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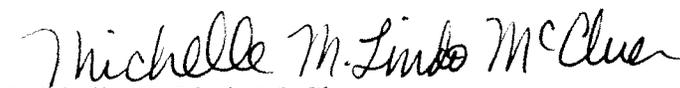
August 5, 2010

Prof. Stephen A. Saltzburg
The George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

Dear Prof. Saltzburg,

In light of the current ABA discussion of a proposal concerning the Model State Code of Military Justice and Model State Manual for Courts-Martial for National Guard units under state control, the National Institute of Military Justice (NIMJ) took a look at the documents. At NIMJ's request, San Diego practitioner Bridget J. Wilson and NIMJ advisor John A. Carr studied the matter. Bridget provided arguments in favor of adopting a Model Code for state Guard units, while John presented points against adopting such a code. Both contributors raised points to consider regarding specific provisions in the proposed Code and Manual, should they be adopted. While NIMJ takes no official position on whether to adopt these documents, we offer these thoughts to facilitate analysis and discussion.

Thank you for the opportunity to provide analysis of the proposed Model State Code of Military Justice and the Model State Manual for Courts-Martial. If NIMJ can be of further assistance in this matter, please do not hesitate to contact us. Please feel free to distribute.


Michelle M. Lindo McCluer
Director

National Institute of Military Justice Analysis of the Model State Code of Military Justice and Model State Manual for Courts-Martial for National Guard units.

Pro—Bridget Wilson

The Model State Code of Military Justice and Model State Manual for Courts-Martial propose a common structure and language for state and federal military justice. These documents are a step forward in abandoning the longstanding (and incorrect) view of the National Guard as the poor stepchild of the Army and Air Force. The extensive use of the National Guard in federally funded Title 32 missions and mobilizations only highlights the desirability of reform of state military justice law. Since the events of September 11, 2001, National Guard troops have frequently “crossed over” from state active duty or Title 32 to Title 10 status in the course of the mobilization to or de-mobilization from purely federal duties. A state military justice system that more closely resembles the federal system will assist National Guard judge advocates in their transitions to and from state and federal missions.

This version of the Model State Code and Model State Manual may need ongoing revision to address any concerns raised by the states. That does not mean it cannot be recommended as an important tool to assist the states in reform of their military justice law and procedure. At least six states have already adopted the Model State Code with modifications.

The most important consideration in reviewing the Model State Code is that it is not compulsory; there is no mandate from the federal government for the states to adopt all or any of the Model State Code and Manual. This is no more and no less a mechanism to update the states’ administration of military justice. In many states the military justice law has not been reviewed and revised in decades. This also is an opportunity for the National Guard Bureau and the states, with the contributions of interested members of the public, to augment the efforts to modernize state military justice. The Model State Code and Manual are, by definition, works in progress. The Model State Code is a roadmap for that reform.

The operations tempo for the National Guard has only increased since the beginning of the Global War on Terrorism. But operations tempo is not the only reason to create state military justice law that is more consistent from state to state. There is a mutual practical benefit in having a similar legal structure for Guard judge advocates and other legal personnel who will practice in the federal system during Title 10 mobilization. The Guard is, like every part of the military, more and more a part of joint operations. When Guard troops are not serving in active duty (full time) missions whether under Title 32 or Title 10, they train. And, they must meet federal standards of competency in all areas of operations, including military justice.

Prior to the restructuring of the U.S. Armed Forces after the end of conscription and the creation of the All Volunteer Force, the National Guard of the States functioned primarily as a state entity. But, by the time of the U.S. intervention in Iraq, and the ongoing operations of OIF and OEF, more than 40% of the Army’s combat arms units were in the National Guard, only one example of the increased dependency on this reserve component. Until the current Global War on Terrorism, the National Guard had not been called up in such large numbers since the Korean conflict. The combination of those two factors and the extensive use of the National Guard in Title 32 status for federally-funded state missions make the adoption of a more consistent Military Code and Manual for Courts-Martial for the states a rational option.

