

**Part IV**  
**PUNITIVE ARTICLES**  
**(Statutory text of each Article is in bold)**

**Discussion**

Part IV of the Manual addresses the punitive articles, 10 U.S.C. §§ 877-934. Part IV is organized by paragraph beginning with Article 77; therefore, each paragraph number is associated with an article. For example, paragraph 60 addresses Article 120, Rape and sexual assault generally. Article 77, Principals, and Article 79, Lesser included offenses, are located in the punitive article subchapter of Title 10 but are not chargeable offenses as such.

Other than Articles 77 and 79, 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. Maximum punishment
- e. Sample specifications

Presidentially prescribed lesser included offenses, as authorized under Article 79(b)(2), are established in Appendix 12A. For offenses not listed in Appendix 12A that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative. Practitioners are advised, to read and comply with *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

Sample specifications are provided in subparagraph e of each paragraph in Part IV and are meant to serve as a guide. The specifications may be varied in form and content as necessary.

R.C.M. 307 prescribes rules for referral of charges and for drafting specifications. The discussion under that rule explains how to allege violations under the code using the format of charge and specification; however, practitioners are advised to read and comply with *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

The term “elements,” as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President’s authority which increases the maximum permissible punishment when specified aggravating factors are pled and proven.

The prescriptions of maximum punishments in subparagraph d of each paragraph of Part IV must be read in conjunction with R.C.M. 1003, which prescribes additional punishments that may be available and additional limitations on punishments.

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**1. Article 77 (10 U.S.C. 877)—Principals**

*a. Text of statute.*

**Any person punishable under this chapter who—**

**(1) commits an offense punishable by this chapter, 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 chapter;**

**is a principal.**

*b. Explanation.*

(1) *Purpose.* Article 77 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 one who commits it directly, and may be punished to the same extent.

Article 77 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, or 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).

¶1.b.(2)(b)

Article 78

(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 or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. See the parentheticals in the examples in subparagraph 1.b.(2)(a) of this paragraph. 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 a 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 subparagraph 1.b.(2)(a) or (b) have been met.

(4) *Parties whose intent differs from the perpetrator's.* 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 an "other party" to 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 who 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, of murder. (See also paragraph 5, Conspiracy, 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. Article 78 (10 U.S.C. 878)—Accessory after the fact**

a. *Text of statute.*

**Any person subject to this chapter who, knowing that an offense punishable by this chapter 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 UCMJ 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 Article 92. See paragraph 18. If the offense involved is a serious offense, and the accused does anything to conceal it, failure to report it may constitute the offense of misprision of a serious offense, under Article 131c. See paragraph 84.

(3) *Offense punishable by the UCMJ.* The term “offense punishable by this chapter” in the text of the article means any offense described in the UCMJ.

(4) *Status of principal.* The principal who committed the offense in question need not be subject to the UCMJ, but the offense committed must be punishable by the UCMJ.

(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 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. Maximum punishment.* Any person subject to the UCMJ who is found guilty as an accessory after the fact to an offense punishable under the UCMJ shall be subject to the maximum punishment authorized for the principal offense, except that in no case shall the death penalty nor more than one-half of the maximum

confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

*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 Uniform 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 \_\_\_\_\_.

**3. Article 79 (10 U.S.C. 879)—Conviction of offense charged, Lesser included offenses, and attempts**

*a. Text of statute.*

**(a) IN GENERAL.—An accused may be found guilty of any of the following:**

**(1) The offense charged.**

**(2) A lesser included offense.**

**(3) An attempt to commit the offense charged.**

**(4) An attempt to commit a lesser included offense, if the attempt is an offense in its own right.**

**(b) LESSER INCLUDED OFFENSE DEFINED.—In this section (article), the term “lesser included offense” means—**

**(1) an offense that is necessarily included in the offense charged; and**

**(2) any lesser included offense so designated by regulation prescribed by the President.**

**(c) REGULATORY AUTHORITY.—Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense.**

*b. Explanation.*

(1) *In general.* Article 79 contains two provisions concerning notice of Lesser included offenses: (1) offenses that are “necessarily included” in the charged offense in accordance with Article 79(b)(1); and (2) offenses designated as Lesser included offenses by the President under Article 79(b)(2). Each provision sets forth an independent basis for providing notice of a lesser included offense.

