AFLOA/JAJM
ARTICLE 32 INVESTIGATING OFFICER'S GUIDE

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Article 32 Investigating Officer's Guide

SECTION I PAGE 6

1. AUTHORITY 6

2. QUALIFICATIONS OF THE INVESTIGATING OFFICER 6

2.1. Status 6

2.2. Grade 6

2.3. Impartiality 6

3. QUALIFICATIONS OF OTHER PARTICIPANTS 8

3.1. Government Representative 8

3.2. Defense Counsel 9

3.3. Witness Counsel 9

3.4 Other Participants 9

4. YOUR RESPONSIBILITIES 9

4.1. Statutory 9

4.2. In General 10

4.3. Before the Investigation 10

5. REVIEWING THE CHARGE SHEET 10

5.1. Format and Personal Data 10

5.2. Corrections to the Charges 10

6. ARRANGING FOR THE HEARING 11

6.1. Time and Date 11

6.2. Public Access 11

7. ARRANGING FOR WITNESSES 12

7.1. With a Government Representative 12

7.2. Without a Government Representative 12

7.3. Reluctant Witnesses 12

7.4. Military Witnesses 12

7.5. Civilian Witnesses 13

7.6. Alternatives to Testimony for Unavailable Witnesses 13

8. CONDUCTING THE INVESTIGATION 13

8.1. Preliminary Advice and Inquiries 13

8.2. Presentation of Evidence 13

8.3. Testimony 15

8.4. Alternatives to Testimony 17

8.5. Documents and Other Evidence 17

8.6. Handling Objections 18

8.7. Handling Other Offenses 19

8.8. Reopening the Investigation 20

9. PREPARING THE REPORT 20

9.1. Role as an Investigator 20

9.2. The Format 21

9.3. Assembly 22

9.4. Reproducing the Report 22

9.5. Distribution of the Report 23

9.6. Defense Counsel's Right to Object 23

10. DUTIES AFTER SERVICE AS THE ARTICLE 32 IO 23

10.1. Disqualification 23

SECTION II PAGE 25

INVESTIGATING OFFICER'S ARTICLE 32 SCRIPT 25

7 ATTACHMENTS 35

1. Letter of Appointment 35

2. Letter to Defense Counsel Re: Scheduling 36

3. Letter to Defense Counsel Re: Evidence 37

4. Invitation to Civilian Witness 38

5. Sample Article 32 Report 39

6. DD Form 457 43

7. 2014 National Defense Authorization Act Changes 45

ARTICLE 32 INVESTIGATING OFFICER'S GUIDE
OVERVIEW

There are two sections to this guide. Section I consists of a discussion of several aspects of the Article 32 Investigation -- the source of authority and requisite qualifications of the Investigating Officer (IO), the role of the other participants, and the IO's responsibilities during the investigation and preparation of the report. Section II consists of an Investigating Officer's script for conducting an Article 32 Investigation. At the end of the guide are seven attachments consisting of sample letters and an example of an Article 32 report.

The Article 32 investigation is a unique component of military justice. Its primary function is to examine the available evidence pertaining to an allegation so that the convening authority may determine whether a court-martial is warranted. As stated during the creation of Article 32, "this is not the trial. It is merely the preliminary investigation to satisfy the officer investigating that there is probable cause that the man did commit the crime and there is enough evidence to warrant that he should be put on trial." HR, Committee on Armed Services, Subcommittee No. 1, Wednesday 23 March 1949 (P. 997). It can also function as a discovery proceeding for the accused. An Article 32 Investigation is similar to a preliminary hearing conducted in many state courts. As such, it should be treated as a quasi-judicial proceeding. Most fundamental, an Article 32 investigation is to be conducted as an impartial gathering of information rather than as an adversarial proceeding. The primary authorities which govern an Article 32 Investigation are: 10 U.S.C. Section 832; Rule for Court-Martial (R.C.M.) 405, 406(b)(2) and 601(d); Military Rules of Evidence (M.R.E.) 412, 1101; and AFI 51-201, Section 4A.

When you are conducting an Article 32 Investigation at a base, the local SJA and the military justice section should provide you with all the support you need to conduct the investigation and complete your report as efficiently and quickly as possible. Although the Article 32 investigation can be held without a government representative to present the evidence and question the witnesses, as a practical matter, a government representative will normally be appointed and will present the case to the IO. If no government representative is appointed, then you have the responsibility to arrange and run the entire hearing. Assuming a government representative is appointed, the government representative should have fully prepared the government's case supporting referral of the charge(s) and be fully prepared to present that case to you by the time of the hearing. It should be the rare case where the date of the Article 32 Investigation has not already been worked out with the defense counsel by the time of your appointment. It should also be the rare case where the government representative has not already informed the defense counsel of the witnesses the government expects to testify at the hearing and the documentary and physical evidence the government will be asking you to consider. The government representative should also have already solicited from the defense which witnesses and what evidence the defense wants produced for the hearing. Upon completing and turning in the original of your report, the local SJA and military justice section should insure your report and all allied papers are in proper form and then make the requisite number of copies of the report.

NOTE: The National Defense Authorization Act for Fiscal Year 2014, Section 1702 mandates substantial changes to Article 32, Uniform Code of Military Justice (UCMJ), and will require substantial modification to R.C.M. 405. These changes are outlined in attachment 7.

SECTION I

1. AUTHORITY

Your authority for conducting an investigation comes from a letter of appointment issued by the special court-martial convening authority (SPCMCA) [or, in rare cases by the general court-martial convening authority (GCMCA)] under R.C.M. 405. This letter gives you the authority necessary to arrange for the appearance of witnesses, secure documents, and obtain cooperation from commanders and other military members. A sample letter of appointment is included at Attachment 1. Your appointment letter should inform you that the investigation is your primary duty until its completion. You must pursue the investigation promptly and diligently to completion unless you are relieved.

2. QUALIFICATIONS OF THE INVESTIGATING OFFICER

2.1. Status. You must be a designated judge advocate to be qualified for appointment as an investigating officer. AFI 51-201, para. 4.1.2.2. This includes Judge Advocate reservists who may be detailed to conduct an investigation while on active duty or performing inactive duty training. Article 136(b), UCMJ, authorizes reserve Judge Advocates to administer oaths while on active duty or performing inactive duty training. If you are an Air National Guard Judge Advocate, you must be on Title 10 orders to serve as an IO. Military Judges are available to serve as IOs in cases in which an Article 120 charge is the heart of the case and both perpetrator and victim are military members. Military Judges may be available for other complex investigations (Article 120 or otherwise) on a case-by-case basis. The use of Military Judges as Article 32 IOs will be centrally funded. Note that a military judge acting as an IO in an Article 32 hearing does not hold any additional power or authority by the fact that he or she has been certified as a military judge. All IOs have the same power, and the same limitation on their power and authority, as detailed in R.C.M. 405.

2.2. Grade. IOs should be senior in rank to the accused. *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987). AFI 51-201, paragraph 4.1.2.2 provides that "(u)nless precluded by military necessity or other compelling circumstances, the IO should be senior in rank to the accused." If you're not senior in rank to the accused, bring the fact to the attention of the appointing authority's Staff Judge Advocate immediately. If you remain assigned to the case, document the military necessity or other compelling circumstances presented by the government representative in your report.

2.3. Impartiality. The Court of Military Appeals has said that an IO must be impartial and has characterized the position as that of a quasi-judicial officer who is held to standards similar to those for military judges. *Reynolds, supra*. Your impartiality can be questioned as a result of your knowledge of the case before you start the investigation and by what you do during the course of the investigation.

2.3.1. **Disqualification by Prior Knowledge or Association**. An accuser cannot serve as investigating officer. R.C.M. 405(d)(1); *United States v. Lopez*, 42 C.M.R. 268 (C.M.A. 1970). Likewise, an officer who is a close personal friend of the accuser is also disqualified to serve. *See United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981). If the IO discloses all grounds for any possible bias, prejudice or impropriety, and the defense fails to object at the investigation, it is generally construed as a waiver. *United States v. Lopez, supra; United States v. Martinez*, 12 M.J. 801 (N.M.C.M.R. 1981).

2.3.1.1. **Investigation of Related Cases**. An IO who has previously had a role in inquiring into the offense to be investigated is disqualified. *United States v. Lopez, supra;United States v. Natalello*, 10 M.J. 594 (A.F.C.M.R. 1980); *U.S. v. Parker*, 19 C.M.R. 201

(C.M.A.1955). However, a disqualification to act as an IO can be waived by an accused. *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958).

2.3.1.2. **Joint Investigations**. Unlike the case of related investigations, a joint investigation is proper since the investigating officer begins the investigation with no preconceived ideas of credibility, guilt, or innocence and has made no prior decisions that he or she might seek to vindicate. Thus, when two or more accuseds are charged with a joint offense, a joint investigation is entirely proper. The mechanics of arranging for a joint investigation are more difficult, however, and the investigating officer would be required to submit a separate report with separate recommendations on each accused.

2.3.1.3. **Office Associations**. An investigating officer is not disqualified solely by virtue of his position in the legal office. *United States v. Reynolds*, *supra* at 263. However, an IO who supervises the accused's defense counsel is disqualified and should be recused absent military exigency. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985). While not prohibited, appointment of the chief of military justice as the IO should be avoided. *See United States v. Merritt*, 2009 WL 1936628, at *2 (A.F. Ct. Crim. App. Jun. 30, 2009).

2.3.2. **Disqualification by Subsequent Action**. Anything you do as investigating officer that reasonably calls your impartiality into question may be subject to later judicial scrutiny. You must, therefore, strive not only for impartiality in fact but also to avoid any appearance of partiality. Limit any *ex parte* communication with the government representative (GR) and defense counsel to administrative matters only. If you are unsure whether an appearance of partiality may exist, you are encouraged to consult the Staff Judge Advocate (SJA) to the appointing authority.

2.3.2.1. **Interviewing Witnesses**. You cannot talk with or interview witnesses *ex parte* (without the concerned parties present) on anything substantive. *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985). You may, of course, talk with a witness for the limited purpose of arranging for the witness's appearance and production of evidence in the witness's control.

2.3.2.2. **Legal Advice**. As the IO, you may seek legal advice concerning your responsibilities from an impartial source, but may not obtain such advice from counsel for any party. *See* R.C.M. 405(d)(1) *Discussion*. You may consult with the local SJA on any matter, including matters of substance. *United States v. Grimm*, 6 M.J. 890 (A.C.M.R. 1979). You must give notice to all parties (*i.e.*, defense counsel, accused, and government representative, if any) before obtaining advice from an independent source, including the local SJA, on substantive issues. *Id*. at 893. The failure to do so may constitute error that will be tested for prejudice if raised at trial. *Id*.

2.3.2.3. **Action on Defense Requests**. Your response to defense requests, such as requests for delay, may be reviewed by appellate courts as an indicator of your impartiality. Remember, an IO can grant a delay only if the appointment letter delegates that authority. R.C.M. 707(c)(1) *Discussion.* If the appointment letter contains no written delegation, the SPCMCA remains the decision authority.

2.3.2.3.1. **Granting Delays**. IOs face potential dilemmas when acting on delay requests. You may be caught between the need for speedy disposition of the charges, and a defense counsel's legitimate need for more preparation time. *See* Articles 10 and 33, UCMJ, and R.C.M. 707). What you must do in such circumstances is to act impartially to protect both interests. To do this, you must ascertain and record in detail the legitimacy of any defense request for delay. Require defense counsel to describe in writing the basis for the delay request and then decide if the request is well-founded. R.C.M. 707(c)(1) *Discussion*, provides that pretrial delays should not be granted *ex parte*; therefore, you should notify the GR, or if one is not appointed, the local SJA, of the delay request and ask for a written response to the delay request. If the government

is not opposed to a well-supported request, you should probably grant the delay, provided your appointment letter authorizes you to do so. Your decision to grant the delay, together with supporting reasons and the dates covering the delay, should **immediately** be reduced to **writing** and included in your report.

2.3.2.3.2. **Other Considerations**. If command is opposed to granting the delay, you should, at a minimum, also ascertain and include in your report when the defense counsel first learned of the case, when defense counsel received the case file, whether additional discovery, if requested, has been furnished, and what other matters or cases have prevented or will prevent the defense counsel from being adequately prepared for the hearing. You will most likely be required to determine whether the length of the defense's requested delay is reasonable and necessary. If, after you review defense's position, you conclude more time is needed in the interests of justice, you should grant the delay. *United States v. Miro*, 22 M.J. 509 (A.F.C.M.R. 1986), held that an IO's refusal to grant a defense request for delay due to inadequate preparation time (less than 24 hours) was reversible error that required a new Article 32 investigation, regardless of whether the accused can demonstrate prejudice.

2.3.2.3.2.1. **SVC or Witness Counsel Unavailable**. If the Special Victims' Counsel (SVC) or other witness counsel provides written notice to the IO that he or she is not available to appear at the hearing, or not available to consult with his or her client via other means (*e.g.*, telephone, video teleconference) during the hearing, the hearing should not proceed without the written approval of the represented witness or the convening authority who appointed the IO.

3. QUALIFICATIONS OF OTHER PARTICIPANTS

3.1. Government Representative. It is a common practice in the Air Force to appoint a GR to present the government's side of the case.

3.1.1. **Role**. The GR's role is to establish the validity of the charge(s) and to develop the government's case. The GR provides logistical support for the IO. This aspect is essential where the IO is not stationed locally. As soon as the GR has been appointed, he or she should contact the IO to determine the logistics necessary to insure a smooth investigation. Among the details the GR should expect to take responsibility for are:

- Assembling the necessary documents for the IO's file of evidence, including a copy of the charge sheet, the appointment letter and this guide;

- Arranging for the travel and appearance at the hearing of government and defense requested witnesses whose production is deemed necessary;

- Notifying the IO of any necessary witnesses or evidence which might not be available for the hearing so that the IO can begin making availability determinations in accordance with R.C.M. 405(g);

- Notifying the defense in writing of witnesses the government expects to call at the hearing and the documentary evidence the government will ask the IO to consider;

- Ensuring the defense is aware of the time and date of the hearing; and

- Arranging for a hearing location.

3.1.2. **Appointment:** The SPCMCA or "other appropriate authority" may appoint the GR. R.C.M. 405(d)(3). The "other appropriate authority" will usually be the Staff Judge Advocate or Acting Staff Judge Advocate.

3.2. Defense Counsel. The accused is entitled to be represented by a defense counsel (DC) certified under Article 27(b) and sworn under Article 42(a), UCMJ. R.C.M. 405(d)(2)(A); AFI 51-201, paragraph 4.1.3.2. This item is covered in block 6 of the investigating officer's report, DD Form 457. He may also elect to hire a civilian defense counsel at his own expense. The IO should ensure that any civilian defense counsel has submitted proof of representation before granting a delay. Make sure you verify that detailed DC is qualified under Article 27(b), UCMJ. The attached script covers this point for you. Note that the accused may request self-representation, but it is not an absolute right. *U.S. v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990).

