinion: 8/

Date	Name & Grade of Judge Advocate	Signature

8. After consideration of all matters presented on appeal, the appeal is: 4/

☐ denied.

☐ granted in part as follows:

Date	Name, Grade & Org of Commander	Signature

PART III- ATTACHMENTS AND/OR COMMENTS 9/10/

Begin list of documentation, witnesses presented, identification of attachments, etc., here (attach additional sheets if necessary):

Instructions for use of Army National Guard Record of Proceedings under Section 130.15 of the New York State Military Law

1/ See Appendix 15 DMNA Reg. 27-2 for further guidance.
2/ Insert a concise statement of each offense in terms stating violation of the State Military Code. If additional space is needed, use Part III and/or continuation sheets as described in Instruction 9/ below.
3/ Give the individual an information copy of this form. Keep all other copies together until Item 9 is completed. Under ordinary circumstances, 72 hours is a reasonable time within which to require the individual to make a decision.
4/ Place a check mark on appropriate line.
5/ If, after presentation of matters in defense and in extenuation and mitigation, the commander decides not to impose Section 130.15 proceedings, the individual should be so notified and all copies of this record destroyed.
6/ Strike out inapplicable word(s). The amount of any fine or detention of pay should be expressed in whole dollar amounts. Odd dollar amounts should be rounded off to the next lower whole dollar amount. If punishment is suspended, the following statement should be added after it: *To be automatically remitted if not vacated before (date).* If punishment includes a written admonition or reprimand, it will be attached to this form and listed in Part III. A fine is collected by a check made payable to "Division of Military and Naval Affairs," with a note on the check "State Military Fund (20127)." The check is then mailed to: Director of Management and Budget, NYARNG MNBF, DMNA, 330 Old Niskayuna Road, Latham, NY 12110. Include a copy of the completed DMNA 1057 without enclosures, attachments, or classified information with the check when mailed. Reduction authority pertaining to AGR personnel is not delegated and rests with The Adjutant General. See table 4-1, DMNA 27-2 for maximum punishments for enlisted members. See DMNA 27-2, Section V, Chapter 4, paragraph k for reduction of offenders in grades E-8 and E-9. Only one of the authorized punishments in NYSML, Section 130.15, may be imposed for each NJP action (example, a reduction cannot be combined with a fine). The punishments of confinement, extra duties, or reduction may not be imposed non-judicially on officers or warrant officers. An executed punishment of reduction or fine may be suspended only for a period of four (4) months after the date imposed.
7/ If the individual appeals, this form and attached sheets should be transmitted immediately to the next superior authority. All witness statements, official records and other documentary evidence considered by the commander imposing punishment also should be transmitted.
8/ Before acting on an appeal, it must be referred to a judge advocate for advice when punishment and legal review.
9/ In this space, provide a brief list of attachments. Such attachments should include all witness statements, all documentary and other evidence, all statements presented by the accused, any evidence or statements presented on appeal, and copies of any supplementary actions on the punishment that are taken. The list of supplementary actions should indicate the date of the action and provide a brief description of its nature. Supplementary actions include each action in suspension, mitigation, remission, or setting aside of punishment, or vacation of suspension. Attachments of such supplementary actions must include the date of the action and the name, grade and position of the officer taking it. The officer taking each action, or his authorized representative, will sign below the description of the action. When a representative signs such a supplementary action, he/she will state his/her own name, grade and position in addition to those of the commander. Distribution of supplementary actions should be made as in the original action. If additional space is needed for completion of any item(s), continuation should be accomplished and listed herein 10/ Applicable portions of the following suggested formats may be used to accomplish supplementary actions: (Appropriate language should be entered in Part III or, if necessary, on continuation sheet):

a. Suspension, Mitigation, Remission or Setting Aside Other than by Superior Acting on Appeal:

On (date), the punishment(s) of_____, imposed on (date of punishment(s) against _____ (name of offender) (unit) (was) (were) suspended (only for a period of (4) months after the date imposed)and will be automatically remitted if not vacated before (date) (mitigated to) (set aside, and all rights, privileges and property affected restored) (by my order) (by order of) (the officer who imposed the punishment) (the successor-in-command to the officer who imposed the punishment) (as superior authority). (Typed name, grade and position) /s/ _____

b. Vacation of Suspension:

The suspension of the punishment(s) of_____, imposed on date of punishment(s) against _____ (name of offender) (unit) and vacated before (date), (is) (are) hereby vacated. The unexecuted portion(s) of the punishment(s) will be duly executed. (Typed name, grade and position) /s/ _____

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APPENDIX 17

REQUEST TO SUPERIOR TO EXERCISE NON-JUDICIAL PUNISHMENT PROCEEDINGS UNDER SECTION 130.15 OF NYSML

THRU: (Include Zip Code) TO: (Include Zip Code)

(Check appropriate line and complete narrative)

1. ☐ It has been reported ☐ The enclosed file indicates that on or about _____ (Date) at _____ (Place)

NOTE: Insert the name and organization of the individual concerned and the nature of the alleged misconduct in the form of a clear and concise statement of an offense that constitutes conduct punishable under the State Code and the article of the State Code violated.

2. I recommend you exercise your authority under the provisions of NYSML 130.15, in the disposition of this case.

3. Enclosures: (List)

Date	Name, Grade and Organization of Commander	Signature

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APPENDIX 18

ARMY NATIONAL GUARD RECORD OF SUPPLEMENTARY ACTION
UNDER 130.15 MILITARY LAW OF THE STATE OF NEW YORK
For use of this form, see AR 27-10
The proponent is MNLA

Name and Grade SSN Unit

Type of Supplementary Action (other than by superior authority acting on appeal). (Put a check mark on the appropriate line.0

_____ SUSPENSION (Complete item 1 below)
_____ MITIGATION (Complete item 2 below)
_____ REMISSION (Complete item 3 below)
_____ SETTING ASIDE (Complete item 4 below)
_____ VACTION OF SUSPENSION (Complete item 5 below)

1. SUSPENSION
The punishment(s) of _____
_____
imposed on the above service member on _____
(Date of Punishment)
(is) (are) suspended and will automatically be remitted if not vacated before _____.

2. MITIGATION
The punishment(s) of _____
_____
imposed on the above service member on _____
(Date of Punishment)
(is) (are) mitigated to _____.

3. REMISSION
The punishment(s) of _____
_____
imposed on the above service member on _____
(Date of Punishment)
(is) (are) remitted. _____

4. SETTING ASIDE.
The punishment(s) of _____
_____
imposed on the above service member on _____
(Date of Punishment)
(is) (are) set aside on the basis that _____
_____
_____

_____.

All rights, privileges and property affected are hereby restored._____

5. VACATION OF SUSPENSION

a. The suspension of the punishment(s) of _____

_____

imposed on the above service member on _____

Date of Punishment

(is) (are) hereby vacated. The unexecuted portion(s) of the punishment(s) will be duly executed.

b. Vacation is based on the following offense(s): _____

_____

_____

_____

c. The member (was) (was not) given an opportunity to rebut.

d. The member (was) (was not) present at the vacation proceeding (AR 27-10, paragraph 3-25).

_____

AUTHENTICATION (Place checkmark on appropriate line)

_____

_____ By my order _____ The officer who imposed the punishment

_____ The successor-in-command to the imposing commander

_____ As superior authority

_____

Date Name, Grade and Organization of Commander Signature

_____

APPENDIX 19

STATE OF NEW YORK)
) ss.:
COUNTY OF)

, being duly sworn deposes and says that deponent is over the age of eighteen years and is not a party in this proceeding. Deponent served a true copy of _____
in the following manner stated herein, and said person being the proper and authorized person to be served in this proceedings, (the name of said person, complete address, time and date of service is as follows on Line (A).

Line (A)

***1.** By delivering to and leaving with personally _____, known to the deponent to be the same person mentioned and described in the above proceedings as the person to be served.

2. By delivering to and leaving with personally _____, on the _____ at the premises mentioned above in Line (A), such person knowing the person to be served and associated with him/her, and after conversing with him/her, deponent believes him/her to be a person of suitable age and discretion, and by mailing a copy of the proceeding herein to said authorized person to the address and at the time stated above in Line (A) which is his/her last known address, enclosed in a postpaid sealed wrapper in an official depository of the United States Postal Service.

3. By affixing a true copy of the same to the door of the actual place of business, dwelling place or usual place of abode state in Line (A) above and by mailing a copy of the proceeding herein to said person to the address and on the date and time stated on Line (A) above.

Service was made in the manner stated in this paragraph because deponent was unable, with due diligence, to find the proper or authorized person to be served or a person of suitable age and discretion at actual place of business, dwelling place or usual place of abode stated in Line (A) above, having called there at the following times and dates:

Deponent further states that he/she describes the person actually served as follows:

SEX	SKIN COLOR	HAIR COLOR	AGE (APPROX)
----- Male	----- Black	----- Light	-----
----- Female	----- White	----- Medium	
	-----	----- Dark	

WEIGHT (APPROX) -------- pounds

Other identifying features:

_____
(Print Name Below Signature)

Sworn to before me this

_____ day of _____, 20__.

_____
Notary Public, State of New York
My Commission expires:

*Three means of service listed -
complete applicable paragraph.

APPENDIX 20

PROCEDURAL RIGHTS OF THE ACCUSED
SCM

You have been accused of a violation of the NYSML or other lawful order or regulation duly issued by the State of New York, and you are to be tried by SCM.

You have the absolute right to object to trial by SCM. If you object, the appropriate authority will decide how to dispose of the case. The charges may be referred to a SPCM or GCM, or they may be dismissed, or the offense charged may be disposed of by NJP or administrative measures.

You are not entitled to military defense counsel in this SCM, however, you may obtain your own private counsel to represent you at your own expense.

Except when military exigencies require otherwise, the SCM will grant you an opportunity to consult with military defense counsel before the trial for advice concerning your rights and options, and the consequences of your waiving any rights.

You are entitled to receive a copy of the charge sheet specifying the violations you have been charged with prior to the opening of trial or arraignment.

If, after trial, you are found guilty of any charges, you may submit written matters to the convening authority after sentence is adjudged.

There is no right of appeal from the decision of a SCM, and you are not entitled to military counsel to pursue an appeal.

The reason of your SCM, and the findings and actions taken thereupon will be reviewed by a JA for legal sufficiency to ensure that all proceedings have been properly conducted.

I HAVE RECEIVED AND READ A COPY OF MY RIGHTS IN A SCM.