(2) “*Necessarily included*” offenses. Under Article 79(b)(1), an offense is “necessarily included” in a charged offense when the elements of the lesser offense are a subset of the elements of the charged offense, thereby putting the accused on notice to be prepared to defend against the lesser offense in addition to the offense specifically charged. A lesser offense is “necessarily included” when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, wrongful appropriation as a lesser included offense of larceny);

(b) All of the elements of the lesser offense are included in the greater offense, but at least one element is a subset by being legally less serious (for example, unlawful entry as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are “included and necessary” parts of the greater offense, but the mental element is a subset by being legally less serious (for example, voluntary manslaughter as a lesser included offense of premeditated murder).

(3) *Offenses designated by the President*. Under Article 79(b)(2), Congress has authorized the President to designate Lesser included offenses by regulation.

(a) The President may designate an offense as a lesser included offense under Article 79(b)(2), subject to the requirement in Article 79(c) that the designated lesser included offense “shall be reasonably included in the greater offense.”

(b) Appendix 12A sets forth the list of Lesser included offenses designated by the President under Article 79(b)(2).

(c) The President may include a “necessarily included offense” in the list of offenses prescribed under Article 79(b)(2), but is not required to do so. A court may identify an offense as a “necessarily included” offense under Article 79(b)(1) regardless of whether the offense has been designated under Article 79(b)(2).

#### Discussion

For offenses that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative.

(4) *Sua sponte duty*. A military judge must instruct panel members on Lesser included offenses reasonably raised by the evidence.

(5) *Multiple Lesser included offenses*. When the offense charged is a compound offense comprising two or more Lesser included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged.

(6) *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 except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word “murder” substituting therefor the words “willfully and unlawfully kill,” of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

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 Article 79.

#### 4. Article 80 (10 U.S.C. 880)—Attempts

a. *Text of statute*.

**(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing to effect its commission, is an attempt to commit that offense.**

**(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.**

**(c) Any person subject to this chapter 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 UCMJ;

(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 reaches 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) *Voluntary abandonment.* It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of

voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.

(5) *Solicitation.* Soliciting another to commit an offense does not constitute an attempt. See paragraph 6 for a discussion of Article 82, Solicitation.

(6) *Attempts not under Article 80.* 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) Article 85—Desertion
- (b) Article 94—Mutiny or sedition
- (c) Article 100—Subordinate compelling surrender
- (d) Article 103a—Espionage
- (e) Article 103b—Aiding the enemy
- (f) Article 119a—Death or injury of an unborn child
- (g) Article 128—Assault

(7) *Regulations.* An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (see paragraph 18) should be charged under Article 80. 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. *Maximum punishment.* Any person subject to the UCMJ who is found guilty of an attempt under Article 80 to commit any offense punishable by the UCMJ shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged. Except in the cases of attempts of rape and sexual assault under Article 120(a) or (b), and rape and sexual assault of a child under Article 120b(a) or (b), mandatory minimum punishment provisions shall not apply.

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 by necessary implication every element).

## 5. Article 81 (10 U.S.C. 881)—Conspiracy

### a. *Text of statute.*

(a) **Any person subject to this chapter who conspires with any other person to commit an offense under this chapter 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) **Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.**

### b. *Elements.*

#### (1) *Conspiracy.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and

(b) 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.

(2) *Conspiracy when offense is an offense under the law of war resulting in the death of one or more victims.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the law of war;

(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused knowingly performed an overt act for the purpose of bringing about the object of the conspiracy; and

(c) That death resulted to one or more victims.

### 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 UCMJ, 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 UCMJ. 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, extramarital sexual conduct, 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.

(9) *Special conspiracies under Article 134.* The United States Code prohibits conspiracies to commit certain specific offenses which do not require an overt act. These conspiracies should be charged under Article 134. Examples include conspiracies to impede or injure any federal officer in the discharge of duties under 18 U.S.C. § 372, conspiracies against civil rights under 18 U.S.C. § 241, and certain drug conspiracies under 21 U.S.C. § 846. See subparagraph 91.c.(4)(a)(1)(iii).

d. *Maximum punishment.*

(1) *Offenses under the UCMJ.* Any person subject to the UCMJ who is found guilty of conspiracy shall be subject to the maximum punishment authorized for

the offense that is the object of the conspiracy, except that in no case shall the death penalty be imposed, subject to subparagraph d.(2) of this paragraph.