3.3. **Witness Counsel.** Witnesses may be represented by counsel during the Article 32 hearing. Only designated judge advocates who are certified under Article 27(b) are authorized to serve as military witness counsel. Civilian witness counsel must take an oath to perform his or her duties faithfully when representing the witness. The IO will administer this oath. If a witness is represented by counsel during the Article 32 hearing, document in the report the name and rank of the witness counsel, the fact that counsel has been certified under Article 27(b) if a designated judge advocate, and whether counsel has taken the requisite oath if civilian.

3.3.1 The witness's counsel may participate in a pre-hearing conference with the IO, GR and DC (*e.g*., scheduling, witness availability, scope of investigation, etc.). However, the witness's counsel's participation in the pre-hearing conferences should be limited to matters within his or her authority (see paragraph 3.3.2.)

3.3.2. The witness's counsel may appropriately advocate to the IO for the witness's interests during the investigation to include:

- Objections to questions pursuant to R.C.M. 405(i). Objections shall be made to the IO upon discovery of the alleged error. The IO shall not be required to rule on any objection; however, the objection shall be noted in the report of investigation upon request of the witness's counsel. The IO should require the witness's counsel to file the objection in writing;

- Requests to close the proceedings pursuant to R.C.M. 405(h)(3);

- Objections to production of the witness's records covered by M.R.E. 412 or Section V (Privileges) of the Military Rules of Evidence (see paragraph 8.2.1 regarding applicability of M.R.E. 412); Note: The witness's counsel should be given adequate opportunity to review the records in question prior to the IO considering them; and

- Requests for the witness's records covered Section V (Privileges) of the Military Rules of Evidence to be sealed and for the witness's personally identifiable information to be redacted.

3.4. Other Participants. The SPCMCA or other appropriate authority can detail a reporter, interpreter, and others to aid the investigation. R.C.M. 405(d)(3). Likewise, the local SJA may assign personnel for administrative support.

4. YOUR RESPONSIBILITIES

4.1. Statutory. Under Article 32(a), UCMJ, you are responsible for "inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline." *See* R.C.M. 405(e).

4.2. In General. The Article 32 investigation "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges." *U.S. v. Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959). It is not intended as a vehicle to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to determine the proper disposition of the case. However, you are not limited to examination of the witnesses and evidence presented by the GR and DC. Your goal is to compile enough relevant information so that the convening authority can assess whether the admissible evidence warrants trial by court-martial. Thus, if your case involves a confession, consent or probable cause search, you should consider addressing in your investigation the circumstances relating to Article 31 warnings and voluntariness of the confession, those relating to voluntariness of the consent, or the information reported to the person who authorized the search. Documents concerning these events should be included as exhibits. Your legal analysis of the admissibility of the evidence is not required, though it is welcome so long as it does not delay the report. **Advice on how to perfect the case is inappropriate; it suggests bias**.

4.3. Before the Investigation. The IO should take the following steps before the investigation begins:

4.3.1 **Review the Letter of Appointment.** Read your letter of appointment and make sure you understand what you are investigating. If you have been tasked to investigate more than one set of charges against the accused, make sure this is accurately reflected in the letter of appointment or that you have a second letter of appointment.

4.3.2. **Review the Evidence.** Read the police and/or AFOSI reports of investigation, and other statements provided to you by the GR, or which are listed on the commander's first indorsement to the charge sheet. **CAUTION**: The sole purpose of this review is to determine what evidence will be necessary to prepare a thorough and impartial investigation. *See* R.C.M. 405(g) *Discussion.* The IO shall inform the parties what other evidence (besides witness testimony) will be considered. Note that the parties shall be permitted to examine all the evidence the IO considers. R.C.M. 405(h)(1)(B).

4.3.3 **Documents to SVC or Witness Counsel.** Upon notice of representation, the IO should direct the GR to provide to the witness's counsel copies of the charge sheet and IO appointment letter; and reasonable notice of, and access to, evidence procured from his or her witness (*e.g.*, statements, records, physical evidence, etc.). Personally identifiable information redactions should be made to these documents.

5. REVIEWING THE CHARGE SHEET.

5.1. Format and Personal Data. You must read the charge sheet and make sure the information on it is correct and the charges are in the proper form. Often, charge sheets contain erroneous personal data or fail to contain the data that they're supposed to contain. Compare each specification with the model specification forms found in Part IV of the MCM and the Military Judge's Benchbook. R.C.M. 603(b) prohibits the IO from making any changes, even minor ones, to the charges. However, you should recommend that necessary changes be made. Alert the local SJA to any errors you note on the face of the charge sheet. If such authorized pen and ink changes are made, be sure to mention them in your report.

5.2. Corrections to the Charges. Remember that your role is to recommend, not act! If you spot some obvious deficiencies in the charges, such as missing dates, etc., notify the local SJA. He or she can arrange for the accuser to correct the charges before you start your investigation. R.C.M. 603(a). It would be better practice if you were not present when the changes were made to avoid the appearance of any impropriety. In all cases in which you, as the IO, communicate directly with the local SJA (and those occasions should be rare), you should inform DC of your intention and the purpose and subject. You should limit such contacts to one-way

communication and refrain from discussion. For recommending changes to the charges after the close of the investigation, see *infra* para. 9.2.4.

6. ARRANGING FOR THE HEARING.

6.1. Time and date. In most cases, the date and place for the Article 32 proceeding will have already been established by the local SJA, GR or chief of military justice and the DC before the charges were preferred. This is good case management and the recommended practice. If for some reason a hearing date has not been established, you must **immediately** set a date to start the proceedings. Since you are tasked with the expeditious investigation of the charges and this is your primary duty, you should ordinarily set the date for the Article 32 investigation no later than the day after your appointment. Do it clearly and explicitly and in writing. Use the formats in Attachments 2 and 3 to notify DC of the Article 32 proceedings and of witnesses and evidence you expect to be produced. You should insist that any defense requests for delays be in writing, specifically setting forth the basis for the request. See para. 2.3.2.3.1.

6.2. Public Access. Ordinarily, Article 32 investigations are open to the public, excluding potential witnesses. Victims of crime may only be excluded under Article 6b if you determine by clear and convincing evidence that the testimony by the victim of an offense under the UCMJ would be materially altered if the victim heard other testimony at the hearing. This rule took effect 26 December 2013 and specifically mentions Article 32 hearings and investigating officers. Congress modeled this provision on the Federal Crimes Victims' Act (18 U.S.C. Section 3771). Note that the standard is not whether the testimony "may" or "might" or "possibly" would be materially altered. You must find it would be materially altered. Federal district court judges have only on very rare occasions found the clear and convincing evidentiary standard to be met. Article 6b defines a victim of an offense as a person who has suffered direct, physical, emotional or pecuniary harm as a result of the commission of an offense under the UCMJ.

6.2.1. **Potential Witnesses**. Although potential witnesses are normally excluded from watching the proceedings, you have the authority to permit some potential witnesses (*e.g.*, experts) to be present if you consider their presence helpful to the proceedings.

6.2.2. **Open proceedings**. Article 32 investigations should ordinarily be open to the public and news media. (*See* AFI 51-201, para. 4.1.9; R.C.M. 405(h)(3); *San Antonio Express News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996); and *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997)). AFI 51-201, paragraph 4.1.9, states a strong regulatory policy in favor of open Article 32 hearings. Access by spectators to all or part of the proceeding, however, may be restricted or foreclosed at the discretion of the convening authority who directed the investigation, or at the discretion of the IO, but only when the interests of justice outweigh the public's interest in access. For example, it may be necessary to close an investigation to encourage complete testimony of a timid or embarrassed witness, to protect the privacy of an individual, or to ensure an accused's due process rights are protected. You should make every effort, though, to close only those portions of the investigation that are clearly justified and keep the remaining portions of the investigation open. If you close a hearing, you should provide specific, substantial reasons, in writing, for closure and attach those reasons to the report of investigation. You need a factual basis supporting your reasons for closing any portion of the hearing. *See U.S. v. Davis*, 62 M.J. 645 (A.F. Ct. Crim. App. 2006) (holding that the IO had no factual basis to support closing a portion of the hearing in an effort to encourage the testimony of two witnesses). Also note, that the convening authority directing the investigation may maintain sole authority over a decision to open or close an Article 32 investigation by giving you procedural instructions at the time of your appointment or at any time thereafter. (*See generally* R.C. M. 405(c)).

6.2.3. **Dealing with Journalists**. You should refer any media request for information on a criminal case to the local SJA. *See* AFI 51-201, para. 13.6.8. You should also immediately advise the local SJA if you receive a direct request from a journalist to attend the proceedings. The local SJA should involve the base's public affairs office. *See infra* para. 8.3.4, for a discussion of the problem of spectators or news media trying to record the proceedings.

7. ARRANGING FOR WITNESSES.

7.1. With a Government Representative. If a GR or administrative assistant (paralegal) has been detailed, work through him or her to obtain witnesses. Be careful to limit your conversations to administrative matters only. Don't discuss *ex parte* the details of any witness expected testimony. This could result in your disqualification.

7.2. Without a Government Representative. If a GR has not been appointed, then you'll have to arrange for the presence of witnesses yourself. Use the legal office personnel to contact the witnesses rather than calling them yourself. If necessary, however, you are not prohibited from contacting a prospective witness to arrange for the witness's presence. If you do contact a witness yourself, don't discuss the substance of the witness's expected testimony. A sample letter of invitation is included as Attachment 4.

7.3. Reluctant Witnesses. You do not have authority to subpoena witnesses. Your only tools for dealing with reluctant civilian witnesses are persuasion and invitational travel orders. Civilian employees of the United States government can be required to testify as a condition of their employment. See AFI 51-201, para. 6.4.

7.4. Military witnesses. You are required to determine initially whether a witness is reasonably available. R.C.M. 405(g)(2)(A). That determination is a balancing test. The more important the witness's testimony, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. R.C.M. 405(g)(1)(B) *Discussion*. A witness who is unavailable under the situations described in M.R.E. 804(a)(1) through (6) is not "reasonably available." R.C.M. 405(g)(1)(A).

7.4.1. **100 Mile Rule**. Note that the courts have set aside the "100 mile" rule found in R.C.M. 405(g)(1)(A). *See U.S. v. Marrie*, 43 M.J. 35 (C.A.A.F. 1995) and *U.S. v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). The courts hold that witness unavailability should not be determined solely on whether a witness is beyond 100 miles from the situs of the investigation, and require IOs to apply the balancing test discussed above.

7.4.2. **Availability**. If you decide that a witness is reasonably available, you should then request his/her presence, either directly or through his/her commander. You are authorized to discuss factors affecting reasonable availability with the witness's immediate commander and with others, such as the Staff Judge Advocate of the appointing authority.

7.4.3. **Commander's Determination**. Because military witnesses are under military control, they are ordinarily available. However, exigent military requirements can make production nearly impossible. If the immediate commander determines that a witness is not reasonably available, he or she is required to give you the reasons for that determination. *See* R.C.M. 405 (g)(2)(A) *Discussion*. If the commander does so in writing, include it in your report. A record of his or her reasons must be kept to show how the commander applied the balancing test of R.C.M. 405(g)(2)(A). If the commander does not give his reasons in writing, **YOU** must make a memo for record of the reasons in detail and include it in your report. The commander's determination is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3). If the immediate commander determines that a military witness is not reasonably available, you are bound by that determination. If you don't think that determination

was correct under applicable principles of witness availability, communicate that fact immediately to the local SJA, with notice to the defense.

7.5. Civilian Witnesses. You alone are responsible for determining the reasonable availability of civilian witnesses. Initially, you determine availability without regard to whether the witness is willing to appear. You then invite those witnesses whom you determine to be reasonably available to appear, and when appropriate, inform them that their necessary expenses will be paid. A sample letter to do this is found at Attachment 4. If the witness refuses to appear or to testify, the witness is then not reasonably available since you cannot compel the witness to attend the pretrial investigation. AFI 51-201, para. 6.4.4.

7.6. Alternatives to Testimony for Unavailable Witnesses. Once you (or the military commander of a military witness whom you initially determined to be reasonably available) have determined that a witness is unavailable, you may consider **over defense objection** under the authority of R.C.M. 405(g)(4)(B) the following alternatives to that witness's testimony:

- Sworn statements;

- Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness's identity is as claimed. (See M.R.E. 901(b)(6) for one method of authenticating a telephone conversation).

- Prior testimony under oath;

- Depositions of that witness; and

- In time of war, unsworn statements.

7.6.1. **Depositions**. If an important civilian witness is unavailable and there are no alternatives to the witness's testimony, you may wish to suggest to the GR or local SJA that the SPCMCA consider appointment of a deposition officer with subpoena powers under R.C.M. 702. Testimony obtained at a subsequent deposition would be an alternative to live testimony if the witness remained unwilling to attend the Article 32 investigation.

8. CONDUCTING THE INVESTIGATION.

8.1. Preliminary Advice and Inquiries. Get a copy of the DD Form 457, Investigating Officer's Report, and check off in pencil each required point as you go over it with the accused. Use the script in Section II of this guide to start your investigation. It covers all the important points required on the DD Form 457.

8.2. Presentation of Evidence. The Military Rules of Evidence do not apply to Article 32 investigation, except for M.R.E. 412 and certain rules dealing with privileges and violations of Article 31 rights. R.C.M. 405(i); M.R.E. 303; M.R.E. 1101(d). This means, quite simply, that you can consider hearsay. *See, e.g., United States v. Matthews*, 15 M.J. 622 (N.C.M.R. 1982). It also means that you do not rule on, note, or report evidentiary objections. You tell DC about the rule and you may require DC to register objections in writing which they wish noted in your report.

8.2.1 **M.R.E. 412 Evidence at trial.** M.R.E. 412 sets forth a clear procedure for admissibility of evidence of victim sexual behavior and sexual predisposition during trials involving an alleged sexual offense. Sexual behavior is defined as "any sexual behavior not encompassed by the alleged offense." Sexual predisposition refers to an alleged victim's "mode

of dress, speech or lifestyle that does not directly relate to sexual activities or thoughts but that may have a sexual connotation for the factfinder." The rule provides for a general exclusion of this evidence whether presented by the prosecution or the defense with three enumerated exceptions. The rule tasks the military judge with the responsibility with conducting closed hearings where the victim has a right to be heard. Recent case law from C.A.A.F interpreted the right to be heard to extend to hearing from SVC or witness counsel. Specific notice procedures are included before introducing this evidence; a process exists for closing hearings and sealing records not admitted into evidence.