DATED:

_____

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APPENDIX 21

AWOL TELEPHONE LOG

_____
DATE

UNIT: _____

CALLER: _____

TIME	AWOL INDIVIDUAL	TELEPHONE NUMBER	REMARKS

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APPENDIX 22

LETTER OF INSTRUCTIONS (LOI)
UNEXCUSED ABSENCES

(Type of Unit Letterhead)

(File Symbol) (Date)

MEMORANDUM FOR

SUBJECT: LOI - Unexcused Absence

1. Attendance records of this unit show that you were . . . (1).

2. Under AR 135-91, you are required to attend all scheduled unit training assemblies and annual training periods. In addition, you are required to participate in a satisfactory manner with regard to proper military appearance and performance of assigned duties.

3. Unless the absences indicated in paragraph 1 are excused, you will have accrued (number) unexcused absences within a one-year period. The one-year period begins on the date you incur your first unexcused absence.

4. Absences from training assemblies may be excused only for reasons of sickness, injury, emergency or other circumstances beyond your control. If your absence was for one of these reasons, you should furnish this unit an appropriate affidavit or certification by a doctor, medical officer, or other person(s) having specific knowledge of the emergency or circumstances, requesting that it be excused. Your absence cannot be excused unless your request, and affidavit or certificate, are received within 15 days of the date you receive this letter.

5. You will be notified in writing within 10 days after receipt of your request as to whether the absence has been excused.

6. If you have family responsibilities that are causing a hardship or if your civilian job is of critical importance to the national or community health, safety, or interest, you should contact me so that I can advise and assist you in the proper procedures to resolve these problems.

7. If you do not have a legitimate reason for failing to report for duty you may be subject to NJP under NYSML, Section 130.15, or a court-martial pursuant to Article 7 of the NYSML wherein you may lose privileges, be fined money, reduced in grade, or be confined to jail.

8. As you are aware, if you accumulate nine unexcused absences within a one-year period, you can be declared an unsatisfactory participant. If this action is taken, you may be transferred to the Individual Ready Reserve for the balance of your obligation.

9. I hope that as a result of this letter you will take immediate steps to improve your attendance.

10. The next scheduled training assembly for this unit is (time and date).

(Signature and Signature Block of Unit Commander)

---

(1) Insert one of the following:

. . . absent from the scheduled unit training assembly (UTA) or multiple unit training assembly (MUTA) on (periods and dates).

. . . charged with unexcused absence on (periods and dates) because of (insert improper military appearance or unsatisfactory performance of assigned duties).

(2) If the letter is delivered to the member in person, add the following statement on the copies. (Do not place statement on the original.)

. . . Receipt of the original hereof is acknowledged.

Have the member sign and date the unit's file copies below this statement when the letter is delivered.

APPENDIX 23

TABLE OF INFORMATION REGARDING ABSENCES

TYPE OF ABSENCE

Excused Absence*

REASON(S) FOR ABSENCE

a. Sickness.

b. Injury.

c. Circumstances beyond member's control.

WHO MAY EXCUSE ABSENCE

Unit commander or, in his or her absence, the acting unit commander.

BASIS FOR EXCUSE/EXCEPTION

Personal knowledge of unit commander/acting commander, or valid documentation, that member's absence was caused by, or will be caused by reason of a, b or c, above.

DOCUMENTATION REQUIRED

Valid certificate of doctor or medical officer.**

Affidavits from other persons having personal knowledge of the emergency or circumstance.**

TYPE OF ABSENCE

Unexcused Absence***

REASON(S) FOR ABSENCE

Any reason other than those shown for excused absence.

WHO MAY GRANT EXCEPTION TO UNEXCUSED ABSENCE

The Adjutant General.

BASIS FOR EXCUSE/EXCEPTION

a. Clearly demonstrated exemplary performance of duty and potential for continued outstanding service. Individual's prior record of attendance at scheduled training assemblies is a primary factor for consideration.

b. Exception will not be approved unless there are extenuating circumstances directly bearing on the failure to attend scheduled training.

DOCUMENTATION REQUIRED

None, unless in the opinion of the unit commander/acting unit commander, an exception is warranted. In such cases, the documentation will be as required by The Adjutant General.

Notes:

* Excused absences are not chargeable as unsatisfactory participation.

** Unit commanders/acting unit commanders need not require such documentation when the sickness, injury or circumstance(s) are known by or apparent to them.

*** Unexcused absences are chargeable as unsatisfactory participation, unless an exception is granted and the absence is made up by equivalent training (AR 135-91, paragraph 4-10d).

APPENDIX 24

WARRANT FOR APPREHENSION

TO _____

_____ Greetings

Whereas, the undersigned has (convened a court martial/initiated NJP) by notation on DMNA Form 1050/Court-Martial Convening Order/DMNA Form 1057, dated _____, 20__, against _____, a member of _____.

Now, therefore, I command you to apprehend the above named _____ and deliver him/her into the custody of the military forces of the State at _____

_____

_____

in accordance with the State Code of Military Justice and regulations issued thereunder, for which this shall be his/her warrant; and I further command you to make return to me of the action under this warrant within _____ days from the date hereof.

Given under my hand at _____, this _____ day of _____, 20__.

_____
Signature of Convening Authority or Appropriate Commander

_____
Grade, Branch and Unit of Convening Authority or Appropriate Commander

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APPENDIX 25

NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NON-JUDICIAL PUNISHMENT	Use 8x11 bond sheets if additional space is required and identify by item number on reverse.	DATE TIME
TO: (Name, Grade, SSAN, Unit, HOR)	FROM: (Name, Grade, Title, Unit)	

1. Preliminary investigation has disclosed that:

In violation of the NYSML, Section(s) _____.

2. I intend to punish you/recommend to the Commander, _____, that he/she punish you under NYSML, Section 130.15, for the above offense(s), unless you give me satisfactory written evidence that you did not commit the offense(s) or give me satisfactory explanation which shows that you should not be punished.

3. You should realize that this is a serious matter. Although NJP will not give you a record of a court conviction, it may remain in your military records. It may affect your future chances for favorable training opportunities, assignments, promotions and so forth. You have the right to submit any matters in extenuation, mitigation or defense.

4. You do not have to give any information about the offense(s) described above. If you do, it may be used for or against you either in this action or in a trial by court-martial.

5. I will consider any matters in extenuation, mitigation or defense you submit in deciding whether (you committed the offense(s), whether to impose punishment, and if so, what type of punishment)/ (whether to recommend the imposition of punishment to the Commander, _____. If I do recommend punishment be imposed, I will forward to the commander any written material you submit. However, you are not entitled to make a further separate presentation to the commander.)

6. You must acknowledge receipt of this notification and reply to this notification by endorsement. Fill in the endorsement on the back of this sheet, attach any documents which you may desire to be considered, and return the endorsement, the documents and this written notification to me no later than _____. If you do not reply or submit matters for my consideration within the required time, this action may nevertheless proceed.

7. Additional information (if any):

Type name, grade & title of person intending to impose/recommend punishment.	Atch
Signature	

(SEE REVERSE)

ENDORSEMENT No. 1 TO NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NON-JUDICIAL PUNISHMENT DATED: _____ (by individual concerned)	DATE:
TO: (Title, Organization of person sending notification)	FROM: (Name, Grade and Organization)

1. I received this notification on _____.

2. I understand that I may submit matters in extenuation, mitigation or defense, including evidence that I did not commit the offense(s), information which may provide a reason for not imposing or recommending punishment, and which will help to decide what my punishment should be, if any. (Check applicable box)

☐ I do not desire to submit written matters in extenuation, mitigation or defense.

☐ I have attached my written matters.

☐ My written matters in extenuation, mitigation or defense are as follows: (Attach additional sheets if necessary).

3. I understand that I will not have another separate opportunity to submit matters in extenuation, mitigation or defense before a decision is made of whether or not punishment will be imposed._____

Type or print name, grade & SSAN of individual concerned.	_____ Atch
Signature	

(Use this space for intermediate return endorsement, if any, or attach additional sheets, as needed.)

INSTRUCTIONS FOR IMPOSITION/RECOMMENDATION OF NJP

NOTE 1. Strike "Impose" or "Recommend" as applicable.

NOTE 2. State military time Notification is signed.

NOTE 3. The person sending the Notification is the one who is authorized to impose the punishment, or who recommends the imposition of punishment. This same person will sign the Notification at the bottom.

NOTE 4. If the space provided in item 1 is insufficient for all offenses being considered, insert the following in that item: "You committed the offense listed in Attachment 1," and state them in full in a "Lost of Offenses," as Attachment 1 to the Notification.

NOTE 5. Strike "to impose punishment" or "to recommend imposition of punishment," as applicable.

NOTE 6. If authorized to impose punishment, strike all language after the slash. If recommending punishment, strike parenthetical language before the slash.

NOTE 7. Use additional pages, as necessary.

NOTE 8. Strike "impose" or "recommend," as applicable.

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APPENDIX 26

PUNISHMENT, AND NOTICE OF RIGHT TO APPEAL ENDORSEMENT NO. _____ TO NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NJP (*See Note 1*)	DATE:
TO: (Name, Grade, SSAN, Org, HOR)	FROM: (Name, Grade, Title, Org)

1. *You are hereby reduced to the permanent grade of Sergeant (E-4) in the NYANG and as a Reserve of the USAF (but the execution of that portion of this punishment which provides for reduction to sergeant is suspended until _____, at which time, unless this suspension is sooner vacated, it will be remitted without further action). (See Notes 2, 5, and 6)*

2. You are hereby reprimanded (admonished) for your misconduct described in the Notification. (See Note 3)

3. *I have considered the matters which you submitted in extenuation, mitigation or defense. (Here the commander may give reasons why notwithstanding the matters submitted, punishment is being imposed, or how the matters submitted affected the type or severity of punishment.) (See Note 4)*

4. You are advised of your right to appeal from the imposition of NJP in accordance with NYSML, Section 130.15(d), Military Regulation No. 8 and HQ NYANGR 111-9.

5. You are directed to acknowledge receipt of this endorsement and sign, date and return it. Upon receipt of this endorsement you must state whether you appeal. If you appeal, you have the right to submit written matters in extenuation, mitigation or defense to be considered by the appellate authority in support of your appeal. You do not have to give any information about the offense(s) or the punishment. If you do, it may be used for or against you either in this action or in a trial by court-martial. If you neither acknowledge receipt of this endorsement or make an appeal election by _____*(Date)*_____, it will be presumed you do not intend to appeal and this action may nevertheless proceed. If you have appealed and do not submit matters in support of your appeal by _____*(Same Date)*_____, it will be presumed that you do not intend to submit any written matters and your appeal will be forwarded to the appellate authority for action.

