

Investigation Manual

CHAPTER 9 - INVESTIGATING UCMJ VIOLATIONS

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0901 **INTRODUCTION:** IG investigators must understand the type of conduct that may constitute a violation of the UCMJ. When the IG investigator encounters conduct that may be a "major crime" under the UCMJ (punishable by imprisonment for more than one year), the IG investigator must consult with NCIS. See paragraph 0206(1). If the allegation is not one that normally would be the subject of an IG investigation, the investigator should also consider turning the matter over to the chain of command. IG investigators must have some knowledge of the punitive provisions of the UCMJ in order to know when Article 31(b) warnings may be required. See paragraphs 0320 through 0328. Return to Chapter Table of Contents.

0902 **PUNITIVE ARTICLES OF UCMJ - ARTICLES 77 - 134:** Many criminal prohibitions to which civilians are subject appear in the UCMJ. Offenses such as murder, manslaughter, rape and other sex offenses, assaults, robbery, larceny, and frauds are crimes under the UCMJ. See Articles 118 - 132. But many of the offenses set forth in the UCMJ are unique to the military, and define conduct that in the civilian world would only be grounds for disciplinary or at most civil action. Examples include fraudulent enlistment, desertion and unauthorized absence, disrespect to superiors, failure to obey orders, misconduct before the enemy, malingering, and fraternization with subordinates. See Articles 83 - 117 and 133 - 134. The investigator should also consider the following examples of UCMJ violations that may trigger the requirement to provide Article 31(b) warnings.

An allegation of unlawful command influence in military justice matters may be made during the conduct of an IG investigation. Article 37 of the UCMJ prohibits convening authorities (the officers authorized to convene, or establish, a court-martial and empower it to try persons subject to the Code) and other

commanding officers from censuring, reprimanding, or admonishing a military judge, counsel, or court-martial member for any action in connection with the court-martial, including adversely commenting on such conduct in a fitness report or other evaluation.

Article 98 of the UCMJ criminalizes noncompliance with procedural rules; violations of Article 37 are punishable under Article 98. See Manual for Courts-Martial, United States, 1984, R.C.M. 104.

An allegation that a convening authority or other officer has acted improperly in commenting on or otherwise trying to influence the proceedings of a court may constitute a UCMJ violation.

Other examples of conduct that may constitute violations of the UCMJ include using government property for personal purposes (for example, charging personal expenses to a government-issued credit card, or using government personnel or equipment for a personal purpose, such as a side occupation); lying to an investigator regarding the subject of an investigation, and obstructing justice by encouraging another to provide a false story to NCIS. Perhaps of greatest import for IG investigations is the fact that provisions of the DoD Joint Ethics Regulation appearing in bold italics are "lawful general orders" that apply to all military members without further implementation (see DoD Directive 5500.7 at paragraph B(2)(a)). Violations of lawful general orders are punishable under Article 92, UCMJ. The maximum punishment that may be imposed includes dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.

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0903 DETERMINE WHETHER A UCMJ VIOLATION MAY EXIST: Investigators should review each allegation against military members to determine whether, if the allegation is substantiated, the military member could be charged under one of the punitive articles of the UCMJ. The prudent investigator will seek legal advice as to the existence and severity of possible UCMJ violations at the outset of the case. The investigator also needs to be sensitive to the possibility that seemingly innocuous questions may elicit responses that constitute admissions to UCMJ violations during the course of an interview. Therefore, the investigator should ask counsel to discuss whether variations on the facts alleged or developed to date could constitute UCMJ violations. The investigator also should ask counsel to explain what additional facts, if any, would create a UCMJ violation. Return to [Chapter Table of Contents](#).

0904 DETERMINE WHETHER TO GIVE ARTICLE 31(b) WARNINGS: This investigations manual does not require that Article 31(b) warnings be given in every instance where the violation of a punitive article of the UCMJ is suspected, because NAVINSGEN views the right as procedural, not substantive. Consequently, the investigator who suspects the subject has violated the UCMJ should balance the adverse effect on the subject interview that giving Article 31(b) warnings would have against the likelihood the convening authority would

want to take punitive action against the subject were the UCMJ violations substantiated by the investigation. The investigator should consider the following:

The warnings should be given if the investigator does not believe it would impede the interview process.

The warning should be given if the investigator believes the likelihood the convening authority would want to take punitive action is very high, even if the warning would impede the interview process.

When the investigator believes the warning would impede the interview process, and thinks the likelihood of prosecution under the UCMJ is not high, the investigator should seek approval to give formal or de facto immunity for information provided during the subject interview.

The investigator should begin by consulting with the investigator's assigned JAGC attorney. If none is available, the investigator should consult with a JAG attorney within the convening authority's chain of command. If the JAG attorney advises that it is not necessary to provide Article 31(b) warnings under the circumstances, the investigator should document the advice and proceed with the interview without providing the warning. By doing so, the investigator is granting de facto immunity for the interview. Note that in this situation the subject may ask why the warning is not given, and may insist on a formal grant of immunity before consenting to the interview or agreeing to answer specific questions in the interview.

Investigators should anticipate that in many cases where a UCMJ violation is suspected, the advice from the JAG attorney will be to give the warning. Should the investigator still believe it advisable to forego the warning, the investigator may discuss the matter with the subject's commanding officer. Should this officer decide that the UCMJ violation, if sustained, would not lead to punitive action under the UCMJ, and that therefore it is not necessary to give the warning, the investigator should document the decision and proceed with the interview as discussed in the foregoing paragraph, noting again that the subject may still refuse to answer specific questions or consent to an interview without a formal grant of immunity.

The investigator's final recourse lies with the general court-martial convening authority who is authorized to issue a formal grant of immunity to the subject. At this point, even if the convening authority is willing to proceed on the basis of de facto immunity, the investigator should consider asking the convening authority to execute a document providing a formal grant of immunity. Then, should the subject still refuse to answer questions or consent to the interview, the immunity document may be presented to the subject, who can then be ordered to cooperate with the investigation.

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