8.2.2 **M.R.E. 412 Evidence at Article 32 hearings – generally**. R.C.M 405(i) explains that the Military Rules of Evidence do not apply at Article 32 hearings with several listed exceptions. M.R.E. 412 is one of the listed exceptions. Standing alone, IOs might quickly conclude that all parts of M.R.E. 412 apply at an Article 32 hearing: the general exclusion under 412(a), the three exceptions under 412(b), the process for determining admissibility under 412(c), and the definition sections under 412(d) and (e). On closer examination of the M.R.E. 412 procedures, IOs quickly begin to have questions as they are not acting as a military judge. To complicate matters further for IOs, the non-binding Discussion to R.C.M. 405(i) appears to contradict R.C.M. 405(i) and M.R.E. 1101 itself when it says:

> "This subsection is solely a crossreference to the Military Rules of Evidence. Mil. R. Evid. 412, which concerns testimony of victims of sexual offenses at trial, ***does not*** apply at Article 32 hearings. (emphasis added). However, there may be circumstances in which questioning should be limited by Mil. R. Evid. 303, which prohibits requiring degrading testimony in pretrial investigations and elsewhere. The privacy interests of the victim may also be protected by closure of the Article 32 hearings during appropriate periods. *See* subsection (h)(3) of this rule."

8.2.3 **Recommended M.R.E. 412 process for IOs.**

(*Note: This guidance expands on AFI 51-201, para. 4.1.7.2.1, which advises to "keep in mind the application of . . . M.R.E. 412, prohibiting questions regarding the alleged victim's past sexual behavior or any perceived predisposition." At this time, there is no clear or decisive case law on this issue.*)

Step 1 - review your IO appointment letter. Some convening authorities are including language to guide the IO on how to handle M.R.E. 412 evidence. You should discuss with the government representative, defense counsel, and any Special Victims' Counsel how you plan to conduct the hearing based on the specific language in your IO appointment letter. This should include a full discussion of which parts, if any, of M.R.E. 412 will be applied. If no parts of M.R.E. 412 are going to apply, you should be mindful of M.R.E. 303 which applies to Article 32 investigations. You should also remember that the new Article 6b of the UCMJ became effective after 26 December 2013. It requires that all victims be treated with fairness and with respect for their dignity and privacy. Article 6b applies to Article 32 hearings.

Step 2 – determine if the President has signed an Executive Order (EO) modifying R.C.M. 405(i). The Joint Service Committee on Military Justice has proposed an amendment to specify that Investigating Officers follow the same M.R.E. 412 procedures in Article 32 investigations that Military Judges apply at trial. This change is in the next EO that has been proposed. It has been forwarded for interagency coordination by DoD.

Step 3 - If step 1 and 2 do not apply, you should be prepared to hear arguments from the government representative, defense counsel, and any Special Victims' Counsel about how M.R.E. 412 should or should not apply. In addition to the argument in Step 1, the following three arguments are routinely presented.

Argument 1 - M.R.E. 412(a)'s general exclusions and definitions apply, but none of the exceptions or procedures apply because you are not acting as a military judge and are not at trial. This argument is most protective of the alleged victim's privacy and it resolves the limitations of M.R.E. 303 when M.R.E. 412 evidence is introduced through a third party. But, it provides the least information to the convening authority. If applied, you must be cognizant that neither side nor you should delve into prior sexual behavior evidence between the accused and alleged victim. Such matters often are contained in written statements taken from the accused, alleged victim, and witnesses during the investigation that are adopted during testimony. This argument reasons that the non-binding discussion should be disregarded because it conflicts with R.C.M. 405(i) and M.R.E. 1101 which are binding.

Argument 2 – All of M.R.E. 412 applies based on the plain reading of R.C.M. 405(i), but the non-binding discussion should be disregarded. This argument allows both sides to utilize all three exceptions. If used, you should tell counsel how you will handle the notice requirement and sealing of evidence offered, but not considered. You should also review the process to conduct a closed session that gives the victim the right to be heard, including through counsel. Finally, you should make sure that your IO report does not inadventently disclose matters that should remain sealed.

Argument 3 – M.R.E. 412's exclusions apply but only the first two exceptions apply because of the inherent differences between a trial and an investigation. This argument focuses on whether anything could ever be constitutionally required to be considered at an Article 32 investigation. IOs may follow the same procedures in Argument #2, but the government representative and defense counsel would not be able to present sexual behavior or predisposition evidence simply because it may be constitutionally required at a later trial.

Step 4 – determine whether inquiry into other matters can substitute adequately for an inquiry into sexual behavior. For example, assume a prior sexual relationship between the accused and alleged victim is now over and it ended with animosity on both sides. Does it matter to either side whether it was a sexual relationship? Or can a thorough hearing be conducted for both sides by exploring the break-up and the closeness of the prior relationship to show any motives for the accused and alleged victim. While this example might not apply in all investigations, IOs often can balance a full inquiry into issues such as bias or mistake of fact without having to consider M.R.E. 412 evidence.

Step 5 - require the parties and SVC or witness counsel to file with you in writing any M.R.E. 412 objections they want noted in your report. That way, if they don't file the M.R.E. 412 objection with you in writing within 24 hours after the close of the investigation, as the script suggests, you may, but do not have to note the M.R.E. 412 objection in your report.

Step 6 – document in your report the procedure you followed for M.R.E. 412 evidence.

8.3. Testimony. All testimony, except that of the accused, is required to be taken under oath. The form for the oath is found in the discussion to R.C.M. 405(h)(1)(A). The IO has broad discretion in conducting the hearing, including the manner in which the witnesses are questioned. The IO may permit the GR to assist in questioning witnesses and presenting evidence as appropriate. The IO must allow the defense wide latitude in cross-examination. AFI 51-201, para. 4.1.7.2.1. The IO also needs to keep in mind the application of M.R.E. 303, prohibiting degrading questions, and M.R.E. 412 as discussed above.

8.3.1 **Taking testimony**. The ancient and perfunctory practice was to simply bring witnesses to the hearing, provide them with their prior statements to the police, get the witnesses to adopt the statement and then yield examination to the defense. That practice alone is not usually the best. *See United States v. Connor*, 27 M.J. 378 (C.M.A. 1989). It usually invites a defense objection that you are considering a sworn statement of an available witness over defense objection. It also contributes nothing to the development of information that can be considered by the convening authority. While the IO need not perfect the case, he or she should allow for a thorough examination of witnesses on relevant matters that avoids the "leading" format that invites limited replies. Read *U.S. v. Bell*, 44 M.J. 403 (C.A.A.F. 1996) on the issue of whether an accomplice or suspect military witness need be informed of Article 31 rights at Article 32 hearings.

8.3.2. **Reducing the testimony to writing**. The IO is required to include in the report of investigation a summary of the substance of all testimony. The IO must take notes as each witness testifies. After the hearing (or after each witness has testified if time permits), the IO must reduce the substance of the testimony of each witness to writing. *See* R.C.M. 405(h)(1)(A) *Discussion*. Note that the courts frown on summarizing a witness's testimony in the third person. *U.S. v. Svoboda*, 12 M.J. 866, note 3, (A.F.C.M.R. 1982). The witness may sign and swear to the truth of their respective testimonies. The IO may also sign that the summary is true and accurate. The latter method is especially important if getting the witness to sign would delay completion of the investigation. AFI 51-201, paragraph 4.1.7.2.2 contains forms for oaths executed within and outside the United States. IOs may seek both parties' input on summarized statements so that mistakes and misinterpretations can be dealt with at the earliest stages.

8.3.3. **Verbatim transcripts**. Tape recording and verbatim transcripts are permitted only with the advance written approval of the SJA to the convening authority who directed the investigation. AFI 51-201, para. 4.1.8. SJAs are encouraged to approve the recording of verbatim transcripts when resources allow it. Under some circumstances, the IO should consider asking permission to record key witness testimony verbatim. For example, in cases of child sexual abuse, the victims sometimes become unavailable to testify at trial. Thus, it is a good idea to record the testimony verbatim and retain the tape in case a transcription is later required. Meanwhile, take notes and make a summary of the witness's testimony as described above. The tapes are subject to defense discovery. R.C.M. 914.

8.3.4. **Tape recordings by defense or others**. Tape recording the testimony of witnesses at an Article 32 investigation is not addressed in the Manual for Courts-Martial. However, AFI 51-201, paragraph 4.1.8 makes clear that "[t]ape recordings . . . of witness testimony at Article 32 investigations are permitted only with the advance written approval of the SJA for the convening authority that directed the investigation." If testimony is tape recorded, a Jencks Act issue may arise, even when summarized testimony is prepared and included in the report. The Jencks Act requires the government to provide the defense "any statement of the witness that relates to the subject matter concerning which the witness has testified." R.C.M. 914. Therefore the tapes or stenographic notes must be retained. *Id.* This will create a potentially touchy issue because the tapes should be maintained by the government. That is, you should inform the DC that the original tapes will need to be turned over to the government for safekeeping.

8.3.4.1. **Defense counsel and accused**. Even if the DC or accused is permitted to tape record the testimony, you should make clear to all parties that your version is the official record. It is incumbent on you to accurately summarize the testimony.

8.3.4.2. **Spectators**. You may prohibit spectators or news media from tape recording, videotaping, or filming the testimony or other parts of the hearing as part of your duty to conduct the hearing in a fair and orderly manner.

8.4. Alternatives to Testimony. Generally, any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if reasonably available - including those requested by the accused if the request is timely. Sometimes witnesses are unavailable to appear at the Article 32 investigation, or, even if the witness is available, the defense may find it more advantageous to submit the witness's testimony in an alternative form. R.C.M. 405(g)(4) allows you to consider alternatives to testimony under the circumstances described in paragraphs 7.6 and 7.6.1 above.

8.4.1 **If defense does not object**. With defense concurrence or in the absence of a defense objection, R.C.M. 405(g)(4)(A) allows you to consider the following alternatives to testimony:

- Sworn statements;

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

- Prior testimony under oath;

- Depositions;

- Stipulations of fact or expected testimony;

- Unsworn statements; and

- Offers of proof of expected testimony of a witness.

8.4.2. **When defense objects**. You are also allowed to consider certain alternatives (see para. 7.6, *supra*.) to testimony even over a defense objection. The key to consideration of these alternatives is the "reasonable availability" of the witness. As noted in para 7.4.1 above, the courts have ruled the "100 mile" rule found in R.C.M. 405(g)(1)(A) out of existence. *U.S. v. Marrie*, 43 M.J. 35 (C.A.A.F. 1995) and *U.S. v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). The courts hold that witness unavailability should not be determined solely on whether a witness is beyond 100 miles from the situs of the investigation, and require IOs to apply the balancing test in R.C.M. 405(g)(1)(A). For a discussion of this concept, *See* Swanson, *The Article 32 Right of An Accused to Pretrial Cross-Examination of Witnesses Against Him If These Are Available*, 24 A.F. L. Rev. 246 (1984). Additionally, if a witness is unavailable under M.R.E. 804(a)(1)-(6), that witness is also not "reasonably available." If your determination is that a witness is not reasonably available, inform all the parties and be sure to note your determination and your reasons in your report.

8.5. Documents and Other Evidence. R.C.M. 405(g)(1)(B) allows you to consider all evidence, including documents and physical evidence, which is relevant and not cumulative. "Documents" as used here means *any writing other than a statement of a witness*. You are required to tell the parties what documents or other evidence you will consider in conducting your investigation. Then you must let all parties examine this evidence. Note the simplicity of this rule: if a writing is a document, you tell DC you intend to consider it and then show it to defense. If counsel objects to your consideration of the document, ask for the basis of the objection. Remember, a hearsay objection is not valid; hearsay evidence can be considered. In evaluating the evidence, however, you must assign it whatever weight you think it deserves. An accused's confession qualifies as a document or other physical evidence. Witnesses' confessions and other written statements (except that of the accused) can only be considered by you if they qualify as an "alternative to testimony." Note that Article 47, UCMJ provides for *subpoena duces tecum* authority for an investigation pursuant to Article 32(b). AFI 51-201, paragraph

6.4.4 states that a "*subpoena duces tecum* (for documents) may be duly issued in accordance with Article 47, UCMJ and R.C.M. 703, when 703 is changed to reflect the amendments to Article 47, UCMJ." However, since R.C.M. 703 has not yet been changed to reflect the Article 47 amendments, a *subpoena duces tecum* may not yet be used for Article 32 investigations.

8.5.1. **Accused's confession or admission**. What is the authority for including an accused's written confession or admission in the term "documents and other physical evidence?" R.C.M. 405(g)(1)(B) states evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Statements that are incriminating are relevant to the truth of the charges and important for the investigating officer in making a recommendation as to disposition of the charges. Because an accused has a right to assert rights under Article 31, UCMJ, and M.R.E. 301 applies during the investigation, R.C.M. 405(i), the accused is not reasonably available and evidence of the confession in the form of statements is admissible. The discussion to R.C.M. 405(e) makes it clear that an investigating officer is often required to look into the admissibility of a confession as part of the investigation.

8.5.2. **Witness statements**. These are not "documents" as that term is used in R.C.M. 405(g)(1)(B). Witness statements can't be considered over a defense objection unless they qualify as an alternative to testimony under R.C.M. 405(g)(4)(B). The problems in this area usually arise where one witness testifying under oath seeks to testify about what another potential witness told the testifying witness. Defense usually objects on the grounds of hearsay, which isn't a proper objection (discussed below). The crux of defense's objection should be that the statement of the non-testifying witness can't be considered by the IO because such consideration would contravene the spirit, if not the letter, of the alternatives-to-testimony rules of R.C.M. 405(g)(4)(B). You should allow the witness to testify about the substance of the statement and then determine whether it can be considered.