6. *It is expected that this misconduct on your part will not be repeated and that in the future you will redeem this lapse in your conduct. (See Note 7)*

Typed Name, Grade, Title & Organization of Officer imposing the punishment _____ Signature	_____ Atch
ENDORSEMENT NO. ____ TO NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NJP	DATE
TO: (Name, Grade, Title, Org of Officer imposing the punishment)	FROM: (Name, Grade, SSAN, Org of Individual Concerned)

1. Receipt acknowledged on _____.

2. I (do) (do not) appeal (strike out the inapplicable choice).

3. (Check applicable box)

☐ I do not desire to submit written matters in support of my appeal.

WARNING: YOU HAVE A RIGHT TO BE PRESENT AT NJP PROCEEDINGS UNDER NYSML, SECTION 130.15. HOWEVER, IF YOU FAIL TO APPEAR AT SUCH PROCEEDINGS, YOU WILL BE DEEMED TO HAVE WAIVED YOUR RIGHT TO BE PRESENT AND THE PROCEEDING WILL TAKE PLACE WITHOUT YOU.

☐ I have attached my written matters.

☐ My written matters are as follows: (Continue on additional page if necessary.)

Type or Print Name, Grade, SSAN, Org of Individual Concerned	_____ Atch
Signature	

ENDORSEMENT NO. _____ TO NOTIFICATION OFINTENT TO IMPOSE/RECOMMEND NJP

TO: (Name, Grade, Title, Org)	FROM: (Org/Office)

(SEE NOTE 8)

Type or Print Name, Grade, Org of Individual Concerned	_____ Atch
Signature	

ENDORSEMENT NO. _____ TO NOTIFICATION OF INTENT TO IMPOSE/RECOMMEND NJP DATE:

TO: (Name, Grade, Title, Org)	FROM: (Org/Office)

Type or Print Name, Grade, Org of Individual Concerned	_____ Atch
Signature	

ENDORSEMENT NO. _____ TO NOTIFICATION OFINTENT TO IMPOSE/RECOMMEND NJP DATE:

TO: (Name, Grade, Title, Org)	FROM: (Org/Office)

Type or Print Name, Grade, Org of Individual Concerned	_____ Atch
Signature	

INSTRUCTIONS FOR PUNISHMENT AND RIGHT TO APPEAL

1. This endorsement follows the first endorsement to the original notification and all endorsements follow the proper sequence. It will be Endorsement No. 2 in most cases. It will not be used when an offender validly demands trial by court-martial since the NJP action ceases at that time.

2. The punishment imposed and any remedial action taken at this time should be in item 1. If an unsuspended reduction is imposed, a paragraph in substantially the following format should be added:

> "You are hereby reduced to the permanent grade of (Sergeant) (E-4) in the NYANG and as a Reserve of USAF. Your new date of rank as (Sergeant E-4) is _____."

3. Item 2 is optional. Strike if not used, and strike inapplicable language.

4. If the offender has failed to reply to the Notification of Intent to Impose/Recommend NJP, punishment may be imposed in the following format as appropriate for item 3:

> "In taking this action, I note that you have failed to respond to the Notification of Intent to Impose/Recommend NJP by _____(Date)_____, as you were required to do (or, you responded but you did not submit any matters in extenuation, mitigation or defense within the required time)."

5. If the action is being terminated without the imposition of punishment because of insufficient evidence, the endorsement should be in substantially the following format as applicable and DMNA Form 1064 will not be used:

a. After considering all the evidence submitted in this action, I do not find sufficient evidence to believe you committed a punishable offense(s).

b. This action is hereby terminated and all references to the commission of the alleged offense(s) and the commencement of this action are hereby ordered to be expunged from your records, and all rights, privileges and property of which you have been deprived or which have been affected by the proceedings to date are hereby restored.

c. You are directed to acknowledge receipt of this endorsement.

6. When the action is terminated before NJP is imposed because the commander wishes to proceed with a court-martial the endorsement will be in substantially the following format and Form 1064 will not be used:

a. After considering all the evidence submitted in this action and the circumstances surrounding the commission of the alleged offense(s), I am terminating this action without imposing NJP, and will instead proceed by court-martial.

b. You will be notified in the near future when the court-martial proceedings are commenced.

c. You are directed to acknowledge receipt of this endorsement.

7. This item is optional with the commander. If not used, strike item 6.

8. Use these endorsements for commander to wing or group commander, wing or group commander to unit JA and/or to Commander, NYANG, and unit JA to HQ, NYANG/SJA. Add additional sheets in this format if needed.

APPENDIX 27

CERTIFICATE OF MAILING OR PERSONAL DELIVERY *(No Notes For This Form)*	NJP ACTION *SSGT Frank R. Frank, 000-00-0000*

The undersigned certifies as follows (complete and strike as applicable):

1. Notification of Intent to Impose/Recommend NJP delivered by *SGT Max D. Brown, 105 CSS, NYANG* on *12 Aug 01* at *place of delivery* _____ to *person delivered to or indicate where notification was left if no one there*.

2. Notification of Intent to Impose/Recommend NJP was mailed (by certified mail) on 12 Aug 01 by *SGT Max D. Brown, 105 CSS, NYANG* to _____*address mailed to*_____ (bearing certificate # _____.)

3. Notification of Intent to Impose/Recommend NJP was received on _____*date*_____.

4. Notification of Intent to Impose/Recommend NJP was returned *unclaimed, addressee unknown, moved, etc.* on *date*.

5. Punishment and Notice of Right to Appeal Endorsement was personally delivered
by _____on_____
at _____
to _____

6. Punishment and Notice of Right to Appeal Endorsement was mailed (by certified mail) on _____ by _____
to _____(bearing certificate # _____.

7. Punishment and Notice of Right to Appeal Endorsement was received on _____.

8. Punishment and Notice of Right to Appeal Endorsement was returned _____
_____ on _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

The undersigned certifies as follows (complete and strike as applicable):

1. Notification of Intent to Vacate (recommend Vacation of) Suspension was personally delivered by _____ on _____
at _____ to _____.

2. Notification of Intent to Vacate (recommend Vacation of) Suspension was mailed (by certified mail) on _____ by_____
to _____ (bearing certificate # _____).

3. Notification of Intent to Vacate (recommend Vacation of) Suspension was returned _____
_____ on _____.

4. Notification of intent to Vacate (recommend Vacation of) Suspension was returned _____
_____ on _____.

5. Vacation of Suspension was personally delivered by _____ on _____ at _____ to _____.

6. Vacation of Suspension (by certified mail) on _____ by _____ to _____ (bearing Certificate # ___).

7. Vacation of Suspension was received on _____.

8. Vacation of Suspension was returned _____ on _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

The undersigned certifies as follows (complete and strike as applicable):

1. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was personally delivered by _____ on _____ at _____ _____ to _____.

2. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was mailed (by certified mail) on _____ by _____ to _____ _____ (bearing Certificate #_____).

3. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was received on _____ _____.

4. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was returned _____ _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

The undersigned certifies as follows (complete and strike as applicable):

1. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification (if not done in the punishment endorsement) was personally delivered by _____ on _____ _____ at _____ to _____.

2. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification was mailed by (certified mail) on _____ by _____ to _____ (bearing Certificate # _____).

3. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification was received on _____.

4. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification was returned _____ on _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

APPENDIX 28

ACTION ON APPEAL FROM NJP	DATE:
TO: (Name, Grade, SSAN, Org, HOR)	FROM: Org/Office

1. Your appeal from the NJP imposed on you by the Commander, (*Organization*) _____ on _____ has been decided after reference to (my Staff JA) (a JA).
(See Note 1)

2.

(See Note 2)

3.

(See Notes 3 & 4)

4. You are directed to acknowledge receipt of this action.

Type Name, Grade, Title, Org. Signature

Endorsement No. TO APPEAL FROM NJP DATE:
(See Note 5)

TO: (Name, Grade, Title, Org) FROM: (Org/Office)

Type Name, Grade, Title, Org Signature

ACTION ON APPEAL FROM NJP		DATE:
TO: (Name, Grade, SSAN, Org, HOR)	FROM: (Org/Office)	
Type Name, Grade, Title Org	Signature	
ENDORSEMENT NO. TO APPEAL FROM NJP		DATE:
TO: (Name, Grade, SSAN, Org, HOR)	FROM: (Org/Office)	
Type Name, Grade, Title Org	Signature	
ENDORSEMENT NO. TO APPEAL FROM NJP		DATE:
TO: Commander, NYANG	FROM: (Name, Grade, SSAN, Org)	
1. Receipt acknowledged.		
Type or Print Name	Signature	

INSTRUCTIONS FOR ACTION ON APPEAL FROM NJP

1. Strike inapplicable language in this form.

2. Item 2 should include one of the two below stated paragraphs:

a. I have considered the written matters you submitted in support of your appeal. (The appellate authority may state how such matters have or have not affected the appeal, including punishment, type and severity and any remedial action.)

b. In deciding your appeal, I note your failure to submit matters in support of your appeal within the required time.

3. The following language, as applicable, may be used in item 3:

a. I find your punishment to be neither unjust nor disproportionate to the offense(s); therefore, your appeal is denied.

b. Your appeal is granted. Your punishment is set aside and all rights, privileges and property of which you have been deprived by virtue of the punishment are hereby restored. (See Note 4 below)

c. The following action is taken on your appeal: _____. (The appellate authority may take whatever remedial action he/she deems appropriate and which is authorized under this regulation in paragraph 2-3 and may also sustain the finding of commission of the offense notwithstanding the remedial action taken, if sustaining such finding is consistent therewith. If such remedial action is taken, the appeal is granted to that extent. DMNA Form 1070 should be used as a guide for the language appropriate to the remedial action taken.)

4. If the action on appeal suspends, mitigates, remits or sets aside a reduction, add the following:

The reduction imposed on _____ is (suspended) (mitigated) (remitted) (set aside). Your date of rank as (grade) is _____. See paragraph 8 of this regulation and, if the action on appeal suspends the reduction, add the appropriate language here using DMNA Form 1070 and item 1of DMNA Form 1064 as a guide. If the reduction is mitigated, include here the other form of punishment to which it is mitigated. Note, only previously suspended reductions or other unexecuted punishments or portions thereof may be remitted. The appellate authority may also add an explanation of the effects of the remedial action taken, as he/she wishes.

