

6. COURTS-MARTIAL MISCELLANEOUS

6.A. UNLAWFUL INFLUENCE IN MILITARY JUSTICE PROCEEDINGS

6.A.1. Prohibition

Article 37(a), UCMJ prohibits unlawful influence in military justice proceedings. All convening authorities, SJAs, trial counsel and others members involved in the administration of military justice must be thoroughly familiar with Article 37(a), UCMJ.

6.A.2. Investigation and Response to Reports of Violations of Article 37(a), UCMJ

6.A.2.a. General

Unlawful influence in violation of Article 37(a), UCMJ has been called the “mortal enemy of military justice“ because it tends to destroy both the fact and the appearance of fairness in military justice proceedings. Unlawful influence will not be tolerated in the Coast Guard.

6.A.2.b. Responsibilities

Any Coast Guard member who becomes aware of a suspected Article 37(a), UCMJ violation shall promptly report such information to appropriate authorities, including the command of the suspected violator, trial counsel, military judge, or convening authority of any potentially affected military justice proceeding. Coast Guard commanding officers shall be proactive in recognizing and addressing the potential for violations of Article 37(a), UCMJ. Any commanding officer who becomes aware of a suspected violation within his or her command shall consult with his or her servicing legal office about an appropriate response to the situation, regardless of whether a violation has in fact affected a military justice proceeding. Appropriate responses may include administrative or disciplinary measures. Violations of Article 37(a), UCMJ, may be punishable under Article 98, UCMJ as well as other criminal provisions. This section is not intended to create rights not otherwise provided by law for members who are the subject of military justice proceedings.

6.B. COURT RULES OF PRACTICE AND PROCEDURE

6.B.1. General

RCM 108 authorizes the Judge Advocate General and persons designated by him or her to issue rules of court not inconsistent with the UCMJ and MCM. RCM 801(b)(1) authorizes the military judge to promulgate and enforce rules of court.

6.B.2. Court Rules of Practice and Procedure for General and Special Courts-Martial

The rules set forth in enclosure (16a) are applicable to all general and special courts-martial in the Coast Guard. [See, enclosure (16b) for sample order of court.]

6.B.3. Military Judge

In the exercise of his or her sole discretion the military judge may issue rules of court for any or all courts to which detailed. Such rules may supplement the rules in enclosure (16a) or may modify or revoke any or all rules set forth in enclosure (16a). Absent a court order by the military judge specifically modifying or revoking them, however, the rules set forth in enclosure (16a) are automatically applicable in all general and special courts-martial convened in the Coast Guard.

6.B.4. Detailed Defense Counsel

Rule 2, Court Rules of Practice and Procedure [enclosure (16a)], require detailed defense counsel to provide a copy of the rules to any civilian counsel retained by the accused. Failure to comply with this requirement will have no effect on the applicability of these rules of court to the court-martial, or on the requirements of civilian counsel to abide by them.

6.C. STANDARDS OF CONDUCT AND ABA STANDARDS

6.C.1. Standards of Conduct

As far as practicable and when not inconsistent with law, the MCM, Coast Guard Regulations, COMDTINST M5000.3 (series), and the ABA Model Rules of Professional Conduct and the Code of Judicial Conduct apply to Coast Guard courts-martial. Model Rule of Professional Conduct 3.8 states, "The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecution knows is not supported by probable cause." The comment to that rule states "a prosecutor has the responsibility of a minister of justice and not simply an advocate."

a. In any case in which, after a full development and evaluation of the evidence, trial counsel is of the opinion there is a lack of merit in the case to be prosecuted, and that as a matter of ethical conscience the charge(s) and specification(s) should be reduced or dismissed, he or she shall communicate in writing such belief, together with the reasons therefor, to the convening authority together with a recommendation as to the appropriate disposition of the case.

b. In the event that the convening authority is in disagreement with trial counsel and does not approve the recommendations submitted by trial counsel, the convening authority shall state such disagreement and disapproval in writing, along with the reasons therefor and provide directions to trial counsel.

c. All matters submitted to the convening authority by trial counsel pursuant to this section and the decision of the convening authority shall be attached to the record of trial [ROT] as appellate exhibits.