8.5.3 **Reports**. Reports are documents, notwithstanding their hearsay nature. Thus, treat them as "other evidence" under R.C.M. 405(h)(1)(B). You permit the parties to examine the report, and **you consider it**! AFOSI reports, SFS reports, and similar investigative reports may not, however, be allowed to become substitutes for the appearance of available witnesses if the defense objects. Witness statements which are included in such reports do not become something you may consider simply because they are attached to a report. *Therefore, if you decide to consider an AFOSI or SFS report, you should list in your report those parts of the AFOSI/SFS report you considered and those parts you did not consider and why.*

8.6. Handling Objections. Handling objections is probably the most misunderstood aspect of Article 32 proceedings. If you keep in mind the purpose of the investigation, however, everything else will fall into place. Remember, the purpose is to **ascertain and compile the facts** so that you and others can make an *informed* recommendation as to disposition of the case. You're not a judge – you're an investigator. As such, you need to be able to obtain and sift through as much information as possible. So, unless one of the few evidentiary rules apply, the basis of a defense objection shouldn't be a rule of evidence. Rather, the basis should be a failure to comply with the procedural requirements of R.C.M. 405. For example, R.C.M. 405 (g)(4)(A) establishes a rule of procedure that prohibits you from considering certain alternatives to testimony over defense objection. Unsworn statements of witnesses are one such type of evidence. If defense objects to your consideration of an unsworn witness's statement, then you simply can't consider it in evaluating the evidence. Your basis for refusing to do so, however, is not because the statement is hearsay, a common objection, but rather because if you did so, you would violate one of the procedural requirements of R.C.M. 405. That does not mean, however, that you should prohibit testimony about the statement or evidence documenting the statement from becoming part of your report of investigation. While the Rules for Courts-Martial prevent you from considering certain evidence, the GCMCA is not subject to those same rules. R.C.M. 601(d)(1) specifically authorizes the GCMCA to consider information from "any source" in

deciding whether to refer charges to trial by general court-martial as long as "there has been substantial compliance with the pretrial investigation requirements of R.C.M. 405." R.C.M. 601(d)(2)(A). It's your job to see to it that your investigation is conducted in substantial compliance with R.C.M. 405, but you should attach valuable evidence even if you can't consider it. Of course you should identify what you did not consider and why it is in your report. With this background, let's turn to some substantive rules for handling objections.

8.6.1. **Procedures**. Remember, you're not a judge, and you're not required to rule on objections. R.C.M. 405(h)(2). So, when one side objects, **don't say**, "Your objection is overruled. This exhibit will be admitted." All that you are required to do is notify the defense of what documents you intend to consider and let defense examine them. As far as witnesses are concerned, you can consider almost anything they say under oath, including hearsay. Hearsay statements that are objected to, however, cannot be considered if to do so would violate the rule on alternatives to testimony. Or put another way, if the statement is one that, if reduced to writing, you could not consider without violating the alternative-to-testimony rules, then the fact that a witness is testifying about the contents of the third party statement does not make the statement subject to your consideration.

8.6.2. **Written Objections**. You can and should require DC as well as the GR to file any objections in writing. R.C.M. 405(h)(2). You are required to note any objections in the report if a party so requests. The best practice, therefore, is to require the parties to file with you in writing any objections they want noted in your report. That way, if they don't file the objection with you in writing within 24 hours after the close of the investigation, as the script suggests, you don't have to note the objection in your report. You can still do so if you want, however. Requiring that the objection be filed in writing reduces unnecessary objections, forces the proponent to articulate the objection, gives you the benefit of calm consideration, and prevents you from becoming a stenographer for counsel.

8.6.3. **Fair and Thorough Proceedings**. Although you don't rule on objections, you certainly are expected to correct any deficiencies in the conduct of the proceedings when they are brought to your attention and you think it's appropriate. For example, suppose the GR presents you with a copy of a witness's statement obviously taken from an OSI or security police report. Defense objects, citing hearsay as the basis for the objection. Although hearsay is not a valid objection for Article 32 proceedings (since the rules of evidence don't apply), you should realize that you are not authorized to consider this statement until you have first determined that the witness is unavailable and then found that the statement qualifies as an alternative to testimony. So entertain the objection as one relating to procedural compliance with R.C.M. 405 and act accordingly. Determine the witness's availability and, if unavailable, then decide whether the statement qualifies for your consideration as an alternative to testimony, e.g., is it sworn? Be sure to explain what you did in your report, i.e., that you determined the witness was unavailable, your facts and rationale for that finding, and that the statement qualified as an alternative to testimony. Don't leave the SPCMCA, GCMCA, and their staffs wondering whether you complied with R.C.M. 405.

8.7. Handling Other Offenses. Another area that frustrates many convening authorities is the haphazard way many IOs handle the problem of other uncharged offenses that are discovered during the investigation. Effective for all cases referred to trial after 10 Feb 96, Article 32(d) of the UCMJ was amended to permit an investigating officer to investigate uncharged misconduct without waiting for preferral. The accused must be present at the investigation, must be informed of each uncharged offense investigated, and must be afforded the opportunity for representation, cross-examination and presentation of anything in his or her own behalf.

8.7.1. **Procedure**. Inform the accused of the new offense(s) at the outset of the investigation or at any point in the investigation where the potential offense is revealed. First,

tell the accused and his counsel that your investigation or the available evidence has disclosed that the accused is reasonably suspected of offenses other than the ones charged and identify these offenses to the accused and counsel. Then tell all parties that now your investigation is enlarged to encompass the additional offenses. AFI 51-201, para. 4.1.11.

8.7.2. **Investigate the New Offense(s).** Proceed with your investigation of the new offenses. If the evidence supports the offense(s), your report should include appropriate recommendations concerning preferral of the new charges prior to anyone forwarding them for referral.

8.8. Reopening the Investigation. It will be necessary to reopen the investigation to address uninvestigated aspects of the case if additional, uninvestigated charges are preferred after the first investigation has been completed, if there has been a "major" change in a specification, or if additional evidence is required. *U.S. v. Louder*, 7 M.J. 548 (A.F.C.M.R. 1979).

8.8.1. **Procedure**. The IO should convene the hearing as before and readvise the accused of his rights and the nature of the charges. The second hearing should then proceed in the same manner as the first.

8.8.2. **The Report**. If the DD Form 457, Investigating Officer's Report, was not completed prior to the reopening, include all matters presented in one report. If the first report was completed, submit the additional matters as an addendum to the original package without accomplishing another DD Form 457.

9. PREPARING THE REPORT.

9.1 Role as an Investigator. Throughout the investigation, the IO should have in mind the statutory obligation to conduct a "thorough and impartial" examination of the charges and evidence accumulated to date. You are not supposed to perfect a prosecution by conducting further police investigation, but you are not precluded from determining the existence of evidence not yet produced when appropriate. Thus, if you should find that certain evidence was produced by a search authorized by a commander, and find no evidence of the written authorization or the affidavits which produced it, you may properly call for production of the affidavits and authorization, consider them, and append them to the report. Similarly, if, for example, in a case involving an offense against a child you see no evidence which establishes the age of the child (a frequent omission), you should pursue and include such information.

9.1.1. **How Much Detail?** Debate continues over the desirable amount of detail in an IO report. Those who might be labeled "minimalists" argue that the investigation need only establish a *prima facie* case ["reasonable grounds. . .to believe that the accused committed the offenses alleged," R.C.M. 405(j)(2)(H)] and would further reduce the report and its exhibits to the minimum necessary for that end. At the other extreme are those who would encumber the report with verbatim transcriptions, extensive investigation and examination, and a complete brief of the law of the case.

9.1.2. **The minimum**. The law and legislative history certainly supports the "minimalists" to this extent: a report of investigation which, with its exhibits, shows a *prima facie* case and includes no substantial errors is sufficient if, despite a motion for appropriate relief, no new investigation should be ordered by a military judge. In short, the convening authority needs to be able to assess the comprehensiveness of the evidence and its admissibility to ensure against a trial on baseless charges. The DD Form 457 covers this entire discussion in a few blocks on side 2. If the exhibits accumulated and considered are sufficient to permit you and others to determine that trial is warranted, then it is possible that little narrative will be needed.

9.1.3. **The best.** In most cases, however, the IO will best serve the appointing and convening authorities by including in his/her report a brief summary of the evidence with citations to the exhibits for each assertion of fact, some comment on the apparent reliability of the evidence, and some notation of any significant legal issues discovered. This is the kind of report that best serves all parties concerned.

9.2. Format. The DD Form 457 was originally intended to serve as a complete report of investigation. Thus, you should not have to supplement it to any great degree. Do *not* repeat in your narrative anything that is adequately reported on the form.

9.2.1. **Summarize the facts**. A brief factual synopsis of the case sets the stage. Usually, a chronological account is best. When present, briefly state the facts which establish the elements of each offense. Cite the exhibits that show each fact you state in the summary.

9.2.2. **Analyze the Evidence**. An analysis of the elements of proof and the available evidence is very helpful. Do not simply copy the elements for no purpose; they are the threshold for your analysis. Obviously, if an element of proof is missing, you shouldn't conclude that a charge is warranted by the evidence. But remember that you can consider hearsay in deciding whether all the elements of proof are met. You should also consider the credibility and demeanor of any witnesses who testify. If relevant, include your observations in your report.

9.2.3. **Note the Legal issues**. Although you are not required to rule on the admissibility of evidence, you are required to note inadmissibility of evidence in your report whenever you are aware that evidence may not be admissible at trial. *See* R.C.M. 405(e) *Discussion*. Thus, you should **briefly** discuss any evidentiary or other legal issues you see. Don't go into a lengthy legal analysis. Cite the proper authorities to save others unnecessary labor, but keep your explanation **brief**. In determining whether the charges are in proper form, you should also consider whether any of the charges are multiplicious on their face and therefore subject to a preliminary motion to dismiss. It is part of your job to determine whether there's been an unreasonable multiplication of charges. Please note that unreasonable multiplication of charges applies to both findings and sentencing. *U.S. v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). That is, "if an offense is multiplicious for sentencing it must necessarily be multiplicious for findings as well." *Id*.

9.2.4. **Recommending changes to the charges**. After hearing and seeing all the evidence, you may note some errors in the charges or wish to make recommendations concerning the referral of the charges to a court-martial; e.g. the date of an alleged offense is inaccurate or a lesser-included offense is warranted because evidence is lacking on a certain element of the offense actually charged. Or, in the extreme, a specification may not be supported at all by the evidence. Remember, you may not make any changes to the charges. You must make **recommendations** which the GCMCA may later accept. When making recommendations, be sure to state specifically what evidence (or lack thereof) supports them and then determine whether they are "minor," or "major" changes.

9.2.4. 1. **Minor changes**. R.C.M. 603 deals with changes to charges and specifications which do not require redrafting or reswearing by the accuser. "Minor" changes are defined as any changes except one which adds a party, offense or substantial matter not fairly included in the charges previously preferred or which is likely to mislead the accused as to the offenses charged. *U.S. v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995); *U.S. v. Page*, 43 M.J. 804 (A.F. Ct. Crim. App. 1995). When the convening authority makes a minor change, the Article 32 investigation does not need to be reopened.

9.2.4.2. **Major changes**. Any changes that are not "minor" are considered "major" by definition. R.C.M. 603(d). For example, converting a specification that does not state an offense into one that does is a major change requiring charges to be resworn and an additional investigation to be conducted. *U.S. v. Garrett*, 17 M.J. 907 (A.F.C.M.R. 1984). Changing a date

or place in the specification is usually "minor" unless a clearly different offense than that contemplated by the accuser results. However, if changing a date affects jurisdiction over the offense, it would be considered a "major" change. If a change is major, the recommendation should be to reopen the Article 32 investigation (*See supra*, para. 8.8), unless the substance of the charge or specification as amended or changed was not covered in the previous investigation. R.C.M. 603, *Discussion*.

9.2.5. **Objections**. You are required to note in your report objections made during the proceedings by either party "if a party so requests." R.C.M. 405(h)(2). The attached IO's Article 32 Script gives you a procedure for handling objections that will facilitate your report writing. Basically, you should advise the parties that they will be required to put their objections in writing. If they don't, you will not have to note them in your report. When written objections are received, you should respond to each in your report and cure any deficiencies, if necessary.

9.2.6. **Delays**. You are required to explain any delays in the investigation. R.C.M. 405(j)(2)(F). Normally, this requirement is interpreted to mean you must explain all delays in excess of the number of days authorized in the letter of appointment for completion of your investigation and report (usually eight days). The brief chronology of your activities should suffice. If DC requested and was granted one or more delays, be sure to include the defense requests and your replies in the report. Remember, you always must have counsel put delay requests in writing for inclusion in the report.

9.3. Assembly. Like records of trial, reports of investigation under Article 32, UCMJ, are expected to follow a certain sequence (up to a point). That sequence follows:

a. IO Appointment letter. This letter is not a numbered exhibit.

b. First endorsement to DD Form 458. This is not a numbered exhibit.

c. DD Form 457 (IO Report), its supplemental pages, and exhibits.

-Exhibits. A copy of the charge sheet is always I.O. Exhibit 1. Do not use the original; it along with court member data will be placed on top of everything else when your report is forwarded to the general court-martial convening authority. Other exhibits and documents such as witness statements and reports you considered (and those which you did not consider) should form the rest of the report. If there are any exhibits that you did not consider, you note this in your report. Paginate exhibits when they have more than one page. *See* AFI 51-201, para. 4.1.13.

9.3.1. **Exhibits containing child pornography**. Under no circumstances should you attach copies of exhibits that may constitute evidence of child pornography. You should provide a recital of the substance or nature of such evidence sufficiently detailed to aid the convening authority in determining whether there is sufficient evidence to warrant referring the charges to trial. R.C.M. 405(j)(2)(C). Additionally, you should note where the evidence is maintained in evidence storage and arrange through the local SJA to have the evidence made available by the evidence custodian for the appropriate convening authority level to review before making a decision on disposition of the case. DC and the accused must not be given copies of such evidence, either prior to the hearing or in copies of the report of investigation.

9.4. Reproducing the Report. You need not reproduce the report, but you must give a report of such quality that all of it can be reproduced clearly and legibly. It goes to a convening authority and must be carefully considered before deciding upon disposition of the case. Your report should establish your craftsmanship, because that establishes your credibility. Therefore:

- Consider having someone else proof your report. Although you should always use a spell checker, it cannot catch all grammatical errors.

-Get the originals, if necessary, from which to have readily **legible** copies made.

-Consider having statements in poor handwriting typed and attach them behind the statements.

-Ensure there are no copies of exhibits that may constitute evidence of child pornography.

9.5 Distribution of the Report. R.C.M. 405(j)(3) obligates you to cause the report to be delivered to the commander who directed the report.

9.5.1. **Local SJA**. Normally, your obligation ends when you deliver your report to the local SJA of that commander. In the absence of contrary instructions in your letter of appointment, *see* R.C.M. 405(c), you need only deliver an original copy of your report to the local SJA. The SJA then becomes responsible for making any other required copies and distributing them. The SJA may, however, decide that your report is inadequate and ask you to clarify certain aspects of it. He or she cannot, however, influence your independent judgment.

9.5.2. **Accused's Copy**. R.C.M. 405(j)(3) obligates the commander who directed the investigation to "promptly cause a copy of the report to be delivered to each accused." The local SJA normally performs this function for the commander so you don't have to worry about it. Note that the requirement is to serve a copy on the accused - not the accused's counsel. However, it may be a good business practice to serve a copy of the report on the DC as well. Local SJA's should get in the habit of serving the copy on the accused *and* simultaneously notifying the accused's counsel that they've done so. Finally, a signed and dated acknowledgment of service on the accused should be included when forwarding the report. *See* AFI 51-201, para. 4.1.4.