5. Following the above action will come successive endorsements necessary to transmit the record to the offender. The appropriate commander will take any necessary action required by granting of the offender's appeal.

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APPENDIX 29

NOTIFICATION OF INTENT TO VACATE (RECOMMEND VACATION OF) SUSPENDED NJP	Use 8x10" bond sheets if additional space is required, and identify by item number.	DATE:
TO: (Grade, name, SSAN, Org, HOR)	FROM: (Title & Org)	

1. PRELIMINARY INVESTIGATION HAS DISCLOSED THAT:

(See Note 1)

IN VIOLATION OF THE NYSML, SECTION(s) _____.

2. On _____, 20__, (I) (my predecessor in command) (the Commander _____ _____(See Note 2)_____) imposed NJP on you under the provisions of the NYSML, Section 130.15 for the offense(s) of _____. Punishment was _____ but the execution of (that portion of) the punishment which provided for _____ was suspended until _____.

3. Because of your misconduct on _____ I intend to vacate (recommend the Vacation of) this suspension. (See Note 3) You may rebut any adverse or derogatory information upon which the intended vacation is based, and submit written matters in extenuation, mitigation, or defense to me.

4. You do not have to give any information or say anything about the offense(s) described in paragraph 1 above. If you do, it may be used for or against you either in this action, further NJP under Section 130.15 or in a trial by court-martial.

5. You must acknowledge receipt of this notification immediately. Fill in the endorsement on the following sheet, attach any documents which you desire to be considered, and return this notification not later than _____. If you do not reply or submit matters within the required time, this action may nevertheless proceed.

TYPE NAME, GRADE AND TITLE OF OFFICER	_____Atch
Signature	

ENDORSEMENT NO. BY INDIVIDUAL CONCERNED	DATE:
TO: (Title, Org of Person Sending Notification)	FROM: (Name, Grade and Org)

1. Receipt acknowledged on _____.

2. (Check applicable box)

☐ I do not desire to submit written matters.

☐ I have attached my written matters.

☐ My written matters are as follows: (Continue on additional page if necessary).

3. I understand that I will not have another separate opportunity to submit written matters before the commander to whom the recommendation to vacate the suspension is being made.

(See Note 4)

TYPE OR PRINT NAME, GRADE AND SSAN OF INDIVIDUAL	_____Atch
Signature	

(Use this space for intermediate return endorsement, if any)

INSTRUCTIONS REGARDING NOTIFICATION OF INTENT TO VACATE (RECOMMEND VACATION OF) SUSPENDED NJP

1. Complete with the same kind of information required for the Notification of Intent to Impose/Recommend NJP but with the new offense.

2. Strike as applicable and include Organization if the person making the notification did not suspend the punishment.

3. Strike as applicable throughout this form.

4. Strike item 3 on endorsement if the person sending the notification is authorized to vacate the suspension.

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APPENDIX 30

VACATION OF SUSPENSION: ENDORSEMENT NO. _____TO NOTIFICATION OF INTENT TO VACATE (RECOMMEND VACATION OF) SUSPENDED NJP	DATE:
TO: (Grade, Name, SSAN, Org, HOR of Individual concerned)	FROM: (Title & Org of Commander) Authorized to vacate suspension)
1. I have considered the matters which you submitted in extenuation, mitigation or defense. (I note you failed to reply or submit matters in extenuation, mitigation or defense within the required time.) *(See Note 1)*	
2. The suspension of so much of the punishment as provides for *a reduction to the grade of airman, imposed on you on 1 August 2001*. _____ *is* hereby vacated. *(The reduction to Airman (E-2) will be duly executed.) (See Notes 1, 2 and 3)*	
3. You will acknowledge receipt of this communication by endorsement hereto.	
Type Name, Grade, Title, Org.	Signature
ENDORSEMENT NO. _____ TO NOTIFICATION OF INTENT TO VACATE (RECOMMEND VACATION OF) SUSPENDED NJP.	DATE
TO: (Name, Grade, Title, Org.)	FROM: (Name, Grade, SSAN, Org.)
1. Receipt acknowledged.	
Type Name, Grade, Title, Org.	Signature
ENDORSEMENT NO. _____ TO NOTIFICATION OF INTENT TO VACATE (RECOMMEND VACATION OF) SUSPENDED NJP.	DATE
TO:	FROM:
(SEE NOTE 4)	
Type Name, Grade, Title, Org.	Signature
Type Name, Grade, Title, Org.	Signature

INSTRUCTIONS FOR VACATION OF SUSPENSION ENDORSEMENT TO NOTIFICATION OF INTENT TO VACATE

1. Strike as applicable.

2. If action taken results in execution of a reduction which was previously suspended, a paragraph in substantially the following form should be added:

"Your new date of rank as (Airman, E-2) _____ will be _____."

3. If no vacation will occur, item 2 should read substantially as follows, as applicable:

"2. After considering all the evidence submitted in this action, I do not find sufficient evidence to warrant a vacation of your suspended punishment. Your suspension termination date remains (_____). (However, because I find you committed the offense(s) alleged, I am extending your suspension termination date until _____.)"

This later alternative may only be used and the suspension period extended, day for day, for each AWOL alleged.

4. Use these additional endorsements as necessary.

APPENDIX 31

EXTENSION OF SUSPENSION PERIOD OF NJP (SEE NOTE 1)	DATE:
TO: (Grade, Name, SSAN, Org, HOR of Individual concerned)	FROM: (Title & Org of Commander)
1. Sufficient evidence has been presented to me that you were AWOL from your appointed place of duty on _____ in violation of NYSML, Section 130.82.	
2. The suspension period of your punishment_____ imposed on _____ and suspended on _____, is hereby extended until _____.	
3. You will acknowledge receipt of this communication by endorsement.	
Type Name, Grade, Title, Org.	Signature
ENDORSEMENT NO. _____ TO EXTENSION OF SUSPENSION PERIOD OF NJP.	DATE
TO: (Name, Grade, Title, Org.)	FROM: (Name, Grade, SSAN, Org.)
1. Receipt acknowledged.	
Type or Print Name, Grade, Title, Org.	Signature
ENDORSEMENT NO. _____ TO EXTENSION OF SUSPENSION PERIOD OF NJP.	DATE
TO: (Name, Grade, Title, Org.)	FROM: (Name, Grade, Title, Org.)
(SEE NOTE 2)	
Type or Print Name, Grade, Title, Org.	Signature
ENDORSEMENT NO. _____ TO EXTENSION OF SUSPENSION PERIOD OF NJP.	DATE
TO: (Name, Grade, Title, Org.)	FROM: (Name, Grade, SSAN, Org.)
Type or Print Name, Grade, Title, Org.	Signature

INSTRUCTIONS FOR USE OF EXTENSION OF SUSPENSION PERIOD OF NJP

1. This action will only be used, if during the time punishment is suspended in one NJP action, the offender is AWOL, and the commander suspending the punishment does not desire to bring a vacation action and no vacation action has otherwise commenced on the recommendation of another person for the(se) alleged AWOL(s). Also, if no vacation is commenced, but a new NJP is commenced for the(se) AWOL(s), any punishment imposed for such new offense(s) may not include an extension of a current suspension. This is based on the necessity for separate actions for separate offenses which also prohibits a new NJP action from vacating a current suspension as part of the punishment imposed in such new action, in lieu of a vacation action.

2. Use additional endorsements as necessary.

APPENDIX 32

(Suspension, etc.) OF NJP IMPOSED ____(Date)____ DATE:

(SEE NOTE 1)

---

1. On _____ (I) (my predecessor in command) (the Commander, _____
_____(Name)_____(Organization)_____
imposed NJP on you, consisting of _____(Type of Punishment)_____.
(No part) (All) of the punishment (the portion of the punishment relating to _____
_____ was suspended.

---

2. (See Note 2)

Type Name, Grade, Title and Organization of Commander (See Note 3)

Signature

DMNA FORM 1070 - NOTES

1. Insert "SUSPENSION," "MITIGATION," "REMISSION" or "SETTING ASIDE" as appropriate. DMNA Form 1070 should only be used when the remedial action is taken after the date punishment is imposed, but not pursuant to an appeal. If remedial action is taken at the time punishment is imposed, the sample language here may be used on Form 1064, item 1. If the remedial action is taken pursuant to an appeal, the sample language here may be used on Form 1066.

2. Use the following paragraphs as applicable:

"I hereby remit the unexecuted (portion of the) punishment relating to _____ effective as of _____date_____."

"I hereby mitigate the (unexecuted) (portion of the) punishment relating to _____until___, at which time, unless the suspension is sooner vacated, it will be automatically terminated." Here, the commander may add an explanation of the effects of suspension and the consequences of vacation, if he wishes.

"I hereby set aside the (unexecuted) (portion of the) punishment relating to _____ _____. All rights, privileges, and property of which you have been deprived by the (portion of the) punishment set aside, are hereby restored."

If the remedial action taken involves a reduction, the appropriate date of rank and grade should be stated in the remedial action paragraph.

3. The commander who imposed the punishment, his successor-in-command or superior authority, may take the remedial action.

APPENDIX 33

WARRANT FOR CONFINEMENT IN CIVIL JAIL AFTER TRIAL

THE PEOPLE OF THE STATE OF NEW YORK

To (1) _____

_____ Greeting:

Whereas , a (2) _____

was appointed by Special _____ Order No. _____,

_____, dated _____, 20__,

and

Whereas, (3) _____

residing at _____

was duly and regularly tried by said court-martial for violation of the State Code of Military Justice, and was found guilty and was sentenced to confinement for _____ days, and the proceedings, findings and sentence of said court-martial having been duly approved by the convening authority, (4) (and by the appropriate commanding general or commanding officer) and the place of confinement having been designated as (5) _____ at _____.

Now, therefore, I command you to take the above named (3) _____

to (5) _____

and deliver him to the jailor thereof; and the said jailor is hereby directed and required to to receive the said (3) _____ and, unless sooner discharged, to keep him/her closely confined in the manner required by law for the said period of _____ days in accordance with the State Code of Military Justice and regulations issued there under, for which this shall be his/her warrant; and I further command you to make return to me of your action under this warrant within _____ days from the date hereof.