(2) *Offenses under the law of war resulting in the death of one or more victims.* Any person subject to the UCMJ who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

e. *Sample specification*

(1) *Conspiracy.*

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 Uniform Code of Military Justice, to wit: (larceny of \_\_\_\_\_, of a value of (about) \$\_\_\_\_, the property of \_\_\_\_\_), and in order to effect the object of the conspiracy the said \_\_\_\_\_ (and \_\_\_\_\_) did \_\_\_\_\_.

(2) *Conspiracy when an offense is an offense under the law of war resulting in the death of one or more victims.*

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 law of war, to wit: (murder of \_\_\_\_\_), and in order to effect the object of the conspiracy the said \_\_\_\_\_ knowingly did \_\_\_\_\_ resulting in the death of \_\_\_\_\_.

## 6. Article 82 (10 U.S.C. 882)—Soliciting commission of offenses

a. *Text of statute.*

**(a) SOLICITING COMMISSION OF OFFENSES GENERALLY.—Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct.**

**(b) SOLICITING DESERTION, MUTINY, SEDITION, OR MISBEHAVIOR BEFORE THE ENEMY.—Any person subject to this chapter who solicits or advises another to violate section 885 of**

this title (article 85), section 894 of this title (article 94), or section 899 of this title (article 99)—

**(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and**

**(2) if the offense solicited or advised is not attempted or committed, 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 a certain offense under the UCMJ; 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 offense under the UCMJ. It is not necessary that the person or persons solicited or advised agree to or 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 any offense under the UCMJ 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 as an element in another offense.* Some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Article 82. When the accused's act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense—for example, pandering and obstructing justice.

d. *Maximum punishment.*

(1) *Solicitation of espionage.* Such punishment that a court-martial may direct, other than death.

(2) *Solicitation of desertion; mutiny or sedition; misbehavior before the enemy.* If the offense solicited

or advised is committed or attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or attempted, then the following punishment may be imposed: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years, or the maximum punishment of the underlying offense, whichever is lesser.

(3) *Solicitation of all other offenses.* Any person subject to the UCMJ who is found guilty of soliciting or advising another person to commit an offense not specified in Article 82(b) that, if committed by one subject to the UCMJ, would be punishable under the UCMJ, shall be subject to the following maximum punishment: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years, or the maximum punishment of the underlying offense, whichever is lesser.

e. *Sample specifications.*

(1) *For soliciting another to commit an offense.*

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 \_\_\_\_\_.

(2) *For soliciting desertion (Article 85) or mutiny (Article 94(a)).*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_ 20 \_\_, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) \_\_\_\_\_ (and \_\_\_\_\_) to (desert in violation of Article 85) (mutiny in violation of Article 94(a)) [\*and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about \_\_\_\_\_, 20 \_\_, (at/on board—location), (attempted) (committed) by \_\_\_\_\_ (and \_\_\_\_\_)].

[\*Note: This language should be added to the end of the specification if the offense solicited or advised is actually committed.]

(3) *For soliciting sedition (Article 94(a)) or misbehavior before or in the presence of the enemy (Article 99).*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location), on or about \_\_\_\_ 20 \_\_, (a time of 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 Article 99) (sedition in violation of Article 94(a)) [\*and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about \_\_\_\_ 20 \_\_, (at/on board—location), committed by \_\_\_\_\_ (and \_\_\_\_\_)].

[\*Note: This language should be added to the end of the specification if the offense solicited or advised is actually committed.]

### 7. Article 83 (10 U.S.C. 883)—Malingering

a. *Text of statute.*

**Any person subject to this chapter who, with the intent to avoid work, duty, or service—**

**(1) feigns illness, physical disablement, mental lapse, or mental 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;

(2) That the accused feigned illness, physical disablement, mental lapse, mental 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.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(4) That the offense was committed (in time of war) (in a hostile fire pay zone).

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 military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt. The seriousness of a sham physical or mental disability is also not material on the question of guilt. 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 service constitutes a violation of this article.

### Discussion

Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the Servicemember was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention.

d. *Maximum punishment.*

(1) *Feigning illness, physical disablement, mental lapse, or mental derangement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Feigning illness, physical disablement, mental lapse, or mental derangement in a hostile fire pay zone or in time of war.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) *Intentional self-inflicted injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) *Intentional self-inflicted injury in a hostile fire pay zone or in time of war.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

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 \_\_\_\_\_).