6.C.2. American Bar Association Standards for the Administration of Criminal Justice

As far as practicable and not inconsistent with law the MCM, and Coast Guard Regulations, COMDTINST M5000.3 (series), and following American Bar Association Standards for the Administration of Criminal Justice are applicable to Coast Guard courts-martial: The Prosecution Function and the Defense Function, The Function of the Trial Judge, and Fair Trial and Free Press. The American Bar Association Standards for the Administration of Criminal Justice are published and periodically updated by the American Bar Association.

6.D. CERTIFICATION AND DESIGNATION OF MILITARY JUDGES

6.D.1. Certification of Military Judges

6.D.1.a. General

Law specialists are certified as military judges pursuant to Article 26(b), UCMJ by The Judge Advocate General of the Coast Guard [TJAG] (General Counsel, Department of Transportation). Law specialists are certified as counsel pursuant to Article 27(b), UCMJ, by the Chief Counsel under authority delegated by TJAG [*see*, 49 CFR, Part 1, Appendix A]. RCM 502(c) and (d) prescribe the qualifications of military judges and counsel.

6.D.1.b. Certification

(1) Factors to be Considered

Applicants will be recommended for attendance at a Military Judge Course and certification based upon the following factors:

(a) Certification as counsel for general courts-martial is required, unless waived. Requests for waiver of this requirement should include information on each requirement for certification [*see*, subparagraph 6.D.1.b(2) below].

(b) Military justice experience must include service as lead counsel in at least five special or general courts-martial, including a least one members case, at least one contested case and combined, at least three contested or members cases (or both). Requests for waiver of this requirement should be accompanied by evidence, such as that specified in subparagraph 6.D.1.b(2)(g), that the applicant has exhibited reasonable courtroom competence and knowledge.

(c) Grade must be at least 0-5, unless waived. Requests for waiver of this requirement should be accompanied by evidence, such as that specified in subparagraph 6.D.1.b(2)(g) that the applicant has the requisite presence and judicial bearing.

(d) The applicant must reasonably expect to be available to serve as a military judge at two to three trials per year for at least one year (and preferably two years) following Military Judge Course attendance and certification.

(e) The applicant's Headquarters Personnel Data Record [PDR] will be reviewed to ensure that there is nothing in the applicant's background that would cast doubt on his or her fitness to serve as a military judge.

(f) Information provided in the application package will be considered, with greatest emphasis on information provided pursuant to subparagraphs 6.D.1.b(2)(e)-(h).

(g) Any relevant information provided from other sources, including but not limited to other military judges' comments will also be considered. Information from other sources may be disclosed to the applicant, upon request.

(h) Diversity in the pool of certified military judges, and travel costs associated with the applicant's billet, are additional factors that will be considered.

(i) The number of applicants to be recommended in a given year will depend on the projected needs of the service for replacements of military judges expected to become unavailable.

(j) No applicant will actually be recommended for certification until successful completion of a Military Judge Course. Applicants are required to submit a copy of their Military Judge Course completion certificate to Commandant (G-LPD) immediately following completion of their course.

(2) Procedures

Coast Guard law specialists desiring to attend a Military Judge Course and be certified as a military judge will make letter application, via the chain of command, and the Chief Trial Judge (Commandant (G-L-4)), to Commandant (G-LPD), no later than 31 January annually. The application will include the following information:

- (a) Format. [*See*, enclosure (26).]
- (b) Education. Include all education after high school (with names of institutions attended and year of graduation) including academic distinctions attained and approximate (if not exactly known) place in class on graduation.
- (c) Military Experience. List all military assignments, including primary duties at each.
- (d) Date(s) designated a law specialist and certified as counsel for general courts-martial.
- (e) Legal Experience other than military justice. Identify all prior legal experience that did not involve military justice. This will include experience gained prior to becoming a member of the Coast Guard, all non-legal assignments significantly law related, and all assignments in legal billets, delineating the primary, nonmilitary justice areas of the law dealt with as required by the billet.
- (f) Military Justice Experience. State, in detail, all past experience with military justice, both prior and subsequent to being designated a law specialist. Be as specific as possible in the number, forum, type, and level of review of records of trial.
- (g) Evidence of requisite knowledge and temperament to be a military judge. Provide this information in the form of opinion by one or more qualified persons having opportunity to form such opinion by courtroom or other observation. The evidence may consist of extracts from one or more OERs, letter(s) or statement(s), endorsement on the letter application, or a combination of these. For each item, the name, qualifications, and opportunity to observe should be stated either in the item itself or separately. Judicial temperament includes, but is not limited to, patience, forbearance to avoid premature decisions, calm demeanor, respect for others, and projection of an air of authority.
- (h) A statement concerning the applicant's expected availability to serve as military judge for the two years following the next Military Judge Course. The statement should cover both the likelihood of remaining in a billet from which the applicant could periodically be spared and any special restrictions on availability within the billet (*e.g.*, any assignment precludes military judge service during the months of July and August).