_____
Signature

_____
Grade, Branch and Unit

(6) {President of said Court
{or Summary Court Officer

Note:--(1) "John Doe, a marshal of the court below names," or "the Sheriff of the City of New York or county of or any police officer, constable or marshal or other peace officer of the city, town or village of _____," (2) "GCM," "SPCM," or "SCM." (3) Grade, name, organization and home address of accused. (4) If convicted by GCM, matter in parenthesis following (4) should be stricken out. (5) Description of place of confinement such as "the Sheriff's Jail" and address thereof. (6) Strike out one.

APPENDIX 34

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

Authority:	NYSML, Section 130.31.
Principal Purpose:	To provide commanders and law enforcement officials with means by which information may be accurately identified.
Routine Uses:	Your social security number is used as an additional/alternate means of identification to facilitate filing and retrieval.
Disclosure:	Disclosure of your social security number is voluntary.

LOCATION	DATE	TIME	FILE NO.

NAME (Last, First, MI)	ORGANIZATION OR ADDRESS
SOCIAL SECURITY NO. GRADE/STATUS	

SECTION A - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

RIGHTS

The investigator whose name appears below told me that he/she is with the New York National Guard and wanted to question me about the following offense(s) of which I am suspected/ accused: _____

_____.

Before he/she asked me any questions abut the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any questions or say anything.

2. Anything I say or do can be used as evidence against me in a criminal trial or court-martial.

3. (For personnel subject to the State Code of Military Justice) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

-or-

(For civilians not subject to the State Code) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for me in accordance with the law.

4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

COMMENT (Continue on page 4)

WAIVER

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES (if available)	SIGNATURE OF INTERVIEWEE
ORGANIZATION OR ADDRESS AND PHONE	SIGNATURE OF INVESTIGATOR
NAME (Type or Print)	TYPED NAME OF INVESTIGATOR
ORGANIZATION OR ADDRESS AND PHONE	ORGANIZATION OF INVESTIGATOR

NON-WAIVER

I do not want to give up my rights:
_____ I want a lawyer. _____ I do not want to be questioned or say anything.

SIGNATURE OF INVERVIEWEE

ATTACH THIS WAIVER CERTIFICATE OT ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUBJECT SUSPECT/ACCUSED.

SECTION B - RIGHTS WARNING PROCEDURE

THE WARNING

1. WARNING - Inform the suspect/accused of:

a. Your official position.
b. Nature of offense(s).
c. The fact that he/she is a suspect/accused.

2. RIGHTS - Advise the suspect/accused of his/her rights as follows:

a. "Before I ask you any questions, you must understand your rights. You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial or trial by court-martial."

b. (For personnel subject to the State Code) "You have the right to talk privately to a lawyer before, during, and after questioning and have to have a lawyer present with you during questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

-or-

(For civilians not subject to the State Code) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for you in accordance with the law."

c. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign the waiver below."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood and, if necessary, repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question:)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question:)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"
(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect says "Yes," have him/her read and sign the waiver section of the waiver certificate on page 2 of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE:
If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY:

In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights, he/she should be told that such statements do not obligate him/her to answer further questions.

2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving SJA should be contacted for assistance in drafting the proper rights advisal.

NOTE: If 1 or 2 above apply, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initiated by the suspect/accused.
COMMENT (Continued)

GLOSSARY OF DMNA FORMS NO.

NEW YORK STATE MANUAL FOR COURTS-MARTIAL
2002 LISTING OF FORMS

DMNA FORM NO.	**TITLE**
1050	Charge Sheet
1051	Investigating Officer's Report
1052	Subpoena
1053	Subpoena Duces Tecum
1054	Attachment Against Witness for Failure to Appear
1055	Waiver/Withdrawal of Appellate Rights
1056	Record of Trial SCM
1057	Army National Guard Record of Proceedings under Section 130.15 - NJP
1058	Army National Guard Request to Superior to Exercise Article 15 Jurisdiction
1059	Army National Guard Record of Supplementary Action under NYSML, Section 130.15
1060	Affidavit of Service
1061	Procedural Rights Warning Form
1062	Warrant of Apprehension
1063	Air National Guard Notification of Intent to Impose/Recommend NJP
1064	Air National Guard Punishment and Notice of Right to Appeal
1065	Certificate of Mailing or Personal Delivery
1066	Air National Guard Action on Appeal from NJP
1067	Air National guard Notification of Intent to Vacate Suspended NJP
1068	Suspension
1069	Air National Guard Extension of Suspension
1070	Suspension, etc., of NJP Imposed
1071	Warrant of Confinement
1076	Rights Warning Procedure/Waiver Certificate

The forms listed above are authorized for local reproduction

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CHARGE SHEET

I. PERSONAL DATA

---

1. NAME OF ACCUSED (LAST, FIRST, MI) **2.** SSN: **3.** GRADE/RANK **4.** PAY GRADE

---

5. UNIT OR ORGANIZATION **6.** CURRENT SERVICE
a. INITIAL DATE **b.** TERM

---

7. PAY PER MONTH
a. BASIC b. SEA/FOREIGN c. TOTAL
8. NATURE OF RESTRAINT OF ACCUSED
9. DATE(S) IMPOSED

II. CHARGES AND SPECIFICATIONS

---

10. CHARGE: New York State Military Law, Section

SPECIFICATION:

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI) **b.** GRADE **c.** ORGANIZATION OF ACCUSER

---

d. SIGNATURE OF ACCUSER **e.** DATE

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this _____ day of _____, ____, and signed the foregoing charge(s) and specification(s) under oath that he/she is a person subject to the State Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Typed Name of Officer

Organization of Officer

Grade

Official Capacity to Administer Oath
(See R.C.M. 307(b) - must be commissioned officer)

Signature

DMNA Form 1050, Jun 03 (Charge Sheet)

12. On , the accused was informed of the charges against

Typed Name of Immediate Commander | Organization of Immediate Commander

Grade | Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

---

13. The sworn charges were received at hours, at

FOR THE COMMANDER:

Typed Name of Officer | Official Capacity of Officer Signing

Grade | Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY **b.** PLACE **c.** DATE

Referred for trial to the court-martial convened by notation on this charge sheet 20 , subject to the following instructions:

Typed Name of Officer | Official Capacity of Officer Signing

Grade | Signature

---

15. On , 20__, I served a copy hereof on the above named accused.

Typed Name of Trial Counsel | Grade or Rank of Trial Counsel

Signature

FOOTNOTES: **1.** When an appropriate commander signs personally, inapplicable fords are stricken.
2. See R.C.M. 601(e) concerning instructions. If none, so state.

30 October 2003 **DMNA Reg 27-2**

INVESTIGATING OFFICER'S REPORT
(Of Charges Under ML Sect 130.32 and R.C.M. 405, Manual for Courts-Martial)

1a. FROM**:** **b.** GRADE: **c.** ORGANIZATION: **d.** DATE OF REPORT:

2a. TO**:** **b.** TITLE: c. ORGANIZATION:

3a. NAME OF ACCUSED: **b.** GRADE: **c.** SSN: **d.** ORGANIZATION: Co A. 1 Bn, 69 IN **e.** DATE OF CHARGES:

(Mark an X in the appropriate box) YES NO

4. In accordance with ML Sec 130.32 and R.C.M. 405, Manual for Courts-Martial, I have investigated the charges appended hereto (Exhibit 1).

5. The accused was represented by counsel (if not, see 9 below)

6. Counsel who represented the accused was qualified under R.C.M. 405(d), 502(d)

7a. NAME OF DEFENSE COUNSEL: **b.** GRADE**:** **8a.** NAME OF ASSISTANT DEFENSE COUNSEL (If any): **b.** GRADE:

c. ORGANIZATION (If appropriate):

9. (To be signed by accused if accused waives counsel. If accused does not sign, Investigating Officer will explain in detail in Item 21.)

a. PLACE: **b.** DATE:

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED:

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF:
(Mark an X in the appropriate box) YES NO

a. The Charge(s) Under Investigation
b. The Identity of the Accuser
c. The Right Against Self-Incrimination
d. The Purpose of the Investigation
e. The Right to be Present Throughout the Taking of Evidence
f. The Witnesses and Other Evidence Known to me Which I Expect to Present
g. The Right to Cross-Examine Witnesses
h. The Right to have Available Witnesses and Evidence Presented
i. The Right to Present Anything in Defense, Extenuation or Mitigation

11a. The accused and accused's counsel were present throughout the presentation of evidence. (If the accused or counsel were absent during part of the presentation of evidence, complete "b" below. YES NO

---

b. State the circumstances and describe the proceedings conducted in absence of accused or counsel.

NOTE: If additional space is required for any item, enter the additional material in item 21 or on a separate sheet.
Identify such material with the proper numerical and, if appropriate, lettered heading (example: "7c"). Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate box)

NAME	GRADE	ORGANIZATION/ADDRESS	YES	NO

---

b. The substance of the testimony of these witnesses has been reduced to writing and is attached.
13a. The following statements, documents, or matters were considered; the accused was permitted to examine each.

DESCRIPTION OF ITEM LOCATION OF ORIGINAL (If not attached)

Statement of

13b. Each item considered, or a copy of recital or the substance or nature thereof, is attached.
14. There are grounds to believe that the accused was not mentally responsible for the offense(s) or not competent to participate in the defense. (See R.C.M. 909, 916k)
15. The defense did request objections to be noted in this report. (If yes, specify in item 21 below)
16. All essential witnesses will be available in the event of trial.
17. The charges and specifications are in proper form.
18. Reasonable grounds exist to believe that the accused committed the offense(s) alleged.
19. I am not aware of any grounds which would disqualify me from acting as Investigating Officer (See R.C.M. 405(d)(1))
20. I RECOMMEND:
a. TRIAL BY _____ SCM _____ SPCM _____ GCM _____
b. OTHER _____ (Specify in item 21 below)

REMARKS (Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.) Examples of other matters which may be discussed here are: (1) Discussion of evidence, credibility of witnesses and sufficiency of proof; (2) Recommendations to dismiss or change any specification; (3) Statement of any anticipated offenses or of any anticipated difficulties in proving any specification on which trial is recommended; (4) Any other matter which should be known to the convening authority or subsequent reviewing authorities.

21a. TYPED NAME OF INVESTIGATING OFFICER **b.** GRADE **c.** ORGANIZATION

---

d. SIGNATURE OF INVESTIGATING OFFICER **e.** DATE

SUBPOENA TO TESTIFY BEFORE MILITARY COURT

THE PEOPLE OF THE STATE OF NEW YORK

TO:

You and each of you are hereby commanded to be and appear in person before a _____ of the State Military Forces at _____ in the City of _____ on the _____ day of _____2002, at _____ in the _____ to testify and give evidence as a witness in a case then and there to be tried between the People of the State of New York and _____ on the part of said _____ and for failure to obey you will be deemed guilty of an offense against the State and may be punished by such court-martial as provided by law.