Over the past three decades, Guard has become a more national, not regional, entity. It is not at all uncommon for Guard soldiers to transfer their duties from one state to another. The Guard is no longer full of hometown soldiers who stay in one state. National Guard members from one state may drill in locations outside their own state with some frequency. Some Guard structures are made up of units in different states.

Some states have included military justice provisions that provide little or no punishment for crimes where another state might provide for imprisonment. There remain several states or territories that have no military justice law or no active military justice system. This does nothing to create confidence in a military justice system that promptly, accurately and fairly administers justice. When one state can court-martial and incarcerate soldiers but another state has no system of military justice, it creates a negative perception of how discipline is carried out among the states. It leaves the appearance that military justice in the states is completely arbitrary.

Although National Guard units are state assets, most National Guard funding comes from the federal government. In addition, National Guard judge advocates (as do all Guard members) receive their training in the U.S. Army or Air Force. Their instruction in virtually all areas of military law, including military justice, is the same as any other judge advocate. Although Guard members are, in part, a state asset, all Guard members have a dual status. In general, National Guard “drills” (the monthly duty) are paid for with federal funds. The Annual Training that Guardsmen receive, as with their counterparts in the Reserve, is paid for with federal funds. Although Title 32 duties are “state” duties, these are missions paid for with federal funds. In some circumstances, Title 32 soldiers who are a part of the Active Guard and Reserve (AGR) can be and are assigned to duties in Title 10 units.

The “portability” of knowledge enhanced by more similar state military law would reflect how judge advocates are used in the National Guard and in joint operations. Although it would benefit active duty judge advocates who deal with Guard courts-martial and also active duty judges who might be assigned to Guard courts-martial, the incorporation of a Model State Code and Manual will assist National Guard judge advocates in their federal duties. First, these National Guard judge advocates have been called up in great numbers for the Global War on Terrorism and other missions. Those judge advocates, having received training in the federal system, often spend their reserve duty in state systems that may little resemble the federal system of military justice. Applying similar law and procedure will only make Guard judge advocates better, more efficient practitioners in both the state and federal systems.

Adopting a similar Manual for Courts-Martial, Model Code and the Military Rules of Evidence gives the states the opportunity to use federal military jurisprudence as a guide for interpretation. Again, the states could interpret the law in a state context, but will have a well-developed body of law to assist in the administration of military justice. Well-tested military rules already exist and can be easily modified and applied to address the needs of the states. In addition, the Military Rules of Evidence (MRE) mirror the Federal Rules of Evidence (FRE).

The Model State Code and Manual provide an outline and format for bringing the state military justice codes into closer alignment. Because the Model State Code cannot be required of the states, it is simply presented as a benefit to them. It can provide the states with proceedings that are relatively consistent from state to state, which is important with an increasingly mobile population of soldiers and airmen. It gives judge advocates in the National

Guard a system of military justice that parallels more closely the federal system and makes their transition from federal to state status simpler. Because there is no requirement that the states adopt the Model State Code or Manual in their entirety, each of the states can tailor these models to the needs of the state. Finally, the full or partial adoption of the Model State Code and Manual that parallel the federal UCMJ and MCM may allow state military judge advocates to reference the highly developed jurisprudence in federal military justice as they confront the increasingly more complex legal issues of our time.