(i) A PDR Review Authorization enclosure signed and dated by the applicant [*see*, enclosure (26)].

(3) Selection

In consultation with the Chief Trial Judge, Commandant (G-LPD) will review the application for attendance at a Military Judge Course and certification, prepare a recommendation, and forward it to the Chief Counsel. The Chief Counsel may select applicants for attendance at a Military Judge Course who have the requisite basic knowledge, experience, and temperament to be a military judge. Following successful completion of a Military Judge Course the Chief Counsel will forward the application to TJAG recommending certification. Commandant (G-LPD) will notify the applicant when final action is taken and TJAG has signed the Military Judge Certificate of Appointment.

6.D.2. Designation and Assignment of General Court-Martial Military Judges

6.D.2.a. General

General court-martial military judges will be designated by, and located at Coast Guard units, as determined by the Chief Counsel. General court-martial military judges will at all times be assigned to and directly responsible to the Chief Counsel for all purposes. Administrative and logistics support, including office space, office equipment, stationery, and office supplies, telephone and other communication services, access to law library, and clerical assistance, will be provided by the unit where the military judge is located.

6.D.2.b. Officer Evaluation Reports

The Chief Counsel is the assigned supervisor, reporting officer, and reviewing officer for the Chief Trial Judge. [*See*, Article 10.A.2(f)(1)(D), Coast Guard Personnel Manual, COMDTINST M1000.6 (series).]

6.D.2.c. Assignment of Duties

The primary duty of general court-martial military judges is to serve as military judge of general courts-martial. No person may assign them any duties other than that of military judge without prior authorization of the Chief Counsel. The Chief Counsel has determined that general court-martial military judges will be made available for detail as military judge for special courts-martial on a not-to-interfere basis with their primary duty.

6.D.2.d. Leave and Temporary Additional Duty [TAD]

The Chief Counsel shall approve leave and TAD for general court-martial military judges.

6.D.3. Designation of Special Court-Martial Judges

All personnel certified as qualified for duty as military judges by TJAG are designated as part-time special court-martial military judges. Detail of individual judges to specific cases shall be in accordance with the procedures prescribed in paragraph 3.H.1 above.

6.D.4. Procedure for Revocation of Certification of Military Judge or Counsel

[See, section 6.G below.]

6.E. TENURE FOR MILITARY TRIAL AND APPELLATE JUDGES

6.E.1. Military Trial Judges

A military trial judge, including the Chief Trial Judge, is assigned for a minimum of three years, except when he or she:

- a. Assumed the duty as trial judge on a less than three-year basis or requests to be reassigned to other duties, and the Chief Counsel approves such assignment;
- b. Retires or otherwise separates from military service;
- c. Is reassigned to other duties by the Chief Counsel based on the needs of the service in time of war or national emergency;
- d. Is reassigned, as a line officer or within the legal program to another billet, under the normal personnel assignment process based on the needs of the service and without regard to any prior performance of judicial duties; or,
- e. Is temporarily, indefinitely, or permanently suspended from practice as a military trial judge by TJAG [General Counsel, Department of Transportation] for good cause [*see, section 6.G below.*].

6.E.2. Appellate Judges

An appellate judge is assigned to the United States Coast Guard Court of Criminal Appeals for a minimum of three years, except when he or she:

- a. Assumed the duty as appellate judge on a less than three-year basis or requests to be reassigned to other duties, and the Chief Counsel, in consultation with TJAG, approves such assignment;
- b. Retires or otherwise separates from military service;

c. Is reassigned to other duties by the Chief Counsel, in consultation with TJAG, based on the needs of the service in time of war or national emergency;

d. Is reassigned, as a line officer or within the legal program to another billet outside the Washington, DC area, under the normal personnel assignment process based on the needs of the service and without regard to any prior performance of judicial duties; or,

e. Is temporarily, indefinitely, or permanently suspended from practice as an appellate judge by TJAG for good cause [*see*, section 6.G below.].