Witness my hand, this _____ day of _____2003.

_____
SIGNATURE

_____
GRADE, BRANCH AND UNIT

[President of said Court
[or Summary Court Officer

INSTRUCTIONS: A subpoena may be served by any person eighteen years of age and upwards. Service is made by showing the original subpoena to the witness and delivering a copy thereof to him/her together with witness fees. (See NYRCM 703(e))

The affidavit should state the place of service by giving house number and name or number of the street and name of city, town or village where service is made.

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SUBPOENA DUCES TECUM

THE PEOPLE OF THE STATE OF NEW YORK

TO: _____

You and each of you are hereby commanded to be and appear in person before a

(1) _____ of the State

Military Forces at (2) _____, in the City of _____, State of New York,

on the ____ day of _____ 20___, at _____ in the _____ to testify and give evidence as

a witness in a case then and there to be tried between The People of the State of New York and (3) ____

_____

on the part of said (4) _____ and you are

required to bring with you and there produce (5) _____

_____

_____

and for a failure to obey you will be deemed guilty of an offense against the State and may be punished

by such court-martial as provided by law.

WITNESS MY HAND this _____ day of _____.

(6) _____
Signature

(7) _____
Grade, Branch and Unit

(8) (President of said Court or
(Summary Court Officer

Notes: (1) "GCM," "SPCM," or "SCM." (2) "The Armory, 107th IN, 643 Park Avenue" or other exact location. (3) Grade, name and organization of the accused. (4) Description of books, papers or documents required. (5) Signature of President of Court or Summary Court Officer. (6) Grade and organization of the President or Summary Court. (7) "President" or "Summary Court Officer." Strike out one.

Instructions: A subpoena duces tecum may be served by any person eighteen years of age or upwards. Service is made by showing the original subpoena duces tecum to the witness and delivering a copy thereof to him/her, together with witness fees. (See NYRCM 703(e))

The affidavit should state the place of service by giving house number and name or number of the street and name of city, town or village where service is made.

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ATTACHMENT AGAINST WITNESS FOR FAILURE TO APPEAR

THE PEOPLE OF THE STATE OF NEW YORK

TO (1) _____ Greeting:

WHEREAS, proof has been made to the satisfaction of a (2) _____ duly appointed by (3) _____ Order No. , (4) _____, dated _____ that a subpoena duly issued from said court was duly and personally served on (5) _____ requiring him to attend before said court at a time and place in said subpoena named, to testify and give evidence as a witness in a case then and there to be tried between The People of the State of New York and (6) _____, and that said (5) _____ is a necessary and material witness at said trial and that he has failed and neglected to attend as so required.

Now, you are hereby commanded to attach said (5) _____ and bring him forthwith before the said (2) _____ at (7) _____ _____, in the _____, State of New York to testify and give evidence as a witness in the above-named case and to answer all other matters that may be brought against him for not obeying said subpoena, and have you then and there this writ.

Given under my hand this ———— day of ————————, 20 ——.

(8) _____
Signature

(9) _____
Grade, Branch and Unit
(10) President of said Court or
Summary Court Officer

Notes: (1) "John Doe, a marshal of the court below named," or "the sheriff of the City of New York or county of ————" or "any police officer, constable or marshal or other peace officer of the city, town or village of _____," (2) "GCM" "SPCM" or "SCM." (3) "General" or "Special," (4) Description of Headquarters of Convening Authority. (5) Name of witness. (6) Grade, name and unit of accused. (7) Place of trial, such as armory, 107th IN, 643 Park Avenue, in the City of New York. (8) Signature of President of Summary Court Officer. (9) His grade, branch and unit. (10) Strike one.

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WAIVER/WITHDRAWAL OF APPELLATE RIGHTS
IN GCM AND SPCM
SUBJECT TO EXAMINATION IN THE OFFICE OF THE STAFF JUDGE ADVOCATE

I have read the attached action, dated _____.

I have consulted with _____, my associate defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review --

a. My case will be examined in the Office of the State JA to determine whether the findings and sentence are legally correct and whether the sentence is appropriate.

b. After examination in the Office of the State JA and final action in my case, I may petition the State JA for review under NYSML, Section 130.68(b). Such a petition must be filed within two years after the convening authority took action in my case, unless I can show good cause for filing later.

2. If I waive or withdraw appellate review --

a. My case will not be examined in the Office of the State JA.

b. My case will be reviewed by a judge advocate for legal error, and I may submit, in writing, allegations of legal error for consideration by the JA.

c. After review by the JA and final action in my case, I may petition the State JA for review under NYSML, Section 130.68(b). Such a petition must be filed within two years after the convening authority took action in my case, unless I can show good cause for filing later.

d. A waiver or withdrawal, once filed, may not be revoked.

3. Understanding the above, I hereby waive my rights to appellate review. I make this decision freely and voluntarily. No one has made any promises that I would receive any benefits from this waiver and no one has forced me to make it.

_____ _____
Typed Name of Accused Rank of Accused

_____ _____
Signature of Accused Date

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RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

1a. NAME OF ACCUSED *(Last, First, MI)* **b.** GRADE **c.** UNIT OR ORGANIZATION OF ACCUSED **d.** SSN OR RANK

(We may have this form)

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ARMY NATIONAL GUARD
REQUEST TO SUPERIOR TO EXERCISE ARTICLE 15, JURISDICTION

THRU: (Include Zip Code) TO: (Include Zip Code)

(Check appropriate line and complete narrative)

1. _____ It has been reported _____ The enclosed file indicates that on or

about _____ at _____
(Date) (Place)

NOTE: Insert the name and organization of the individual concerned and the nature of the alleged misconduct in the form of a clear and concise statement of an offense that constitutes conduct punishable under the State Code and the article of the State Code violated.

2. I recommend that you exercise your authority under the provisions of Article 15, in the disposition of this case.

3. Enclosures: (List)

Date Name, Grade and Organization of Commander Signature

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STATE OF NEW YORK)
) ss.:
COUNTY OF)

, being duly sworn deposes and says that deponent is over the age of eighteen years and is not a party in this proceeding. Deponent served a true copy of

_____

in the following manner stated herein, and said person being the proper and authorized person to be served in this proceedings, (the name of said person, complete address, time and date of service is as follows on Line (A).

Line (A)

***1.** By delivering to and leaving with personally _____, known to the deponent to be the same person mentioned and described in the above proceedings as the person to be served.

2. By delivering to and leaving with personally _____, on the _____ M. at the premises mentioned above in Line (A), such person knowing the person to be served and associated with him, and after conversing with him, deponent believes him to be a person of suitable age and discretion, and by mailing a copy of the proceeding herein to said authorized person to the address and at the time stated above in Line (A) which is his last known address, enclosed in a postpaid sealed wrapper in an official depository of the United States Postal Service.

3. By affixing a true copy of the same to the door of the actual place of business, dwelling place or usual place of abode state in Line (A) above and by mailing a copy of the proceeding herein to said person to the address and on the date and time stated on Line (A) above.

Service was made in the manner stated in this paragraph because deponent was unable, with due diligence, to find the proper or authorized person to be served or a person of suitable age and discretion at actual place of business, dwelling place or usual place of abode stated in Line (A) above, having called there at the following times and dates:

Deponent further states that he describes the person actually served as follows:

SEX	SKIN COLOR	HAIR COLOR	AGE (APPROX)
----- Male	----- Black	----- Light	-----
----- Female	----- White	----- Medium	
	-----	----- Dark	

WEIGHT (APPROX) -------- pounds

Other identifying features:

_____
(Print Name Below Signature)

Sworn to before me this

_____ day of _____, 20__.

_____
Notary Public, State of New York
My Commission expires:

*Three means of service listed -
complete applicable paragraph.

PROCEDURAL RIGHTS OF THE ACCUSED
SCM

You have been accused of a violation of the NYSML or other lawful order or regulation duly issued by the State of New York, and you are to be tried by SCM.

You have the absolute right to object to trial by SCM. If you object, the appropriate authority will decide how to dispose of the case. The charges may be referred to a SPCM or GCM, or they may be dismissed, or the offense charged may be disposed of by NJP or administrative measures.

You are not entitled to military defense counsel in this SCM, however, you may obtain your own private counsel to represent you at your own expense.

Except when military exigencies require otherwise, the SCM will grant you an opportunity to consult with military defense counsel before the trial for advice concerning your rights and options, and the consequences of your waiving any rights.

You are entitled to receive a copy of the charge sheet specifying the violations you have been charged with prior to the opening of trial or arraignment.

If, after trial, you are found guilty of any charges, you may submit written matters to the convening authority after sentence is adjudged.

There is no right of appeal from the decision of a SCM, and you are not entitled to military counsel to pursue an appeal.

The reason of your SCM, and the findings and actions taken thereupon will be reviewed by a JA for legal sufficiency to ensure that all proceedings have been properly conducted.

I HAVE RECEIVED AND READ A COPY OF MY RIGHTS IN A SCM.

DATED:

_____

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WARRANT FOR APPREHENSION

TO: Sheriff, County of , Greeting

Whereas, the undersigned has convened a SPCM by Special Order No. , NYARNG, dated , charges having been preferred against , residing at , as set forth on the attached charge sheet (DMNA Form 1050). Now, therefore I command you to apprehend the above names and deliver him into the custody of the military forces of the State at in accordance with the State Code of Military Justice and regulations issued thereunder, for which this shall be his warrant; and I further command you to make return to me of the action under this warrant within two days from the date hereof.

Given under my hand at _____, this _____ day of _____, 20__.

_____
Signature of Convening Authority or Appropriate Commander

_____
Grade, Branch and Unit of Convening Authority or Appropriate Commander

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NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NJP (See Note 1)	Use 8x11 bond sheets if additional space is required and identify by item number on reverse.	DATE TIME (See Note 2)
TO: (Name, Grade, SSAN, Unit, HOR)	FROM: (Name, Grade, Title, Unit)	

1. Preliminary investigation has disclosed that:

In violation of the New York State Military Law, Section(s) _____ (See Note 4).

2. I intend to punish you/recommend to the Commander, , that he punish you See Note 5) under Section 130.15 of the Military Law for the above offense(s), unless you give me satisfactory written evidence that you did not commit the offense(s) or give me satisfactory explanation which shows that you should not be punished.