9.5.3 **Witness's Counsel**. Upon request by a witness in the case, or the witness's counsel, the convening authority that directed the investigation, or the SJA on behalf of the convening authority, should promptly cause a FOIA compliant copy of the report to be served upon the requestor.

9.6. Defense Counsel's Right to Object. Service of a copy of the report on the accused starts the running of the 5-day period for DC to object to the report. R.C.M. 405(j)(4); AFI 51-201, para. 4.1.4. The day the report is delivered to the accused is not counted in calculating the 5-day period. *See* R.C.M. 103(9). Failure to object to matters included or omitted from the report "will constitute a waiver of such objections in the absence of good cause for relief from the waiver." R.C.M. 405(k) and *Discussion*. The convening authority, or the IO, if the convening authority has delegated such authority, may extend the period of time during which the DC may object to the report. The SPCMCA is not required to wait for expiration of the 5-day period before deciding whether or not to forward the charge and report of investigation. R.C.M. 405(j)(4). If the charges have already been forwarded when timely objections are received, the objections should be sent through the SPCMCA through the GCM SJA to the GCMCA.

10. DUTIES AFTER SERVICE AS THE ARTICLE 32 IO

10.1 Disqualification. An IO is disqualified to act later in the same case in any other capacity. R.C.M. 405(d)(1).

SUMMARY

R.C.M. 405 is not comprehensive enough to allow an investigating officer to begin an investigation with no other information. The purpose of this guide is to fill that gap so that Article 32 investigating officers can promptly and diligently pursue the investigations to which they are detailed, correctly gather and compile the evidence for review by others, and correctly resolve the issues which most frequently confront them. In brief, the Article 32 investigating officer is neither a judge nor a substitute for a judge, but is an investigator with a special charge of impartiality and thoroughness.

SECTION II
INVESTIGATING OFFICER'S ARTICLE 32 SCRIPT

INTRODUCTION:

IO: Good (morning/afternoon). This investigation will come to order. I am (Grade)(Full name). I am assigned to _____. The Commander of the _____ Wing, (Grade) (Name), has appointed me to investigate (a charge/certain charges) against (Grade) (Full name). Are you (Grade) (Full name), the accused in this case?

ACC: _____.

PRELIMINARY ADVICE:

(*Use a copy of DD Form 457 for notes*.)

IO: Before I begin my investigation, I need to cover certain preliminary matters with you. First, I would like counsel to introduce and identify themselves. Government?

GR: I am (Grade) (Full name). I am assigned to the _____ AFB legal office; I am the government representative in this proceeding.

IO: Thank you, (Grade) (Name). Are you aware of any grounds that might disqualify you from serving as the government representative?

GR: No.

IO: Would counsel representing the accused please identify your (self/selves) for the record and state your qualifications?

DC: I am (Grade) (Full name), Area Defense at _____ AFB. I am qualified under Article 27(b) and sworn under Article 42(a). (I have not/no member of defense has) acted in any manner which might tend to disqualify (me/them) in this investigation.

CIV: I am (Mr/Ms) _____. I am an attorney. My office is located at _____. My mailing address is _____. My office phone number is _____. I am a member in good standing of the bar of the state of _____.

(*Civilian counsel must be sworn*)

IO: Do you (swear/affirm) that you will faithfully perform all the duties of defense counsel in the case now in hearing [so help you God]?

CIV: I do.

(*If witness counsel is present*)

IO: Would counsel representing (Grade) (Full Name), a witness in this case, please identify yourself for the record and state your qualifications?

WC: I am (Grade) (Full name), Special Victims' Counsel at _____ AFB. I am qualified under Article 27(b). I have not acted in any manner which might tend to disqualify me in this investigation.

CIV: I am (Mr/Ms) _____. I am an attorney. My office is located at _____. My mailing address is _____. My office phone number is _____. I am a member in good standing of the bar of the state of _____.

(*Civilian counsel must be sworn*)

IO: Do you (swear/affirm) that you will faithfully perform all the duties when representing (Grade)(Name) in the case now in hearing [so help you God]?

IO: It appears that counsel representing the accused (has/have) the requisite qualifications under R.C.M. 405(d)(2) and I will so note in my report.

Before I proceed further, I would like to state that I am not aware of any reason that would disqualify me from serving as investigating officer. [My involvement thus far in this case has consisted of _____. (*e.g.*, reviewing the AFOSI report of investigation for a preliminary determination of which witnesses are relevant and necessary for this investigation, setting a hearing date)] Is the accused or counsel for either side aware of any grounds that might disqualify me from conducting this investigation?

(*Please note: it is not a per se exclusion or disqualification if the IO is assigned to the legal office that supports the SPCMCA or is rated by the SPCMCA or his/her SJA*)

GR: The government is aware of none.

DC: The defense is aware of none.

IO: (Accused's Grade) (Name), please remain seated throughout these proceedings. Do you have a copy of the charge sheet(s) in front of you?

The charge(s) that I have been appointed to investigate are contained on (a charge sheet/charge sheets) dated _____ [and _____]. Basically, you are accused of the following offense(s):

_____
_____
_____

(e.g.: Desertion from your unit from _____ to _____; Use of cocaine at or near _____ AFB on or about _____.)

IO: (Accused's Grade) (Name), do you wish me to read the formal charges to you?

ACC: _____.

(If the answer is "yes," IO then reads the charges to the accused.)

(*IO should check off block 10a on the DD Form 457.*)

IO: You have been accused of these charges by (Grade) (Full name), (commander of the _____squadron.

(*IO should check off block 10b on the DD Form 457.*)

IO. I now will advise you of the purposes of this investigation and of your rights during it.

As the Investigating Officer, I have a duty to thoroughly and impartially investigate all the matters set forth in the charge[s] and specification[s] against you. The primary purpose of this investigation is to inquire into the truth of the matters set forth in the charge[s], to look at the form of the charge[s] to see if (its/they're) proper, and to secure information on which to determine what disposition should be made of this case. But this investigation also serves another purpose as well. It serves as a means for you to learn about the government's case against you.

Do you have any questions about the purposes of this investigation?

ACC: _____.

(*IO should check off block 10d on the DD Form 457.*)

IO: Now I will inform you of your rights during these proceedings. If there is any portion of these rights that you do not understand, please ask me about it.

First, you have all the rights afforded you by Article 31 of the Uniform Code of Military Justice. Article 31 reads as follows:

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received as evidence against him in a trial by court-martial.

Basically, what that all means is that you have the right under Article 31, UCMJ, not to incriminate yourself. This means that you have the right to remain silent during these proceedings and at other times as well. You don't have to say or do anything that might tend to incriminate you. In addition, if you do say or write something and give up that right, you should know that whatever you say can be used against you in these proceedings as well as in a trial by court-martial and also in administrative proceedings.

Do you understand these rights?

ACC: _____

IO: Now I will advise you of your rights to counsel.

First, you have the right to be represented at this investigation by your detailed defense counsel, (Grade) (Name), or you may be represented by military counsel of your own selection, if the counsel you request is reasonably available. Military counsel are provided to you free of charge. You also have the right to be represented by a civilian counsel provided by you at your own expense. Civilian counsel may represent you alone or along with your military counsel.

Do you understand these rights?

ACC: _____

IO: By whom do you wish to be represented?

ACC: _____

(*IO should check off block 10c of the DD Form 457*.)

IO: You also have the right to be present with your counsel during these proceedings throughout the taking of evidence. However, if you are voluntarily absent or disruptive, your right to be present may be considered to be waived.

Do you understand this right?

ACC: _____.

(*IO should check off block 10e of the DD Form 457*.)

IO: You also have the right to cross-examine any witnesses presented [either] by me [or the government representative] and you have the right to have any available witnesses and evidence presented on your behalf. This includes the right to ask for the production of evidence, including documents or physical evidence which is in the control of military authorities. If this evidence is relevant and not cumulative -- that means that it doesn't duplicate other evidence that's already been produced -- and if the evidence is determined by me to be reasonably available, it will be produced.

Do you understand this right?

ACC: _____.

(*IO should check off blocks 10g and 10h of the DD Form 457*.)

IO: You also have the right to present anything you wish, either statements or real evidence in defense, extenuation or mitigation. This means that in these proceedings you can present anything you want that you think shows that you are not guilty of any offense that you're charged with, or which shows that your guilt is in a lesser degree than that alleged. You may also present any matters that are appropriate for consideration on the disposition of any offense, such as an outstanding combat or overseas record.

Do you understand this right?

ACC: _____.

(*IO should check off block 10i of the DD Form 457*.)

IO: You also have the right to make an unsworn or sworn statement during the proceedings. You can make your statement either orally or in writing by yourself or through counsel - the choice is yours. Remember, however, as I advised you before, anything you say in a sworn or unsworn statement - even if it's only in writing and you don't actually say it - can be used against you in a trial by court-martial.

Do you understand this right?

ACC: _____.

(*IO should check off block 10j on the DD Form 457*.)

IO: That completes my advice to you of your rights during these proceedings. I am also required to inform you at the outset of the investigation of any witnesses or other evidence known to me which I expect to be presented.

I expect the following witnesses to testify:

_____
_____
_____

I also expect to consider the following other evidence:

_____
_____
_____

Naturally, other evidence may be presented for consideration.

(*IO should check off block 10f, thus completing all the blocks in para. 10 of the DD Form 457*.)

<u>MENTAL RESPONSIBILITY</u>:

IO: Finally, does either counsel feel there are grounds to believe that the accused was not mentally responsible at the time of the alleged offense(s) and/or not competent to participate in (his/her) defense? (If so consult R.C.M. 706)

DC: _____.

GR: _____.

ARTICLE 32 PROCEDURES:

IO: Now, let me go over with you the procedures I will use to conduct this investigation. First, (I/the government representative) will call any available witnesses and produce any available documents which are relevant to this investigation. Defense counsel will be given an opportunity to cross-examine these witnesses after they have testified. Defense counsel will also be allowed to examine any documents presented. I will explain in a minute how I intend to handle objections.

Second, after these witnesses and documents have been produced, the defense will be permitted to put on any available witnesses and documents of its own which are relevant to this investigation. Any defense witness will be subject to additional questions by me [and cross-examined by the government representative].

Third, the witness's counsel will be allowed to appropriately advocate for his/her client during the investigation. For example, the witness's counsel may ask that I close all or part of the proceedings to the public, seal the witness's records which contain privileged information or information regarding the alleged sexual behavior or sexual predisposition of the witness, or redact personally identifiable information such as social security number or date of birth. The witness's counsel may also object if he or she believes a question has been asked of their client which is outside the scope of this inquiry or which violates a pertinent rule.

HANDLING OBJECTIONS:

IO: I will handle any objections in the following fashion: I am not a judge - I don't rule on the admissibility of evidence. I am entitled to consider any evidence that qualifies for my consideration under R.C.M. 405. That includes testimony and other evidence, or their alternatives, if permitted under R.C.M. 405(g)(4) and (5).

Generally, the Military Rules of Evidence do not apply in these proceedings. Those that do apply are the rule prohibiting compulsory self-incrimination, the rule of privilege for any mental examination of the accused, the rule on degrading questions, the rule requiring that a suspect who is subject to the code be warned of rights afforded by Article 31 before being questioned, [the rule (M.R.E. 412) regarding inadmissibility of evidence of a victim's past sexual behavior or alleged sexual predisposition], and the rules on privileges contained in Section V of the Military Rules of Evidence. Thus, I can and will consider hearsay evidence unless there is some other reason to prevent me from doing so.

Now that I've said that I'm not going to rule on evidentiary questions - except those expressly mentioned - let me explain the type of objections I will rule on.

First, I will rule on objections that relate to relevancy. I want to keep this investigation focused on the subject matter.

Second, I expect counsel to be familiar with the alternatives to testimony and alternatives to evidence that I am entitled to consider under R.C.M. 405. I will accept and rule on any defense objections to my consideration of alternatives to evidence or testimony. If it turns out that the alternative is one that I cannot consider, I will so inform the parties.

OBJECTIONS MUST BE IN WRITING TO BE PRESERVED:

IO: I am required to note objections in my report of investigation if a party so requests. But I am also allowed to require that a party making an objection file the objection in writing. So, the rule we will follow in these proceedings is that if any party makes an objection that they want me to note in the report of investigation, they must file that objection with me in writing within 24 hours after the close of this investigation. Any objection that is not reduced to writing and filed within the deadline will be discussed in my report of investigation only if I, in my discretion, choose to do so. [Note: your authority for this procedure is R.C.M. 405(h)(2)]. Are there any questions?

GR: _____.

DC: _____.

REQUESTS FOR ASSISTANCE:

IO: Does the defense have any witnesses or documents which they desire my assistance in producing?

DC: (No/Yes, I request your assistance in.....)

EXAMINATION OF WITNESSES AND EXHIBITS:

If a reporter is used for any verbatim portions:

IO: (Mr./Ms.) (Name) has been appointed reporter for this investigation and (has been previously sworn/will be sworn):

If not previously sworn, administer the following oath: Do you (swear/affirm) that you will faithfully perform the duties of reporter to this investigation, so help you God?

CR: I do.

IO: Let's call the first witness.

IO/GR: I call as the first witness (Grade) (Full name).

IO/GR: Do you (swear/affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth [so help you God]?

WIT: I do.

If an interpreter is required for the witness, the interpreter should be sworn to the following oath by the IO:

IO/GR: Do you (swear/affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret [so help you God]?

INT: I do.

IO/GR: Please state your full name [and Grade].

WIT: _____.

IO/GR: (Military) What is your organization and station?
(Civilian) In what city do you live?

WIT: _____.

IO/GR: (Civilian) Does the government representative or defense counsel have a way of contacting you in the event we need to speak with you again?

WIT: _____.

IO/GR: Do you know the accused, (Grade) (Name), the subject of this investigation?

If this case is referred to trial, it may be some time before that trial is actually conducted. Do you know of any reasons, such as your PCS, TDY, date of separation, etc., you might not be available for trial?

WIT: _____.

(*Note: If the witness will not be available for trial and his or her testimony is crucial, consider preserving the testimony verbatim or arranging a deposition. The IO should consult with the local SJA concerning these arrangements*.)

[*If there is a prior statement, having the witness adopt it is optional*.]

IO/GR: I show you I.O. exhibits [ ] which purport to be _____ (identify exhibits-prior statements of the witness, items of evidence, etc.). Can you identify (this/these) item[s]?