6.F. CERTIFICATION OF COUNSEL UNDER ARTICLE 27(b), UCMJ

6.F.1. General

In addition to the requirements stated in RCM 502, each attorney is expected to meet the qualifications listed below in order to become certified in accordance with Article 27(b), UCMJ.

6.F.1.a. Designation as Law Specialist

Each attorney serving in a legal program billet is expected to obtain designation as a law specialist. Authority to designate attorneys as law specialists has been delegated to the Chief Counsel. Requests for designation as a law specialist shall be made to the Chief Counsel and shall include the information required by Article 6.A.6, Coast Guard Personnel Manual, COMDTINST M1000.6 (series). Requests may be submitted in writing or may be made online through the Chief Counsel's web site. When requesting certification online, copies of the applicant's law degree and bar license or card must be faxed to G-LPD to complete the application.

6.F.1.b. Basic Lawyer Course

Each law specialist must successfully complete the Basic Lawyer Course conducted by the Naval Justice School or the Basic Judge Advocate Course conducted by the U.S. Army or Air Force. [Note: Designation as a law specialist is not a prerequisite to attend the Basic Lawyer Course.] Waivers of this requirement may be granted on a case-by-case basis and must include a positive recommendation from the SJA requesting the waiver. Waiver requests should also include a listing of all military justice on-the-job training such as assistant counsel at courts-martial, comparable prior trial experience in civilian courts or previous certification in one of our sister services.

6.F.2. Certification

Personnel already designated as law specialists will normally receive Article 27(b), UCMJ certification and be sworn in upon graduation from the Basic Lawyer Course at

the Naval Justice School (or the U.S. Army or Air Force equivalent). Those attorneys who are unable to obtain designation as a law specialist prior to the completion of the Basic Lawyer Course shall seek designation as a law specialist and certification under Article 27(b), UCMJ as soon as the requirements in Article 6.A.6, Coast Guard Personnel Manual, COMDTINST M1000.6 (series) are met.

6.G. PROFESSIONAL SUPERVISION OF MILITARY TRIAL AND APPELLATE JUDGES AND ATTORNEYS PRACTICING IN PROCEEDINGS GOVERNED BY THE UCMJ AND MCM

[See, RCM 109.]

6.G.1. General

Subject to the limitations of Article 37, UCMJ, information as to alleged personal or professional misconduct by Coast Guard attorneys should be reported, together with appropriate supporting information, to the Chief Counsel. For the purpose of this section, “misconduct” is defined as any act or omission that is a violation of an applicable standard of professional responsibility [*see, e.g.*, section 6.C above] or serves to demonstrate the unfitness [*see, RCM 109(c)(2)*] of the respective Coast Guard attorney to perform his or her legal duties. For the purpose of this section, “Coast Guard attorney” is defined as a military trial or appellate judge or an attorney practicing in proceedings governed by the UCMJ and MCM. This section does not affect any other criminal or administrative proceedings arising from the underlying alleged misconduct. This section addresses only the authority of Coast Guard military trial and appellate judges and attorneys to practice as a judge or attorney for the Coast Guard.

6.G.2. Investigation and Discipline of Coast Guard Attorneys

6.G.2.a. General

This section [6.G above] concerns investigation of alleged personal or professional misconduct by and professional supervision of Coast Guard attorneys. These procedures are promulgated pursuant to RCM 109 and are intended to provide supplementary detail to the process set out in that rule. To the extent these processes are determined appropriate by the Chief Counsel or the Judge Advocate General of the Coast Guard [TJAG; General Counsel, Department of Transportation], they may be used to investigate and resolve other issues of Coast Guard attorney professional conduct not associated with military justice.

6.G.2.b. Complaints

The Chief Counsel is designated by TJAG to receive complaints under RCM 109(c)(3). Complaints need not be in any specific form, but, if possible, should be made under oath [*see, RCM 109(c)(3), Discussion*].

6.G.2.c. Initial Action Upon Receipt of a Complaint under RCM 109

The Chief Counsel shall take initial action upon the receipt of a complaint cognizable under RCM 109 as provided by RCM 109(c)(4).