3. You should realize that this is a serious matter. Although NJP will not give you a record of a court conviction, it may remain in your military records. It may affect your future chances for favorable training opportunities, assignments, promotions and so forth. You have the right to submit any matters in extenuation, mitigation or defense.

4. You do not have to give any information about the offense(s) described above. If you do, it may be used for or against you either in this action or in a trial by court-martial.

5. I will consider any matters in extenuation, mitigation or defense you submit in deciding whether (you committed the offense(s), whether to impose punishment, and if so, what type of punishment)/ whether to recommend the imposition of punishment to the Commander, _____. If I do recommend punishment be imposed, I will forward to the commander any written material you submit. However, you are not entitled to make a further separate presentation to that commander. (See Note 6)

6. You must acknowledge receipt of this notification and reply to this notification by endorsement. Fill in the endorsement on the back of this sheet, attach any documents which you may desire to be considered, and return the endorsement, the documents and this written notification to me no later than _____. If you do not reply or submit matters for my consideration within the required time, this action may nevertheless proceed.

7. Additional information (if any): (See Note 7)

Type name, grade & title of person intending to impose/recommend punishment.	
Signature	Atch

ENDORSEMENT No. 1 TO NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NJP DATED: _____ (by individual concerned)	DATE:
TO: (Title, organization of person sending notification)	FROM: (Name, Grade and Organization)

1. I received this notification on _____.

2. I understand that I may submit matters in extenuation, mitigation or defense, including evidence that I did not commit the offense(s), information which may provide a reason for not imposing or recommending punishment, and which will help to decide what my punishment should be, if any. (Check applicable box)

☐ I do not desire to submit written matters in extenuation, mitigation or defense.

☐ I have attached my written matters.

☐ My written matters in extenuation, mitigation or defense are as follows: (Attach additional sheets if necessary).

3. I understand that I will not have another separate opportunity to submit matters in extenuation, mitigation or defense before a decision is made of whether or not punishment will be imposed._____

Type or print name, grade & SSAN of individual concerned.	_____ Atch
Signature	

(Use this space for intermediate return endorsement, if any, or attach additional sheets, as needed.)

INSTRUCTIONS FOR IMPOSITION/RECOMMENDATION OF NJP

NOTE 1. Strike "Impose" or "Recommend" as applicable.

NOTE 2. State military time Notification is signed.

NOTE 3. The person sending the Notification is the one who is authorized to impose the punishment, or who recommends the imposition of punishment. This same person will sign the Notification at the bottom.

NOTE 4. If the space provided in Item 1 is insufficient for all offenses being considered, insert the following that item: "You committed the offense listed in Attachment 1," and state them in full in a "Lost of Offenses," as Attachment 1 to the Notification.

NOTE 5. Strike "to impose punishment" or "to recommend imposition of punishment," as applicable.

NOTE 6. If authorized to impose punishment, strike all language after the slash. If recommending punishment, strike parenthetical language before the slash.

NOTE 7. Use additional pages, as necessary.

NOTE 8. Strike "impose" or "recommend," as applicable.

INSTRUCTIONS FOR IMPOSITION/RECOMMENDATION OF NJP

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PUNISHMENT, AND NOTICE OF RIGHT TO APPEAL DATE:
ENDORSEMENT NO. _____ TO NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NJP (See Note 1)

TO: (Name, Grade, SSAN, Org, HOR)	FROM: (Name, Grade, Title, Org)

1. You are hereby reduced to the permanent grade of Sergeant (E-4) in the NYANG and as a Reserve of the USAF (but the execution of that portion of this punishment which provides for reduction to sergeant is suspended until _____, at which time, unless this suspension is sooner vacated, it will be remitted without further action). (See Notes 2, 5, and 6)

2. You are hereby reprimanded (admonished) for your misconduct described in the Notification. (See Note 3)

3. I have considered the matters which you submitted in extenuation, mitigation or defense. (Here the commander may give reasons why notwithstanding the matters submitted, punishment is being imposed, or how the matters submitted affected the type or severity of punishment.) (See Note 4)

4. You are advised of your right to appeal from the imposition of NJP in accordance with NYSML, Section 130.15(d), Military Regulation No. 8 and HQ NYANGR 111-9.

5. You are directed to acknowledge receipt of this endorsement and sign, date and return it. Upon receipt of this endorsement you must state whether you appeal. If you appeal, you have the right to submit written matters in extenuation, mitigation or defense to be considered by the appellate authority in support of your appeal. You do not have to give any information about the offense(s) or the punishment. If you do, it may be used for or against you either in this action or in a trial by court-martial. If you neither acknowledge receipt of this endorsement or make an appeal election by _____, it will be presumed you do not intend to appeal and this action may nevertheless proceed. If you have appealed and do not submit matters in support of your appeal by _____, it will be presumed that you do not intend to submit any written matters and your appeal will be forwarded to the appellate authority for action.

6. It is expected that this misconduct on your part will not be repeated and that in the future you will redeem this lapse in your conduct. (See Note 7)

Typed Name, Grade, Title & Org of Officer imposing the punishment _____ Signature	_____Atch
ENDORSEMENT NO. ____ TO NOTIFICATION OF INTENT TO IMPOSE/ RECOMMEND NJP	DATE

TO: (Name, Grade, Title, Org of Officer imposing the punishment)	FROM: (Name, Grade, SSAN, Org of Individual Concerned)

DMNA Form 1064, Jun 03 (Air National Guard Punishment, and Notice of Right to Appeal)

1. Receipt acknowledged on .

2. I (do) (do not) appeal (strike out the inapplicable choice).

3. (Check applicable box)

☐ I don not desire to submit written matters in support of my appeal.

WARNING: YOU HAVE A RIGHT TO BE PRESENT AT NJP PROCEEDINGS UNDER NYSML, SECTION 130.15. HOWEVER, IF YOU FAIL TO APPEAR AT SUCH PROCEEDINGS, YOU WILL BE DEEMED TO HAVE WAIVED YOUR RIGHT TO BE PRESENT AND THE PROCEEDING WILL TAKE PLACE WITHOUT YOU.

☐ I have attached my written matters.

☐ My written matters are as follows: (Continue on additional page if necessary.)

Type or Print Name, Grade, SSAN, Org of Individual Concerned | _____ Atch

Signature

ENDORSEMENT NO. _____ TO NOTIFICATION OFINTENT TO IMPOSE/RECOMMEND NJP

TO: (Name, Grade, Title, Org) | FROM: (Org/Office)

(SEE NOTE 8)

Type or Print Name, Grade, Org of Individual Concerned _____ _____ Atch

Signature

ENDORSEMENT NO. _____ TO NOTIFICATION OFINTENT TO IMPOSE/RECOMMEND NJP

DATE:

TO: (Name, Grade, Title, Org) | FROM: (Org/Office)

Type or Print Name, Grade, Org of Individual Concerned | _____ Atch

Signature

ENDORSEMENT NO. _____ TO NOTIFICATION OFINTENT TO IMPOSE/RECOMMEND NJP

DATE:

TO: (Name, Grade, Title, Org) | FROM: (Org/Office)

Type or Print Name, Grade, Org of Individual Concerned | _____ Atch

Signature

AND RIGHT TO APPEAL

1. This endorsement follows the first endorsement to the original notification and all endorsements follow the proper sequence. It will be Endorsement No. 2 in most cases. It will not be used when an offender validly demands trial by court-martial since the NJP action ceases at that time.

2. The punishment imposed and any remedial action taken at this time should be in item 1. If an unsuspended reduction is imposed, a paragraph in substantially the following format should be added:

> "You are hereby reduced to the permanent grade of (Sergeant) (E-4) in the NYANG and as a Reserve of USAF. Your new date of rank as (Sergeant E-4) is _____."

3. Item 2 is optional. Strike if not used, and strike inapplicable language.

4. If the offender has failed to reply to the Notification of Intent to Impose/Recommend NJP, punishment may be imposed in the following format as appropriate for Item 3:

> "In taking this action, I note that you have failed to respond to the Notification of Intent to Impose/Recommend NJP by _____(Date)_____, as you were required to do (or, you responded but you did not submit any matters in extenuation, mitigation or defense within the required time)."

5. If the action is being terminated without the imposition of punishment because of insufficient evidence, the endorsement should be in substantially the following format as applicable and DMNA Form 1064 will not be used:

a. After considering all the evidence submitted in this action, I do not find sufficient evidence to believe you committed a punishable offense(s).

b. This action is hereby terminated and all references to the commission of the alleged offense(s) and the commencement of this action are hereby ordered to be expunged from your records, and all rights, privileges and property of which you have been deprived or which have been affected by the proceedings to date are hereby restored.

c. You are directed to acknowledge receipt of this endorsement.

6. When the action is terminated before NJP is imposed because the commander wishes to proceed with a court-martial the endorsement will be in substantially the following format and Form 1064 will not be used:

AND RIGHT TO APPEAL (cont'd)

a. After considering all the evidence submitted in this action and the circumstances surrounding the commission of the alleged offense(s), I am terminating this action without imposing NJP, and will instead proceed by court-martial.

b. You will be notified in the near future when the court-martial proceedings are commenced.

c. You are directed to acknowledge receipt of this endorsement.

7. This item is optional with the commander. If not used, strike Item 6.

8. Use these endorsements for commander to wing or group commander, wing or group commander to unit JA and/or to Commander, NYANG, and unit JA to HQ, NYANG/SJA. Add additional sheets in this format if needed.

CERTIFICATE OF MAILING OR PERSONAL DELIVERY NJP ACTION

(No Notes For This Form)

The undersigned certifies as follows (complete and strike as applicable):

1. Notification of Intent to Impose/Recommend NJP delivered by _____ _____ on _____ at_____ to _____

2. Notification of Intent to Impose/Recommend NJP was mailed (by certified mail) on _____ by _____to _____ (bearing certificate # _____.)

3. Notification of Intent to Impose/Recommend NJP was received on _____.

4. Notification of Intent to Impose/Recommend NJP was returned _____ on _____.

5. Punishment and Notice of Right to Appeal Endorsement was personally delivered by _____on_____ at _____ to _____

6. Punishment and Notice of Right to Appeal Endorsement was mailed (by certified mail) on _____ by _____ to _____(bearing certificate # _____.