WIT: _____.

IO/GR: Do you wish to adopt (this/these) statement[s] as part of your testimony at this hearing?

(*Note: The IO should use caution to ensure private or sensitive information is not inadvertently inserted into the report. Additionally, if the witness is available to testify, they may adopt their statement even though it's hearsay*.)

WIT: _____.

IO/GR: (*Thoroughly examine the witness*.)

IO: The defense may examine the witness.

DC: _____.

(*Upon completion of cross-examination, the IO may ask questions of the witness. If the IO has conducted the initial examination of the witness, the government representative, if any, should be allowed to ask questions*.)

IO: Are there further questions from either side for this witness?

DC: _____.

GR: _____.

IO: Thank you, you are excused. I will prepare a summary of your testimony. When it is ready, I will ask you to read it carefully to be sure it is accurate. You may make any changes you think are necessary to accurately reflect your testimony here today. I may then ask you to sign it under oath or I may sign it myself as a summarized recollection of your testimony. (Please wait outside until the statement is prepared/return when called to sign the statement).

(*Note: The summary of testimony may be prepared or dictated in the presence of the witness to ensure it is accurate*.)

(*Proceed with other witnesses in the same fashion, giving the above oath*.)

GR: The government has no further witnesses.

IO: I have no further witnesses to be called or evidence to be presented.

Does the accused wish to make a statement - sworn or unsworn?

DC: _____.

(*If accused makes a sworn statement, the IO administers the oath*.)

IO: Does the defense have any witnesses or other evidence?

DC: Yes. Defense calls _____.

IO/GR: Do you (swear/affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth so help you God?

WIT: I do.

(*Defense witnesses are examined by DC, GR, and IO*.)

DC: I have no further witnesses.

<u>CLOSING</u>:

IO: That completes all the witnesses. Just so that everyone is aware of what documentary evidence I intend to consider, let me state for the record that I intend to consider the following documents:

_____

_____

_____

IO: Does either party have any objections to my consideration of these documents? If so, please state it for the record at this time.

GR: _____.

DC: _____.

IO: [Very well, I will consider your objection. If you wish me to note that objection in my report, you must file it with me in writing within 24 hours.]

GR: _____.

DC: _____.

IO: Would either party like to present a brief argument concerning the charge(s) and the evidence.

GR: _____.

DC: _____.

IO: The investigation is closed.

Attachment 1

MEMORANDUM FOR *INVESTIGATING OFFICER*

FROM: WG/CC

SUBJECT: Article 32 Investigation, U.S. v. *(name, grade, squadron of accused)*

1. You are hereby designated as Investigating Officer pursuant to Article 32, UCMJ, to investigate the attached charges against *(name, grade, and squadron of accused).*

2. In conducting your investigation, you will comply with the provisions of Articles 31 and 32, UCMJ, R.C.M. 405; and AFI 51-201, Chapter 4, Section A, dated 6 June 2013. You should review each of these references before beginning your investigation.

3. Your attention is directed to AFI 51 -201, paragraph 4.1.2. A verbatim transcript of the testimony of a witness will only be prepared with the approval of my Staff Judge Advocate. You are expected to prepare a summary of testimony as soon as practicable after a witness has testified.

4. Your report and recommendations using DD Form 457, will be submitted within eight days through my Staff Judge Advocate in an original and five copies. The Article 32 hearing in this case is scheduled for _____. Pursuant to R.C.M. 707, all delays from this scheduled Article 32 hearing date will be approved by me. In the event that I am unavailable to act upon a delay request, you are authorized pursuant to R.C.M. 707, to authorize delays. (*OR, You are hereby delegated authority to approve delays in the Article 32 hearing date. Your decision granting a delay must be in writing.)* Any delay beyond eight days in submitting your report will be fully explained in your report. My Staff Judge Advocate will provide any required assistance and support.

Brigadier General, USAF
Commander

Attachment 2

MEMORANDUM FOR DC, GR & WC

FROM: Article 32 Investigating Hearing Officer

SUBJECT: Article 32 Hearing - _____

1. This is to inform you that an Article 32 hearing into the charge(s) against _____ has been set for _____, at _____ in the Legal Office courtroom, _____AFB.

2. The Uniform of the Day will be _____.

3. Should you have any questions concerning the Article 32 hearing, contact me at _____.

Investigating Officer

Attachment 3

MEMORANDUM FOR *DC, GR & WC*

FROM: Article 32 Investigating Hearing Officer

SUBJECT: Article 32 Hearing - _____

1. Listed below are the witnesses who are expected to testify at the Article 32 investigation into the charges against _____.

a.
b.
c.

[2. I have determined that _____ is not reasonably available to testify at the investigation. My reasons for this determination will be disclosed at the hearing and discussed in my report.]

3. Listed below are statements, documents and the physical evidence that I propose to consider in the Article 32 Investigation.

a.
b.
c.

4. Please inform me in writing of any objections you have to my consideration of the evidence listed in paragraph 3. Also please inform me if you desire my assistance in the production of witnesses or evidence that you think I should consider during this investigation.

Investigating Officer

Attachment 4

__AW/JA
Address
Base/ZIP

Mr./Ms. _____
Address
City/State/ZIP

Dear Mr./Ms.

You are invited to appear as a witness in proceedings under Article 32, Uniform Code of Military Justice, against _____. You are requested to appear at the Office of the Staff Judge Advocate, _____, AFB, at _____ a.m. on _____.

You are entitled to witness fees and transportation allowances to cover your attendance. You may collect these fees and allowances after completing your testimony.

Please inform me by _____ if you can appear on this date so I can prepare the necessary paperwork in advance to pay you right after your testimony and so I can arrange your access to the installation. My phone number is _____.

[For witnesses who must travel long distances: If you require advance travel assistance, please let me know and I will arrange for government-provided transportation to and from the proceedings.]

[If international travel is required: If you do not have a passport, please let me know]

Sincerely

_____, Captain, USAF

Chief, Military Justice**

** *It is better practice to send these letters out well in advance of Article 32 proceedings. That is why we have used the chief of military justice's signature block. The government representative or the investigating officer can also send these invitations out, time permitting.*

Attachment 5

SAMPLE ARTICLE 32 REPORT

Continuation of Item 13a

Exhibit No.	Description	Location of Original
1	Charge Sheet	62 AW/JA
2	Air Force Drug Testing Laboratory Drug Testing Report	Attached
3	Order to Report for Urinalysis Testing	Attached
4	Copy of Urinalysis Log Book	Attached
5	Summarized Testimony of Maj O'Bryant	Attached
6	Summarized Testimony of MSgt O'Day	Attached
7	Summarized Testimony of Amn Smith	Attached
8	Summarized Testimony of Mr. March	Attached
9	Summarized Testimony of TSgt Jones	Attached
10	Enlisted Performance Report, 13 Aug 09-14 Aug 11	62 MPF
11	Enlisted Performance Report, 13 Aug 11-14 Aug 13	62 MPF
12	Certificate-Airman of the Quarter, FY 13	Attached
13	Defense Objections	Attached

Continuation of Item 21, Investigating Officer's Report, DD Form 457, 14 October 2013

a. Case Synopsis.

(1) On 20 May 2013, the Commander, 22nd Communications Squadron, decided that he would do an inspection of his entire squadron via urinalysis. He consulted with the chief of military justice, Capt Ginny Tea and the drug demand reduction program office and determined that Tuesday, 28 May, would be a good day for the inspection since it fell on the day after a 3-day weekend. (I.O. Ex. 5, 6, 8)

(2) On 27 May 2013, the Commander met with his First Sergeant to go over the logistics of the inspection. *Id*. After finalizing the plan, the first sergeant printed out letters for each squadron members telling the member to report to the drug demand reduction program office NLT 0730 on 28 May 2013. (I.O. Ex. 5, 6)

(3) On 28 May 2013, the Commander signed all of the letters and issued a squadron-wide recall at 0600 with a report time of 0700 at the 22nd CS headquarters building. Once all squadron members were present, the letters were issued to each person, to include the accused (I.O. Ex. 3) and the squadron members boarded busses and were taken to the drug demand reduction program office. (I.O. Ex. 6)

(5) The accused signed the urinalysis log book at 0745 and, while observed, provided a specimen in excess of 60 ml. (I.O. Ex. 4.) This specimen was subsequently tested at the Air Force Drug Testing Laboratory (AFDTL), Joint Base San Antonio, Texas which detected and confirmed the presence in it of benzoylecgonine, a cocaine metabolite. (I.O. Ex. 2.) The lab reported the positive result to base authorities on 7 July 2013, a medical officer reviewed the accused's medical files, and a single charge alleging cocaine use was preferred against the accused an 10 October 2013.

b. Elements of The Offense Charged. The specification of the charge alleges that the accused wrongfully used cocaine at or near McConnell Air Force Base, Kansas between 20-28 May 2013, in violation of Article 112a, U.C.M.J. The elements of this offense are:

(1) That at or near McConnell Air Force Base, Kansas, between 26-28 May 2013, the accused used cocaine;

(2) That the accused actually knew he used the substance;

(3) That the accused actually knew that the substance he used was cocaine or of a contraband nature, and

(4) That the use by the accused was wrongful.

c. Discussion of the Evidence. Potential issues in this case are the location of the accused's use and whether his use was knowing and wrongful. In regard to the location of use, since the use most likely occurred over a weekend, it is probably impossible to establish the exact location of the use. Master Sergeant O'Day stated that the accused had been present for duty the work week of 20-24 May and that he had reported to his duty section at 0730 on Tuesday, 28 May. (I.O. Ex 6) Airman Smith, 62 CS, who lives down the hall from the accused in the Communications Squadron dormitory, said he saw the accused in the dormitory on Saturday afternoon . (I.O. Ex. 7). Thus, I conclude there is good reason to believe that the offense occurred "at or near McConnell Air Force Base," as alleged. With respect to wrongfulness, the medical review officer testified/wrote that the accused had no prescription for cocaine and his Commander testified that the accused was not acting in a law enforcement capacity during the charged time frame. Moreover, as there was no evidence to the contrary introduced at the hearing, wrongfulness of the use may be inferred at this point, [MCM, Part IV, para 37c(5)], as may be knowledge of the presence of the controlled substance by the presence of the controlled substance in the accused's body, [MCM, Part IV, paragraph 37c(10)].

d. Legal Issues. Defense objected in writing to several aspects of the investigation. (I.O. Ex. 10).

(1) Defense counsel objected to hearsay contained in the testimony of Master Sergeant O'Day. This objection related to what Master Sergeant O'Day had been told by the accused's supervisor as to the accused's duty status during the week before the urinalysis. Hearsay may be considered in this investigation. R.C.M. 405(i).

(2) Prior to the hearing, defense counsel requested that Technical Sergeant Henrietta Lambert, a laboratory technician at the AFDTL, Joint Base San Antonio, Texas, appear at the hearing to testify concerning the circumstances of testing irregularities noted in the AFDTL reports in this case. Applying the balancing test in R.C.M. 405(g)(1)(A), I determined that the defense's request for this witness was timely and that the significance of her testimony outweighed the difficulty and expense in producing her. In accordance with R.C.M. 405(g)(2)(A), I contacted Colonel John D. Carlson, the Commander, AFDTL, and asked him to make Technical Sergeant Lambert available for the hearing. Colonel Carlson told me that he could not let Technical Sergeant Lambert travel because to do so would negatively affect the ability of the laboratory to perform its mission. Several other technicians were on leave, the laboratory was working extra shifts to analyze urine samples, and Technical Sergeant Lambert's absence from her job would cause a significant logjam at the laboratory and prevent the laboratory from quickly and efficiently testing urine specimens for the Air Force. He told me he thus determined that Technical Sergeant Lambert was not reasonably available for the hearing and would not allow her to travel. I considered the sworn affidavit of Technical Sergeant Lambert in the AFDTL reports as an alternative to her appearance at the hearing.

(3) Defense counsel also requested that Mr. Thomas Friedman appear at the hearing. Mr. Friedman apparently was present at a party attended by the accused and would testify that he saw persons unknown to him sprinkling a white powdery substance into bowl of punch which punch was then consumed by many of the party attendees. I initially determined that Mr. Friedman was available to testify at the hearing. He has a local address and the importance of his testimony outweighed the difficulty and expense of ensuring his attendance. I then called Mr. Friedman, invited him to appear at the hearing, and offered to pay necessary expenses. Mr. Friedman told me that he would not attend the hearing under any circumstances and that the only way I could get him to attend would be to subpoena him. Lacking subpoena power I had no alternative but to declare him not reasonably available to appear at the hearing. Defense did not offer a prior statement of Mr. Friedman.

e. Recommendations: I recommend that a minor (pursuant to R.C.M. 603) amendment be made to the form of the charge. I recommend that the words "between on or about" be inserted into the specification before the dates "18 May" and "28 May" appearing in the specification.

f. Chronology:

10 October -- Appointed Investigating Officer.

11 October -- Set date and time for hearing

12 October -- Investigation began at 1300.
Investigation ended at 1700.

13 October -- Prepared summaries of witness statements and wrote report.

14 October -- Completed report. Delivered to SJA at 1600.

SUMMARIZED TESTIMONY OF LT COL PHILLIP J. O'BRYANT

Major Phillip J. O'Bryant appeared at the investigation, was sworn, and testified substantially as follows:

I am the commander of the 22d Communications Squadron. On 20 May 2013, after consulting with the chief of military justice, Capt Ginny Tea, the head of the drug demand reduction program office, Mr. Johnny March, and my first sergeant, Sergeant O'Day, I decided to do a squadron wide urinalysis inspection on the Tuesday following the 3 day weekend over Memorial Day.

On 27 May 2013, I met with Sergeant O'Day to go over the logistics of the inspection. After finalizing the plan, the first sergeant printed out letters for each squadron members telling the member to report to the drug demand reduction program office NLT 0730 on 28 May 2013. (I.O. Ex. 5, 6)

On 28 May 2013, I signed all of the letters early in the morning and issued a squadron recall at 0600 with a report time of 0730 at the 22 Communications Squadron headquarters building. I have 30 military members in my squadron. Only 28 people were recalled because 2 were on leave. The letters were issued to each person, to include Sergeant Johnson. Once everyone had their letter, the squadron boarded busses and were taken to the drug demand reduction program office. (I.O. Ex. 6)

That's the last I heard until we received a report back from the lab that Sergeant Johnson's sample had tested positive for cocaine. Sergeant Johnson is a communications troop and not a security forces troop. I have not assigned him to any law enforcement role and I am not aware of him working for law enforcement. To my knowledge, none of my troops have a prescription for cocaine.

I declare under penalty of perjury that the foregoing is true and correct. Executed at _____ Air Force Base, _____, on _____ 20___.