(1) Screening

The process of screening a complaint cognizable under RCM 109 shall be at the discretion of the Chief Counsel. A decision by the Chief Counsel after screening that a complaint does not warrant commencement of an initial inquiry is final and constitutes final agency action.

(2) Notification to TJAG

The Chief Counsel will notify TJAG in all cases before proceeding to an initial inquiry of a military trial or appellate judge. [*See*, RCM 109(c)(4).]

(3) Suspension from Performing Legal Duties Pending Investigation

Notification to TJAG that a complaint has been filed and that an initial inquiry will be conducted shall contain a recommendation as to whether TJAG should temporarily suspend the subject of the complaint (respondent) from performing duties as military trial or appellate judge, if applicable, pending the outcome of further inquiry or investigation. With the exception of military trial or appellate judges, the Chief Counsel may temporarily suspend any Coast Guard attorney from performing legal duties pending further inquiry or investigation.

6.G.2.d. Initial Inquiry under RCM 109

(1) General

The initial inquiry shall follow the procedures for a one-officer standard informal administrative investigation [*see*, Administrative Investigations Manual [AIM], COMDTINST M5830.1 (series)] to the extent practical. All matters associated with the investigation shall be kept confidential. Investigations shall be conducted with reasonable promptness. [*See*, RCM 109(c)(4)-(5).]

(2) Initial Inquiry Officer

The initial inquiry officer shall meet the qualifications of RCM 109(c)(5)(B). The initial inquiry officer shall be assigned by the Chief Counsel and should be senior to the respondent and of similar legal experience (*i.e.* an officer senior to the respondent with current or prior military trial judge experience should be assigned if reasonably available to conduct an inquiry into allegations against a current military trial judge) [*but see*, Article 66(g), UCMJ limitation on appointment of a current sitting appellate judge to investigate another appellate judge]. The initial inquiry officer's written report to the Chief Counsel shall render an opinion as to whether a complaint has been substantiated. A complaint is substantiated upon finding that it is shown by a preponderance of the evidence (*i.e.*, more

likely than not) that the respondent engaged in the alleged acts or omissions constituting professional misconduct or demonstrating unfitness to perform legal duties [*see*, RCM 109(c)(5)(A)]. The initial inquiry officer shall make recommendations for appropriate action in the report to the Chief Counsel.

(3) Due Process

[*See, RCM 109(c)(5)(C).*]

(a) Notice

The initial inquiry officer will notify the respondent that a professional responsibility inquiry under this section is being conducted, the specific nature of the complaint, and the date by which written material in response to the complaint may be submitted. The notice shall advise the respondent of the rights set out in subparagraph 6.G.2.d(3)(b). Failure to submit a written response waives the opportunity to be heard.

(b) Opportunity to be Heard

The respondent shall be accorded the following rights if he or she chooses to appear before or respond to the initial inquiry officer:

- i. To examine any relevant information collected by the initial inquiry officer and to offer written rebuttal to any of that information;
- ii. To present, in writing, relevant facts, statements, explanations, documents, and physical evidence to the initial inquiry officer; and,
- iii. To submit a written argument on his or her behalf.

6.G.2.e. Chief Counsel's Action Following the Initial Inquiry

(1) Additional Inquiry

The Chief Counsel may order additional inquiry.

(2) Complaint Not Substantiated

If the Chief Counsel determines a complaint against a Coast Guard attorney other than a military trial or appellate judge is not substantiated, the complainant and respondent shall be notified that no further action will be taken. If the Chief Counsel determines a complaint against a military trial or appellate judge is not substantiated, the Chief Counsel shall inform TJAG and recommend notification to the complainant and respondent that no further action will be taken [*see*, RCM 109(c)(5)(D)].

**(3) Complaint Substantiated Against a Coast Guard Attorney
Other Than a Military Trial or Appellate Judge**

In response to a substantiated complaint against a Coast Guard attorney other than a military trial or appellate judge, the Chief Counsel may take no action, order the Ethics Commission [*see*, subparagraph 6.G.2.f below] to consider the complaint and render an opinion and recommendation, take professional disciplinary action, or refer the matter to the appropriate state bar of admissions for disposition. The Chief Counsel shall assure the respondent was afforded the rights set out in subparagraph 6.G.2.d(3) on the full record on which the Chief Counsel takes action, if such action is adverse to the respondent. Professional disciplinary actions include: verbal counseling or a direction to supervising officers to verbally counsel; oral or written (nonpunitive) censure; temporary, indefinite, or permanent suspension from practice in courts-martial; and revocation of Article 27(b) certification.