7. Punishment and Notice of Right to Appeal Endorsement was received on _____.

8. Punishment and Notice of Right to Appeal Endorsement was returned _____ _____ on _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

The undersigned certifies as follows (complete and strike as applicable):

1. Notification of Intent to Vacate (recommend Vacation of) Suspension was personally delivered by _____ on _____ at _____ to _____.

2. Notification of Intent to Vacate (recommend Vacation of) Suspension was mailed (by certified mail) on _____ by_____ to _____ (bearing certificate # _____).

3. Notification of Intent to Vacate (recommend Vacation of) Suspension was returned _____ _____ on _____.

4. Notification of intent to Vacate (recommend Vacation of) Suspension was returned _____ _____on_____

5. Vacation of Suspension was personally delivered by _____ on _____ at _____ to _____.

6. Vacation of Suspension (by certified mail) on _____ by _____ to _____ (bearing Certificate # ___.

7. Vacation of Suspension was received on _____.

8. Vacation of Suspension was returned _____ on _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

The undersigned certifies as follows (complete and strike as applicable):
1. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was personally delivered by _____ on _____ at _____ _____ to _____.

2. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was mailed (by certified mail) on _____ by _____ to _____ _____ (bearing Certificate #_____).

3. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was received on _____ _____.

4. Termination of Action Without (Imposing NJP) (Vacation of Suspension) was returned _____ _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

The undersigned certifies as follows (complete and strike as applicable):
1. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification (if not done in the punishment endorsement) was personally delivered by _____ on _____ _____ at _____ to _____.

2. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification was mailed by (certified mail) on _____ by _____ to _____ (bearing Certificate # _____.

3. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification was received on _____.

4. The Suspension, Mitigation, Remission, Setting Aside of Punishment Notification was returned _____ on _____.

Typed Name, Grade, Org & Title of Certifying Official	Signature

VACATION OF SUSPENSION:

ENDORSEMENT NO. _____TO NOTIFICAITON OF INTENT TO VACATE DATE:
(RECOMMEND VACATION OF) SUSPENDED NJP

TO: (Grade, name, SSAN, Org, HOR of Individual concerned)	FROM: (Title & Org of Commander) Authorized to vacate suspension)

1. I have considered the matters which you submitted in extenuation, mitigation or defense. (I note you failed to reply or submit matters in extenuation, mitigation or defense within the required time.) (See Note 1)

2. The suspension of so much of the punishment as provides for _____
_____
is
hereby vacated. (See Notes 1, 2 and 3)

3. You will acknowledge receipt of this communication by endorsement hereto.

Type Name, Grade, Title, Org.	Signature

ENDORSEMENT NO. _____ TO NOTIFICATION OF INTENT TO VACATE (RECOMMEND VACATION OF) SUSPENDED NJP.	DATE

TO: (Name, Grade, Title, Org.)	FROM: (Name, Grade, SSAN, Org.)

1. Receipt acknowledged.

Type Name, Grade, Title, Org.	Signature

ENDORSEMENT NO. _____ TO NOTIFICATION OF INTENT TO VACATE (RECOMMEND VACATION OF) SUSPENDED NJP.	DATE

TO:	FROM:

(SEE NOTE 4)

Type Name, Grade, Title, Org.	Signature

Type Name, Grade, Title, Org. Signature

DMNA Form 1068, Jun 03 (Vacation of Suspension)

INSTRUCTIONS FOR VACATION OF SUSPENSION ENDORSEMENT TO NOTIFICATION OF INTENT TO VACATE

1. Strike as applicable.

2. If action taken results in execution of a reduction which was previously suspended, a paragraph in substantially the following form should be added:

"Your new date of rank as ( ) _____ will be _____."

3. If no vacation will occur, item 2 should read substantially as follows, as applicable:

"2. After considering all the evidence submitted in this action, I do not find sufficient evidence to warrant a vacation of your suspended punishment. Your suspension termination date remains (_____). (However, because I find you committed the offense(s) alleged, I am extending your suspension termination date until _____.)"

This later alternative may only be used and the suspension period extended, day for day, for each AWOL alleged.

4. Use these additional endorsements as necessary.

(Suspension, etc.) OF NJP IMPOSED (Date) DATE:

(SEE NOTE 1)

---

1. On _____ (I) (my predecessor in command) (the Commander, _____ _____ imposed NJP on you, consisting of _____. (No part) (All) of the punishment (the portion of the punishment relating to _____ _____ was suspended).

---

2. (See Note 2)

Type Name, Grade, Title and Organization of Commander (See Note 3)

Signature

DMNA FORM 1070 - NOTES

1. Insert "SUSPENSION," "MITIGATION," "REMISSION" or "SETTING ASIDE" as appropriate. DMNA Form 1070 should only be used when the remedial action is taken after the date punishment is imposed, but not pursuant to an appeal. If remedial action is taken at the time punishment is imposed, the sample language here may be used on Form 1064, item 1. If the remedial action is taken pursuant to an appeal, the sample language here may be used on Form 1066.

2. Use the following paragraphs as applicable:

"I hereby remit the unexecuted (portion of the) punishment relating to _____ effective as of _____."

"I hereby mitigate the (unexecuted) (portion of the) punishment relating to _____ until ___, at which time, unless the suspension is sooner vacated, it will be automatically terminated." Here, the commander may add an explanation of the effects of suspension and the consequences of vacation, if he/she wishes.

"I hereby set aside the (unexecuted) (portion of the) punishment relating to _____ _____. All rights, privileges, and property of which you have been deprived by the (portion of the) punishment set aside, are hereby restored."

If the remedial action taken involves a reduction, the appropriate date of rank and grade should be stated in the remedial action paragraph.

3. The commander who imposed the punishment, his successor-in-command or superior authority, may take the remedial action.

Clear Form

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

Authority:	NYSML, Section 130.31.
Principal Purpose:	To provide commanders and law enforcement officials with means by which information may be accurately identified.
Routine Uses:	Your social security number is used as an additional/alternate means of identification to facilitate filing and retrieval.
Disclosure:	Disclosure of your social security number is voluntary.

LOCATION	DATE	TIME	FILE NO.

NAME (Last, First, MI)	ORGANIZATION OR ADDRESS
SOCIAL SECURITY NO. GRADE/STATUS	

SECTION A - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

RIGHTS

The investigator whose name appears below told me that he/she is with the New York National Guard and wanted to question me about the following offense(s) of which I am suspected/ accused:

Before he/she asked me any questions abut the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any questions or say anything.

2. Anything I say or do can be used as evidence against me in a criminal trial or court-martial.

3. (For personnel subject to the State Code of Military Justice) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

-or-

(For civilians not subject to the State Code) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for me in accordance with the law.

4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer! present, I have a right to stop answering questions at any time, or speak privately with a lawyer! before answering further, even if I sign the waiver below.

COMMENT (Continue on page 4)

WAIVER

I understand my rights as stated above, including the right to counsel. I am now willing to discuss the offense(s) under investigation at time.

INVESTIGATOR NAME:_____

INVESTIGATOR ORGANIZATION: _____

INVESTIGATOR SIGNATURE:_____

INTERVIEWEE NAME:_____

INTERVIEWEE ORGANIZATION: _____

INTERVIEWEE SIGNATURE:_____

WITNESSES NAME (if available)_____

WITNESSES SIGNATURE (if available)_____

NON-WAIVER

I do not want to give up my rights. I do not want to be questioned or say anything.

INVESTIGATOR NAME:_____

INVESTIGATOR ORGANIZATION: _____

INVESTIGATOR SIGNATURE:_____

INTERVIEWEE NAME:_____

INTERVIEWEE ORGANIZATION: _____

INTERVIEWEE SIGNATURE:_____

WITNESSES NAME (if available) _____

WITNESSES SIGNATURE (if available)_____

ATTACH THIS WAIVER CERTIFICATE OT ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUBJECT SUSPECT/ACCUSED.

SECTION B - RIGHTS WARNING PROCEDURE

THE WARNING

1. WARNING - Inform the suspect/accused of:
- **a.** Your official position.
- **b.** Nature of offense(s).
- **c.** The fact that he/she is a suspect/accused.

2. RIGHTS - Advise the suspect/accused of his/her rights as follows:

a. "Before I ask you any questions, you must understand your rights. You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial or trial by court-martial."

b. (For personnel subject to the State Code) "You have the right to talk privately to a lawyer before, during, and after questioning and have to have a lawyer present with you during questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

-or-

(For civilians not subject to the State Code) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for you in accordance with the law."

c. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign the waiver below."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood and, if necessary, repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question:)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question:)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"

(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect says "Yes," have him/her read and sign the waiver section of the waiver certificate on page 2 of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE:
If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY:

In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights, he/she should be told that such statements do not obligate him/her to answer further questions.

2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving SJA should be contacted for assistance in drafting the proper rights advisal.

NOTE: If 1 or 2 above apply, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initiated by the suspect/accused.
COMMENT (Continued)

Clear Form

Privacy Act Statement

Pursuant to 10 U.S.C. 3013, we request this information. This information will be used to evaluate the facts and circumstances currently under investigation. Your response is not mandatory. However, your failure to respond will require that we evaluate this matter without the benefit of your input. This information will be used in determining the appropriateness of any action, including adverse administrative action. Department of Defense employees, acting within their official capacity, who have a need to know this information, will have access to this information. This information may be used as the basis for adverse personnel action, and documents reflecting this information and such action may be filed in your official personnel files.

Affidavit

I, _____ have read or have had read to me this Privacy Act Statement. I fully understand the contents of the entire statement.

_____
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths, this day of at

_____
(Type name of Person Administering Oath)

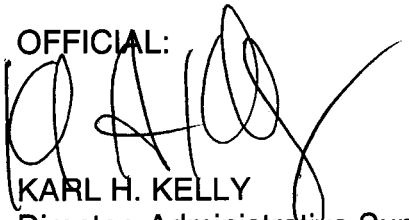
_____
(Signature of Person Administering Oath)
(Locked after CAC signature)

☐ NYSML 131.2 ☐ _____

_____
(Authority to Administer Oath)

The proponent of this regulation of the Legal Affairs Office. Users are invited To send comments and suggested improvements ad changes on DA Form2028 (Recommended Changes to Publications and Blank Forms) directly to The Adjutant General, ATTN: MNLA, 330 Old Niskayuna Road, Latham, New York. 12110-2224.

OFFICIAL:



KARL H. KELLY
Director, Administrative Support

THOMAS P. MAGUIRE, JR.
Major General, NYANG
The Adjutant General

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