/s/ Phillip J. O'Bryant
PHILLIP J. O'BRYANT, Maj, USAF

I declare under penalty that the foregoing is a true and correct (not verbatim/verbatim) summary of the testimony given by the witness. Executed at _____ Air Force Base, _____, on _____ 20___.

Investigating Officer

Attachment 6

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. **FROM:** *(Name of Investigating Officer - Last, First, MI)*	b. GRADE	c. ORGANIZATION		d. DATE OF REPORT
2a. **TO:** *(Name of Officer who directed the investigation - Last, First, MI)*	b. TITLE		c. ORGANIZATION	
3a. NAME OF ACCUSED *(Last, First, MI)*	b. GRADE	c. SSN	d. ORGANIZATION	e. DATE OF CHARGES

(Check appropriate answer)	YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)		
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)		
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)		

7a. NAME OF DEFENSE COUNSEL *(Last, First, MI)*	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL *(If any)*	b. GRADE
c. ORGANIZATION *(If appropriate)*		c. ORGANIZATION *(If appropriate)*	
d. ADDRESS *(If appropriate)*		d. ADDRESS *(If appropriate)*	

9. *(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)*

a. PLACE	b. DATE

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: *(Check appropriate answer)*	YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION		
b. THE IDENTITY OF THE ACCUSER		
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31		
d. THE PURPOSE OF THE INVESTIGATION		
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE		
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT		
g. THE RIGHT TO CROSS-EXAMINE WITNESSES		
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED		
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION		
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING		
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE *(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)*		

b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading *(Example: "7c".)* **Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."**

DD Form 457, AUG 84 EDITION OF OCT 69 IS OBSOLETE. Reset Adobe Professional 8.0

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: *(Check appropriate answer)*				
NAME *(Last, First, MI)*	GRADE *(If any)*	ORGANIZATION/ADDRESS *(Whichever is appropriate)*	YES	NO
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.				
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL *(If not attached)*			
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED				
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. *(See R.C.M. 909, 916(k).)*				
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT *(If Yes, specify in Item 21 below.)*				
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL				
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM				
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED				
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. *(See R.C.M. 405(d) (1).*				

20. I RECOMMEND:
a. TRIAL BY ☐ SUMMARY ☐ SPECIAL ☐ GENERAL COURT-MARTIAL
b. ☐ OTHER *(Specify in Item 21 below)*

21. REMARKS *(Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)*

22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION

d. SIGNATURE OF INVESTIGATING OFFICER	e. DATE

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Attachment 7

REVISION OF ARTICLE 32 UNDER THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, SECTION 1702

SEC. 1702. REVISION OF ARTICLE 32 AND ARTICLE 60, UNIFORM CODE OF MILITARY JUSTICE.

(a) USE OF PRELIMINARY HEARINGS.—

(1) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended to read as follows:

‘‘§ 832. Art. 32. Preliminary hearing

‘‘(a) PRELIMINARY HEARING REQUIRED.—(1) No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.

‘‘(2) The purpose of the preliminary hearing shall be limited to the following:

‘‘(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

‘‘(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

‘‘(C) Considering the form of charges.

‘‘(D) Recommending the disposition that should be made
of the case.

‘‘(b) HEARING OFFICER.—(1) A preliminary hearing under subsection (a) shall be conducted by an impartial judge advocate certified under section 827(b) of this title (article 27(b)) whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. If the hearing officer is not a judge advocate, a judge advocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer.

[NOTE: On 25 November 2013, The Judge Advocate General, by Air Force Guidance Memorandum, changed AFI 51-201, *Administration of Military Justice*, paragraph 4.1.2.2, to require that an Article 32 investigating officer be a designated judge advocate in all cases.]

‘‘(2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.

‘‘(c) REPORT OF RESULTS.—After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) and (f).

‘‘(d) RIGHTS OF ACCUSED AND VICTIM.—(1) The accused shall be advised of the charges against the accused and of the accused’s right to be represented by counsel at the preliminary hearing under subsection (a). The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section.

‘‘(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).

‘‘(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deeemed to be not available for purposes of the preliminary hearing.

‘‘(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).

‘‘(e) RECORDING OF PRELIMINARY HEARING.—A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.

‘‘(f) EFFECT OF EVIDENCE OF UNCHARGED OFFENSE.—If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused—

‘‘(1) is present at the preliminary hearing;

‘‘(2) is informed of the nature of each uncharged offense considered; and

‘‘(3) is afforded the opportunities for representation, crossexamination, and presentation consistent with subsection (d).

‘‘(g) EFFECT OF VIOLATION.—The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error.

‘‘(h) VICTIM DEFINED.—In this section, the term ‘victim’ means a person who—

‘‘(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and

‘‘(2) is named in one of the specifications.’’

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter VI of chapter 47 of such title is amended by striking the item relating to section 832 and inserting the following new item:

‘‘832. Art 32. Preliminary hearing.’’.

(c) CONFORMING AMENDMENTS.—

(3) REFERENCES TO ARTICLE 32 INVESTIGATION.—(A) Section 802(d)(1)(A) of such title (article 2(d)(1)(A) of the Uniform Code of Military Justice) is amended by striking ‘‘investigation under section 832’’ and inserting ‘‘a preliminary hearing under section 832’’.

(B) Section 834(a)(2) of such title (article 34(a)(2) of the Uniform Code of Military Justice) is amended by striking ‘‘investigation under section 832 of this title (article 32) (if there is such a report)’’ and inserting ‘‘a preliminary hearing under section 832 of this title (article 32)’’.

(C) Section 838(b)(1) of such title (article 38(b)(1) of the Uniform Code of Military Justice) is amended by striking ‘‘an investigation under section 832’’ and inserting ‘‘a preliminary hearing under section 832’’.

(D) Section 847(a)(1) of such title (article 47(a)(1) of the Uniform Code of Military Justice) is amended by striking ‘‘an investigation pursuant to section 832(b) of this title (article 32(b))’’ and inserting ‘‘a preliminary hearing pursuant to section 832 of this title (article 32)’’.

(E) Section 948b(d)(1)(C) of such title is amended by striking ‘‘pretrial investigation’’ and inserting ‘‘preliminary hearing’’.

(d) EFFECTIVE DATES.—

(1) ARTICLE 32 AMENDMENTS.—The amendments made by subsections (a) and (c)(3) shall take effect one year after the date of the enactment of this Act and shall apply with respect to offenses committed under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), on or after that effective date.

[NOTE: The President signed the NDAA for FY 14 on 26 December 2013; therefore, the Article 32 amendments will take effect on 26 December 2014].

Presidential Documents

Executive Order 13669 of June 13, 2014

2014 Amendments to the Manual for Courts-Martial, United States

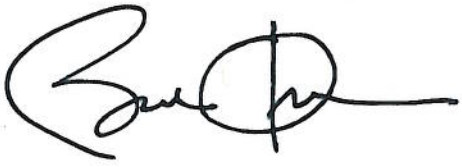
By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, the Discussion for Part II, and the Analysis for Part II of the Manual for Courts-Martial, United States, are amended as described in the Annex attached and made a part of this order.

Sec. 2. These amendments shall take effect as of the date of this order, subject to the following:

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.



THE WHITE HOUSE,

June 13, 2014.

Billing code 3295–F4–P

ANNEX

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) R.C.M. 405(f)(10) is amended to read as follows:

"(10) Have evidence, including documents or physical evidence, produced as provided under subsection (g) of this rule;".

(b) R.C.M. 405(g)(1)(B) is amended to read as follows:

"(B) *Evidence*. Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely and in compliance with this rule. As soon as practicable after receipt of a request by the accused for information that may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence."

(c) R.C.M. 405(g)(2)(C) is amended to read as follows:

"(C) *Evidence generally*. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not

reasonably available, the investigating officer shall inform the parties."

(d) R.C.M. 405(g)(2)(C)(i) is inserted to read as follows:

"(i) *Evidence under the control of the Government.* Upon the investigating officer's determination that evidence is reasonably available, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3)."

(e) R.C.M. 405(g)(2)(C)(ii) is inserted to read as follows:

"(ii) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained through noncompulsory means or by subpoena duces tecum issued pursuant to procedures set forth in R.C.M. 703(f)(4)(B). A determination by the investigating officer that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3)."

(f) R.C.M. 405(i) is amended to read as follows:

"(i) *Military Rules of Evidence.* The Military Rules of Evidence do not apply in pretrial investigations under this rule except as follows:

(1) Military Rules of Evidence 301, 302, 303, 305, and Section V shall apply in their entirety.

(2) Military Rule of Evidence 412 shall apply in any case defined as a sexual offense in Mil. R. Evid. 412(d).

(3) In applying these rules to a pretrial investigation, the term "military judge," as used in these rules, shall mean the investigating officer, who shall assume the military judge's powers to exclude evidence from the pretrial investigation, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in paragraphs (1) and (2)."

(g) R.C.M. 703(e)(2)(B) is amended to read as follows:

"(B) *Contents*. A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents, data, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties. A subpoena issued for an investigation pursuant to Article 32 shall not command any person to attend or give testimony at an Article 32 investigation."

(h) R.C.M. 703(e)(2)(C) is amended to read as follows:

"(C) *Who may issue.*

(1) A subpoena to secure evidence may be issued by:

(a) the summary court-martial;

(b) detailed counsel representing the United States at an Article 32 investigation;

(c) the investigating officer appointed under R.C.M. 405(d)(1);

(d) after referral to a court-martial, detailed trial counsel;

(e) the president of a court of inquiry; or

(f) an officer detailed to take a deposition.

(2) A subpoena to secure witnesses may be issued by:

(a) the summary court-martial;

(b) after referral to a court-martial, detailed trial counsel;

(c) the president of a court of inquiry; or

(d) an officer detailed to take a deposition.

(i) R.C.M. 703(e)(2)(D) is amended to read as follows:

"(D) *Service.* A subpoena may be served by the person authorized by this rule to issue it, a United States Marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and by providing to the person named travel orders and a means for reimbursement for fees and mileage as may be

prescribed by the Secretary concerned, or in the case of hardship resulting in the subpoenaed witness's inability to comply with the subpoena absent initial government payment, by providing to the person named travel orders, fees, and mileage sufficient to comply with the subpoena in rules prescribed by the Secretary concerned."

(j) R.C.M. 703(e)(2)(G)(ii) is amended to read as follows:

"(ii) *Requirements.* A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that a means of reimbursement of fees and mileage was provided to the witness or advanced to the witness in cases of hardship, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse is reasonably apparent for the witness's failure to appear."

(k) R.C.M. 703(f)(4)(B) is amended to read as follows:

"(B) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained by subpoena issued in accordance with subsection (e)(2) of this rule. A subpoena duces tecum to produce books, papers, documents, data, or other objects or electronically stored information for a pretrial investigation pursuant to Article 32 may be issued, following the convening authority's order

directing such pretrial investigation, by either the investigating officer appointed under R.C.M. 405(d)(1) or the detailed counsel representing the United States. A person in receipt of a subpoena duces tecum for an Article 32 hearing need not personally appear in order to comply with the subpoena."

(l) R.C.M. 1103(b)(3) is amended by inserting new subsection (N) after R.C.M. 1103(b)(3)(M) as follows:

"(N) Documents pertaining to the receipt of the record of trial by the victim pursuant to subsection (g)(3) of this rule."

(m) R.C.M. 1103(g) is amended by inserting new subsection (3) after R.C.M. 1103(g)(2) as follows:

"(3) *Cases involving sexual offenses.*

(A) "Victim" defined. For the purposes of this rule, a victim is a person who suffered a direct physical, emotional, or pecuniary harm as a result of matters set forth in a charge or specification; and is named in a specification under Article 120, Article 120b, Article 120c, Article 125, or any attempt to commit such offense in violation of Article 80.

(B) *Scope; qualifying victim.* In a general or special court-martial, a copy of the record of trial shall be given free of charge to a victim as defined in subparagraph (A) for a specification identified in subparagraph (A) that resulted in any finding under R.C.M. 918(a)(1). If a victim is a minor, a

copy of the record of trial shall instead be provided to the parent or legal guardian of the victim.

(C) *Notice*. In accordance with regulations of the Secretary concerned, and no later than authentication of the record, trial counsel shall cause each qualifying victim to be notified of the opportunity to receive a copy of the record of trial. Qualifying victims may decline receipt of such documents in writing and any written declination shall be attached to the original record of trial.

(D) *Documents to be provided*. For purposes of this subsection, the record of trial shall consist of documents described in subsection (b)(2) of this rule, except for proceedings described in subsection (e) of this rule, in which case the record of trial shall consist of items described in subsection (e). Matters attached to the record as described in subsection (b)(3) of this rule are not required to be provided."

(n) R.C.M. 1104(b)(1) is amended by inserting new subsection (E) after the Discussion section to R.C.M. 1104(b)(1)(D)(iii)(d) as follows:

"(E) *Victims of Sexual Assault*. Qualifying victims, as defined in R.C.M. 1103(g)(3)(A), shall be served a copy of the record of trial in the same manner as the accused under subsection (b) of this rule. In accordance with regulations of the Secretary concerned:

(i) A copy of the record of trial shall be provided to each qualifying victim as soon as it is authenticated or, if the victim requests, at a time thereafter. The victim's receipt of the record of trial, including any delay in receiving it, shall be documented and attached to the original record of trial.

(ii) A copy of the convening authority's action as described in R.C.M. 1103(b)(2)(D)(iv) shall be provided to each qualifying victim as soon as each document is prepared. If the victim makes a request in writing, service of the record of trial may be delayed until the action is available.

(iii) Classified information pursuant to subsection (b)(1)(D) of this rule, sealed matters pursuant to R.C.M. 1103A, or other portions of the record the release of which would unlawfully violate the privacy interests of any party, to include those afforded by 5 U.S.C. § 552a, the Privacy Act of 1974, shall not be provided. Matters attached to the record as described in R.C.M. 1103(b)(3) are not required to be provided."

(o) R.C.M. 1105A is newly inserted and reads as follows:

"Rule 1105A. Matters submitted by a crime victim

(a) *In general*. A crime victim of an offense tried by any court-martial shall have the right to submit a written statement to the convening authority after the sentence is adjudged.

(b) *"Crime victim" defined.* For purposes of this rule, a crime victim is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority is taking action under R.C.M. 1107. When a victim is under 18 years of age, incompetent, incapacitated, or deceased, the term includes one of the following (in order of precedence): a spouse, legal guardian, parent, child, sibling, or similarly situated family member. For a victim that is an institutional entity, the term includes an authorized representative of the entity.