**(4) Complaint Substantiated Against a Military Trial or Appellate
Judge**

If the Chief Counsel determines a complaint against a military trial or appellate judge is substantiated, the Chief Counsel shall inform TJAG and recommend appropriate action from the options below [*see*, RCM 109(c)(5)(D)]. The Chief Counsel may take no action; take minor professional disciplinary action; order the Ethics Commission to consider the complaint and render an opinion and recommendation; or forward the report, with an endorsement on the findings and recommendations to TJAG. Minor professional disciplinary action is defined as verbal counseling or a direction to supervising officers to verbally counsel or provide oral or written (nonpunitive) censure. The Chief Counsel may approve, disapprove, or modify any findings and recommendations when forwarding the report. Prior to taking action other than to dismiss the complaint, the Chief Counsel shall ensure the respondent was afforded the rights set out in subparagraph 6.G.2.d(3) on the full record on which the Chief Counsel takes an action adverse to respondent or forwards a recommendation to TJAG. [*See*, RCM 109(c)(6)(D).] Only TJAG may take other than minor professional disciplinary action against a military trial or appellate judge pursuant to RCM 109(c)(6) [*see*, subparagraphs 6.G.2.g below and 6.E.1 above]. A copy of the Chief Counsel's decision or recommendation to TJAG shall be provided to the respondent.

6.G.2.f. Ethics Commission
[*See*, RCM 109(c)(7).]

(1) Membership

The Ethics Commission should normally consist of the Deputy Chief Counsel and two legal program Office Chiefs selected by the Chief Counsel. Members of the Ethics Commission should normally be senior to the respondent and of similar legal experience [*but see*, Article 66(g), UCMJ limitation on appointment of a current sitting appellate judge to investigate another appellate judge]. An initial inquiry officer may not be appointed to an Ethics Commission in the same case. [*See*, RCM 109(c)(7)(A).]

(2) Duties

Normally, the Ethics Commission considers a complaint and provides an opinion whether the respondent's acts or omissions constitute professional misconduct or demonstrate unfitness to perform legal duties. If TJAG or Chief Counsel orders the Ethics Commission to conduct additional inquiry into the complaint, the Commission shall generally follow the procedures for a standard informal administrative board of investigation as contained in the Administrative Investigations Manual, COMDTINST M5830.1 (series). Before making any finding or recommendation regarding the alleged misconduct or unfitness, the Ethics Commission shall ensure the respondent was provided a complete copy of all information the Ethics Commission will consider in making a finding or recommendation. The Ethics Commission shall provide the Chief Counsel, or TJAG, via the Chief Counsel written findings and opinions concerning the alleged misconduct or unfitness. Dissenting opinions, if any, shall be included in providing a report to the Chief Counsel. The Ethics Commission shall identify those applicable provisions of the American Bar Association's Code of Professional Responsibility, Code of Judicial Conduct, Manual for Courts-Martial, or other standard of conduct drawn into question, and state whether, under the circumstances, the applicable standards were violated, with supporting rationale. If misconduct or unfitness to perform duties is found, the Ethics Commission shall recommend an appropriate disposition to the Chief Counsel, or TJAG via the Chief Counsel. [See, RCM 109(c)(7)(B).]

6.G.2.g. TJAG Action

[See, RCM 109(c)(6).]

Upon receipt of a report of inquiry with the Chief Counsel's endorsement and recommendation, pursuant to subparagraph 6.G.2.g.(5), TJAG may: dismiss the complaint; order additional inquiry; return the matter to the Chief Counsel or Ethics Committee for additional consideration by the same or different members; refer the matter to the appropriate state bar for disciplinary action; or take professional disciplinary action. Professional disciplinary actions include: verbal counseling or a direction to supervising officers to verbally counsel; oral or written (nonpunitive) censure; temporary, indefinite, or permanent suspension from practice in courts-martial or assignment as a military trial or appellate judge; and/or revocation of Article 26(b) and 27(b), UCMJ certifications. [See, RCM 109(c)(6)(B).] Prior to taking professional disciplinary action under this subparagraph, TJAG shall find in writing that respondent engaged in professional misconduct or is otherwise unfit for continued service as a military judge, and that such misconduct or unfitness is established by clear and convincing evidence. [See, RCM 109(c)(6)(C).] Prior to taking any action other than to dismiss the complaint, TJAG shall ensure the respondent was afforded the rights set out in subparagraph 6.G.2.d(3) above on the full record on which TJAG makes a decision. [See, RCM 109(c)(6)(D).]