Con John Carr

1. Are these measures necessary? Has any state TAG, commander, or JAG requested greater authority or structure in order to maintain good order and discipline within the unit? The draft ABA proposal is short on specifics as to the precise mischief sought to be remedied. For example, it is difficult to see how the course of justice could be frustrated in the case of criminal conduct by a person in Title 32 status since general state criminal law (and procedure) would be available in any event.
2. The structure and content of the Model Code fails to appreciate that Guard units are fundamentally state assets – comprised of members from that state, who work for that state, and who are familiar the laws, procedures and personnel of that state. That familiarity and allegiance is present from the commander, to the local JAG, to the lowest enlisted member (who may be a prominent businessperson or lawyer).
3. Supporters of this Model Code have cited to disparities in the way various states treat a given case as a justification to adopt a uniform Code. However, it is less than clear that the reason for any inequality in the treatment of a given case is based upon differences among the states’ military codes. Instead, under any system, commanders ultimately have discretion to charge or not to charge, and to administer justice at a level of their choosing. In the absence of further evidence, one may argue that any inequalities lie in the commander’s decision not to use certain authority, as opposed to not having the authority to begin with.
4. It has been suggested that adoption of the Model Code would alleviate confusion for Guard troops who are ordered to Title 10 status and thus made subject to the UCMJ. In the absence of any evidence that such confusion exists (since the UCMJ requires all US military personnel to be briefed on the punitive articles, one questions the significance of this rationale.
5. Similarly, supporters of the proposal cite the benefit of uniformity among the state codes. This rationale would seem to benefit not the individual state units, but instead, active duty JAGs who are unfamiliar with the various states’ codes. Since most Guard JAGs practice law in the state civil and criminal systems, and are also familiar with the state’s military code, one may question how the adoption of the Model Code helps the individual state Guards.

There are several provisions of the Model State Code and Manual that likely will be the

subject of discussion and disagreement. Among these are the following:

Jurisdiction

Article 2 of the Model State Code that would allow prosecution of “non-military” crimes which have a military “nexus” in state courts. The “nexus” test was abandoned in federal military law as a result of *Solorio*. It is questionable whether the states will want to adopt the complex analysis of a nexus test.

Views on Rules of Evidence

Adoption of the MRE could conflict with some state rules of evidence or substantive law.

A number of states have adopted a form of the FRE in their civilian courts, and many Guard judge advocates are familiar with the FRE in their civilian practices. The use of state rules of evidence would likely require a state to create a separate body of state military evidence rules unnecessarily. The states need not reinvent the wheel.

The applicable rules of evidence for a state proceeding of a NG troops in Title 32 status should be the state’s rules of evidence, not the Federal Rules of Evidence, as those are the rules with which state practitioners will be familiar.

Adoption of U.S. Code

The Model Code permits states to prosecute violations not only of state civil law and the Model Code, but also violations of the laws of the United States. This provision seems to be a significant, and improper, expansion of the applicable laws which a state could enforce, with perhaps equally significant constitutional and policy implications. State legislators and executive officials will carefully consider whether to yield to federal norms where Congress has not so required.

Personal Jurisdiction

Given the complexity of the pre-*Solorio* service-connection jurisprudence, one wonders whether it is wise to return to the *O’Callahan/Relford* standards. One of the benefits of the Model Code is to bring simplicity to the proceedings. Some states may wish to be more aggressive than others in protecting grand and petit jury rights; uniformity may be impossible to achieve as a result, but at least state authorities should focus carefully on the policy implications in light of, among other things, the demands of their state constitution.

Offenses

Should the Model Code refer to non-military-specific offenses? While the member is in Title 32 status, and therefore still in CONUS, the member will be subject to the state criminal laws of the jurisdiction in which the conduct occurs. (Of course, active duty members on Title 10 status may be overseas, which makes the inclusion of non-military specific crimes in the UCMJ necessary and warranted.) One may also question if a state commander should be given such broad and potentially vague authority to prosecute offenses such as Articles 133 (conduct unbecoming an officer) and 134 (general article).

Appellate Procedure

In states with few judge advocates, it may not be practical to set up an expansive appellate structure. Cost is a factor in this analysis, as are the difficulty of providing conflict-free

counsel and advice to reviewing authorities. One may also question the necessity or wisdom of each state supreme court hearing appeals from courts-martial, given the unique nature of the legal substance and procedure. This may be a long-term project, addressed in part by a joint initiative of the National Guard Bureau and the states to link Guard and reserve judge advocates with Regular Component defense services and expand the base of available counsel.