6.G.2.h. Professional Disqualification

Notwithstanding the provisions of this section, a temporary, indefinite, or permanent suspension or withdrawal of certification of any Coast Guard attorney under Article 26(b) or (27)(b), UCMJ may be ordered by the Chief Counsel, with notification to TJAG, if, after

compliance with subparagraph 6.G.2.d(3) above, a Coast Guard attorney becomes professionally disqualified from practice through due process of law: for example, because of the attorney's disbarment by a state or federal court, or because of his or her suspension by the Judge Advocate General or another armed service. TJAG notification or action is not a prerequisite to the Chief Counsel's action because the member will, by virtue of the loss of his or her license to practice, be unqualified for TJAG certification.

6.G.2.i. Contempt Proceedings

Suspension or withdrawal of certification under subparagraphs 6.G.2.e(3) above or 6.G.2.g above is separate and distinct from any matter involving contempt, as provided by RCM 809, except to the extent that the same conduct may be relevant to both proceedings.

6.H. DESIGNATING AND CHANGING OF PLACE OF CONFINEMENT

Commandant (G-W) has been authorized to issue regulations as required, relating to the designation of, and change in, place of confinement for Coast Guard prisoners [*see*, Chapter 8.F., Coast Guard Personnel Manual, COMDTINST M1000.6 (series)]. Commandant (G-W) may designate places of confinement and, when necessary, approve transfer of prisoners including transfer of prisoners between DoD confinement facilities and Federal penal or correctional institutions.

6.I. SUBMITTING PROPOSED CHANGES TO THIS MANUAL

Proposals for changes to this Manual are welcome from any interested source. Proposals with justification, if appropriate, may be submitted at any time to:

Commandant (G-LMJ)
U.S. Coast Guard
2100 2nd St., SW, Room 3404
Washington, DC 20593-0186
facsimile: (202) 267-4993.

6.J. SUBMITTING PROPOSED CHANGES TO THE MANUAL FOR COURTS-MARTIAL [MCM]

6.J.1. Joint Service Committee [JSC]

6.J.1.a. JSC Mission

The President of the United States prescribed the current Manual for Courts-Martial [MCM]. The President in 1984 directed the Secretary, Department of Defense [DoD] to revise and update the MCM annually. [See, enclosure (25), the DoD Directive 5500.17 governing such revision.] The JSC, via the DoD General Counsel, is the organization primarily responsible for fulfilling this responsibility. Each year, the JSC performs an annual review of the MCM and proposes changes to DoD for the President's consideration. The JSC also conducts studies on military justice issues as needed. The JSC is distinct from the Code Committee, a separate body that reviews the UCMJ annually and submits a report to Congress and the Secretary DoD, pursuant to Article 146, UCMJ. In short, the JSC's focus is on the MCM while the Code Committee's focus is towards the statutory UCMJ. Necessarily, there is some overlap. For a brief compendium of the JSC's role in drafting the MCM since 1969, see Appendices 21 and 22 of the MCM.

6.J.1.b. JSC Composition

The JSC is composed of two entities: the Voting Group and the Working Group.

(1) Voting Group.

The Voting Group consists of five senior judge advocates, one each from the Navy, Marine Corps, Army, Air Force, and Coast Guard. A non-voting senior judge advocate from the DoD General Counsel's office consults with and advises the Voting Group. The Chief, Office of Military Justice (G-LMJ) is the Coast Guard Voting Group representative. The Voting Group's primary function is to review the MCM annually and submit a proposed Executive Order containing amendments to the MCM for the President's signature. The Voting Group Chair rotates among the Service judge advocates biennially.

(2) Working Group

The Working Group consists of representatives of each of the services and includes a non-voting member from the Court of Appeals for the Armed Forces [CAAF]. The Working Group assists the Voting Group, mainly by researching and drafting proposals adopted by the Voting Group. The JSC Working Group representative is the Senior Government Appellate Counsel.

6.J.2. Submitting Suggestion for Change to the MCM

6.J.2.a. Coast Guard Submissions to JSC

Annually, the Chief Counsel submits proposed changes to the MCM to the JSC. The ideas for such proposed changes may originate with the staff of the Commandant (G-LMJ), but often are submitted by other interested parties from throughout the Coast Guard. Although there are no formal guidelines for the submission of a proposal, a well-researched and drafted proposal stands a better chance for submission to the JSC. Proposals from outside Commandant (G-LMJ) (preferably through the chain of command), will be reviewed, studied, and coordinated within the Coast Guard, as appropriate. If the Chief Counsel deems the proposal warrants consideration by the JSC, it will be raised at the next JSC meeting and placed in a pool with all other proposals. The Voting Group will study the proposal. If a majority of the Voting Group finds that the proposal warrants further consideration, it will place the proposal in the Annual Review for the year. If not, the proposal will not be considered further. The JSC annual review of the MCM commences on 1 May of every year. Proposed MCM changes should be received in Commandant (G-LMJ) in time to be staffed before 1 May. Submissions are welcome anytime, but, if not placed on the JSC's agenda by May, may have to wait until the next annual cycle (the following May).

6.J.2.b. JSC Seeks Public Comment

Once the Voting Group has placed a proposal on its agenda, it will prioritize and modify the proposal as needed and place it into a draft Executive Order containing all of the year's proposed changes. Each May, the JSC publishes the draft Executive Order in the Federal Register to solicit public comment regarding the changes. The JSC then schedules and conducts a public hearing session in Washington, DC, to gather additional public comment. (For a list of historical JSC Federal Register publications, perform a LEXIS search for "joint service committee" in the Federal Register database.)

6.J.2.c. JSC Proposes Executive Order

Once the public comment period closes, the JSC examines all comments received and decides whether and/or how to incorporate the comment into each proposed MCM change. The JSC has committed to provide individual or public feedback through the Federal Register on the public comments received. When this process is complete, the JSC finalizes the proposed Executive Order and forwards it to DoD's General Counsel. The General Counsel sends the proposed Executive Order for formal DoD coordination. Thereafter, DoD forwards it to the Office for Management and Budget [OMB]. OMB coordinates review of the proposed Executive Order throughout the executive branch, primarily a formal coordination by the Department of Justice [DoJ]. When coordination is complete, the proposed Executive Order is forwarded to the President for signature. Once the President signs the Executive Order, it becomes a part of the MCM, although each proposal contained within the order may have its own effective date. (For a list of historical Executive Orders amending the MCM, perform a LEXIS search for "Manual for Courts-Martial" in the Presidential Documents database.)

6.J.2.d. Deliberate Process

Because DoD or the President may modify the proposed Executive Order after it leaves the JSC, the final Executive Order (*i.e.*, MCM change) may differ substantially from that published in the Federal Register. Also, it is important to bear in mind that the rulemaking procedures of the Administrative Procedures Act [APA], 5 U.S.C. 553(a)(1), do not apply to changes in the MCM (there are, however, some similarities with APA procedure). Finally, due to the significant number of steps in the process and the extensive coordination of proposed MCM changes, the process usually takes a two years to complete.

6.J.2.e. Typographical Errors

Minor typographical errors in the MCM do not require Presidential action to fix. Any reader finding one in the MCM is invited to advise Commandant (G-LMJ) so that the nonsubstantive typographical errors may be fixed in the next printing of the MCM.

6.J.3. UCMJ changes

Proposals to change the UCMJ follow a different path. If a majority of the Voting Group approves a proposal to change the UCMJ, the JSC will forward the proposal to DoD for submission to Congress. DoD will likely send all statutory changes proposed by the JSC to the Code Committee for review. Ultimately, however, the JSC has no control over the process of proposing a bill and lobbying for its passage into law, and the JSC does not solicit public comment or hold public hearings on proposed legislative changes. The JSC addresses statutory change issues only incidentally to its charter to review the MCM. Legislative functions are within the sole purview of Congress. UCMJ changes are most frequently found in the “Military Justice” section of each year’s National Defense Authorization Act (NDAA). To review military justice items that Congress is considering, see www.defenselink.mil/dodgc/lrs/.