(c) *Format of statement.* The statement shall be in writing, and signed by the crime victim. Statements may include photographs, but shall not include video, audio, or other media.

(d) *Timing of statement.*

(1) *General and special courts-martial.* The crime victim shall submit the statement to the convening authority's staff judge advocate or legal officer no later than 10 days after the later of:

(A) if the victim is entitled to a copy of the record of proceedings in accordance with Article 54(e), UCMJ, the date on which the victim receives an authenticated copy of the record of trial or waives the right to receive such a copy; or

(B) the date on which the recommendation of the staff judge advocate or legal officer is served on the victim.

(2) *Summary courts-martial*. The crime victim shall submit the statement to the summary court-martial officer no later than 7 days after the sentence is announced.

(3) Extensions. If a victim shows that additional time is required for submission of matters, the convening authority or other person taking action, for good cause, may extend the submission period for not more than an additional 20 days.

(e) *Notice*. Subject to such regulations as the Secretary concerned may prescribe, trial counsel or the summary court-martial officer shall make reasonable efforts to inform crime victims of their rights under this rule, and shall advise such crime victims on the manner in which their statements may be submitted.

(f) *Waiver*.

(1) *Failure to submit a statement*. Failure to submit a statement within the time prescribed by this rule shall be deemed a waiver of the right to submit such a statement.

(2) *Submission of a statement*. Submission of a statement under this rule shall be deemed a waiver of the right to submit an additional statement.

(3) *Written waiver.* A crime victim may expressly waive, in writing, the right to submit a statement under this rule. Once filed, such waiver may not be revoked."

(p) R.C.M. 1106(a) is amended to read as follows:

"(a) *In general.* Before the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial, on a record of trial by special court-martial that includes a sentence to a bad-conduct discharge or confinement for one year, or on a record of trial by special court-martial in which a victim is entitled to submit a statement pursuant to R.C.M. 1105A, that convening authority's staff judge advocate or legal officer shall, except as provided in subsection (c) of this rule, forward to the convening authority a recommendation under this rule."

(q) R.C.M. 1106(d)(3) is amended to read as follows:

"(3) *Required contents.* Except as provided in subsection (e), the staff judge advocate or legal advisor shall provide the convening authority with a copy of the report of results of the trial, setting forth the findings, sentence, and confinement credit to be applied; a copy or summary of the pretrial agreement, if any; a copy of any statement submitted by a crime victim pursuant to R.C.M. 1105A; any recommendation for clemency by the sentencing authority made in conjunction with the

announced sentence; and the staff judge advocate's concise recommendation."

(r) R.C.M. 1106(f) and (f)(1) are amended to read as follows:

"(f) *Service of recommendation on defense counsel, accused, and victim; defense response.*

(1) *Service of recommendation on defense counsel, accused, and victim.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on the counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including the transfer of the accused to a different place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally. If the accused was found guilty of any offense that resulted in direct physical, emotional, or pecuniary harm to a victim or victims, a separate copy of the recommendation will be served on that victim or those victims. When a victim is under 18 years of age, incompetent, incapacitated, deceased, or otherwise unavailable, service shall be made on one of the

following (in order of precedence): the victim's attorney, spouse, legal guardian, parent, child, sibling, or similarly situated family member. For a victim that is an institutional entity, service shall be made on an authorized representative of the entity.

(s) R.C.M. 1106(f)(4) is amended to read as follows:

"(4) *Response*. Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation and its enclosures believed to be erroneous, inadequate, or misleading, and may comment on any other matter."

(t) R.C.M. 1107(b)(3)(A) is amended by inserting new subsection (iv) immediately after R.C.M. 1107(b)(3)(A)(iii) as follows:

"(iv) Any statement submitted by a crime victim pursuant to R.C.M. 1105A."

(u) R.C.M. 1107(b)(3) is amended by inserting new subsection (C) immediately after R.C.M. 1107(b)(3)(B)(iii) as follows:

"(C) *Prohibited matters*. The convening authority shall not consider any matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial."

(v) R.C.M. 1306(a) is amended to read as follows:

"(a) *Matters submitted*.

(1) *By a crime victim*. After a sentence is adjudged, a crime victim may submit a written statement to the convening

authority in accordance with R.C.M. 1105A. A statement submitted by a crime victim shall be immediately served on the accused.

(2) *By the accused.* After a sentence is adjudged, the accused may submit written matters to the convening authority in accordance with R.C.M. 1105."

Sec. 2. The Discussion to Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion immediately following R.C.M. 306(b) is amended to read as follows:

"The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the

offense's effect on morale, health, safety, welfare, and discipline;

(B) when applicable, the views of the victim as to disposition;

(C) existence of jurisdiction over the accused and the offense;

(D) availability and admissibility of evidence;

(E) the willingness of the victim or others to testify;

(F) cooperation of the accused in the apprehension or prosecution of another accused;

(G) possible improper motives or biases of the person(s) making the allegation(s);

(H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;

(I) appropriateness of the authorized punishment to the particular accused or offense.

(b) The Discussion immediately following R.C.M. 405(g)(1)(B) is amended to read as follows:

"In preparing for the investigation, the investigating officer should consider what evidence, including evidence that may be obtained by subpoena duces tecum, will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, as to potential witnesses, whether their

personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness's testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call, it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness's personal appearance if the sole reason for the witness's testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the

offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence, including evidence that may be obtained by subpoena duces tecum.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subsection (g)(6), may be required to protect whatever information the government may decide to release to the accused."

(c) The Discussion immediately following R.C.M. 405(g)(2)(B) is amended to read as follows:

"The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend

and, when appropriate, informed that necessary expenses will be paid.

If the witness refuses to testify, the witness is not reasonably available because civilian witnesses may not be compelled to attend a pretrial investigation. Under subsection (g)(3) of this rule, civilian witnesses may be paid for travel and associated expenses to testify at a pretrial investigation. Except for use in support of the deposition of a witness under Article 49, UCMJ, and ordered pursuant to R.C.M. 702(b), the investigating officer and any government representative to an Article 32, UCMJ, proceeding does not possess authority to issue a subpoena to compel against his or her will a civilian witness to appear and provide testimony."

(d) The Discussion immediately following R.C.M. 405(g)(2)(C)(i) is amended to read as follows:

"Evidence shall include documents and physical evidence that are relevant to the investigation and not cumulative. *See* subsection (g)(1)(B). The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer."

(e) The following Discussion is inserted immediately after R.C.M. 405(g)(2)(C)(ii):

"A subpoena duces tecum to produce books, papers, documents, data, electronically stored information, or other objects for a pretrial investigation pursuant to Article 32 may be issued by the investigating officer or counsel representing the United States. *See* R.C.M. 703(f)(4)(B).

The investigating officer may find that evidence is not reasonably available if: the subpoenaed party refuses to comply with the duly issued subpoena duces tecum; the evidence is not subject to compulsory process; or the significance of the evidence is outweighed by the difficulty, expense, delay, and effect on military operations of obtaining the evidence."

(f) The Discussion immediately following R.C.M. 405(g)(3) is amended to read as follows:

"*See* Department of Defense Joint Travel Regulations, Vol. 2, paragraph C7055."

(g) The Discussion immediately following R.C.M. 405(i) is amended to read as follows:

"With regard to all evidence, the investigating officer should exercise reasonable control over the scope of the inquiry. *See* subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, see subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented. Certain rules relating to the form of testimony that

may be considered by the investigating officer appear in subsection (g) of this rule.

Mil. R. Evid. 412 evidence, including closed hearing testimony, must be protected pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a. Evidence deemed admissible by the investigating officer should be made a part of the report of investigation. *See* subsection (j)(2)(C), *infra*. Evidence deemed inadmissible, and the testimony taken during the closed hearing, should not be included in the report of investigation and should be safeguarded. The investigating officer and counsel representing the United States are responsible for careful handling of any such evidence to prevent indiscriminate viewing or disclosure. Although R.C.M. 1103A does not apply, its requirements should be used as a model for safeguarding inadmissible evidence and closed hearing testimony. The convening authority and the appropriate judge advocate are permitted to review such safeguarded evidence and testimony. *See* R.C.M. 601(d)(1)."

(h) The Discussion immediately following R.C.M. 703(e)(2)(B) is amended to read as follows:

"A subpoena may not be used to compel a witness to appear at an examination or interview before trial, but a subpoena may be used to obtain witnesses for a deposition or a court of inquiry. In accordance with subsection (f)(4)(B) of this rule, a subpoena

duces tecum to produce books, papers, documents, data, or other objects or electronically stored information for pretrial investigation pursuant to Article 32 may be issued, following the convening authority's order directing such pretrial investigation, by either the investigating officer appointed under R.C.M. 405(d)(1) or the counsel representing the United States.

A subpoena normally is prepared, signed, and issued in duplicate on the official forms. *See* Appendix 7 for an example of a subpoena with certificate of service (DD Form 453) and a Travel Order (DD Form 453-1)."

(i) The Discussion immediately following R.C.M. 703(e)(2)(D) is amended to read as follows:

"If practicable, a subpoena should be issued in time to permit service at least 24 hours before the time the witness will have to travel to comply with the subpoena.

Informal service. Unless formal service is advisable, the person who issued the subpoena may mail it to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelope provided. The return envelope should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness

to fees and mileage will not be impaired by voluntary compliance with the request and that a voucher for fees and mileage will be delivered to the witness promptly on being discharged from attendance.

Formal service. Formal service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. *See* Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when the witness is in the vicinity. When the witness is not in the vicinity, the subpoena may be sent in duplicate to the commander of a military installation near the witness. Such commanders should give prompt and effective assistance, issuing travel orders for their personnel to serve the subpoena when necessary.

Service should ordinarily be made by a person subject to the code. The duplicate copy of the subpoena must have entered upon it proof of service as indicated on the form and must be promptly returned to the person who issued the subpoena. If service cannot be made, the person who issued the subpoena must be informed promptly. A stamped, addressed envelope should be provided for these purposes.

For purposes of this Rule, *hardship* is defined as any situation which would substantially preclude reasonable efforts to appear that could be solved by providing transportation or fees and mileage to which the witness is entitled for appearing at the hearing in question."

(j) The Discussion immediately following R.C.M. 703(e)(2)(G)(i) is amended to read as follows:

"A warrant of attachment (DD Form 454) may be used when necessary to compel a witness to appear or produce evidence under this rule. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

Subpoenas issued under R.C.M. 703 are Federal process and a person not subject to the code may be prosecuted in a Federal civilian court under Article 47 for failure to comply with a subpoena issued in compliance with this rule and formally served.

Failing to comply with such a subpoena is a felony offense, and may result in a fine or imprisonment, or both, at the discretion of the district court. The different purposes of the warrant of attachment and criminal complaint under Article 47 should be borne in mind. The warrant of attachment, available without the intervention of civilian judicial proceedings, has as its purpose the obtaining of the witness's presence,

testimony, or documents. The criminal complaint, prosecuted through the civilian Federal courts, has as its purpose punishment for failing to comply with process issued by military authority. It serves to vindicate the military interest in obtaining compliance with its lawful process.

For subpoenas issued for a pretrial investigation pursuant to Article 32 under subsection (f)(4)(B), the general court-martial convening authority with jurisdiction over the case may issue a warrant of attachment to compel production of documents."

(k) The Discussion immediately following R.C.M. 703(f)(1) is amended to read as follows:

"Relevance is defined by Mil. R. Evid. 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact. The discovery and introduction of classified or other government information is controlled by Mil. R. Evid. 505 and 506."

(l) The following Discussion is added immediately after R.C.M. 703(f)(4)(B):

"The National Defense Authorization Act for Fiscal Year 2012, P.L. 112-81, § 542, amended Article 47 to allow the issuance of subpoenas duces tecum for Article 32 hearings. Although the amended language cites Article 32(b), this new subpoena power

extends to documents subpoenaed by the investigating officer and counsel representing the United States, whether or not requested by the defense."

(m) The following Discussion is inserted immediately after R.C.M. 1103(b)(3)(N):

"Per R.C.M. 1114(f), consult service regulations for distribution of promulgating orders."

(n) The following Discussion is added immediately after R.C.M. 1103(g)(3)(B):

"This rule is not intended to limit the Services' discretion to provide records of trial to other individuals."

(o) The following Discussion is inserted immediately after R.C.M. 1103(g)(3)(D):

"Subsections (b)(3)(N) and (g)(3) of this rule were added to implement Article 54(e), UCMJ, in compliance with the National Defense Authorization Act for Fiscal Year 2012 (P.L. 112-81, § 586). Service of a copy of the record of trial on a victim is prescribed in R.C.M. 1104(b)(1)(E)."

(p) The following Discussion is added immediately after R.C.M. 1104(b)(1)(E):

"Subsection (b)(1)(E) of this rule was added to implement Article 54(e), UCMJ, in compliance with the National Defense Authorization Act for Fiscal Year 2012 (P.L. 112-81, § 586). The

content of the victim's record of trial is prescribed in R.C.M. 1103(g)(3)(D).

Promulgating orders are to be distributed in accordance with R.C.M. 1114(f)."

(q) The following Discussion is added immediately after R.C.M. 1105A(c):

"Statements should be submitted to the convening authority's staff judge advocate or legal officer, or, in the case of a summary court-martial, to the summary court-martial officer."

(r) The Discussion immediately after R.C.M. 1106(d)(3) is amended to read as follows:

"The recommendation required by this rule need not include information regarding the recommendations for clemency. *See* R.C.M. 1105(b)(2)(D), which pertains to clemency recommendations that may be submitted by the accused to the convening authority.

The recommendation is only required to include a crime victim's statement if the statement is submitted by the crime victim under the provisions of R.C.M. 1105A. The recommendation is not required to contain any other statements that a crime victim may have made on other occasions unless those previous statements are submitted by the crime victim under the provisions of R.C.M. 1105A."

(s) The Discussion immediately after R.C.M. 1106(f)(7) is amended to read as follows:

""New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation. The method of service and the form of the proof of service are not prescribed and may be by any appropriate means. *See* R.C.M. 1103(b)(3)(G). For example, a certificate of service, attached to the record of trial, would be appropriate when the accused is served personally. If a victim statement, submitted under R.C.M. 1105A, is served on the accused prior to service of the recommendation, then that statement shall not be considered a "new matter" when it is again served on the accused as an enclosure to the recommendation."

Sec. 3. Appendix 21 of the Manual for Courts-Martial, United States, Analysis of Rules for Courts-Martial, is amended as follows:

R.C.M. 1107, after the paragraph beginning with the words "Subsection (3)(A)(i)," insert the following language:

"*2014 Amendment*. The prohibition against considering matters that relate to the character of a victim expands upon the prohibition against considering "submitted" matters that is

set forth in section 1706(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 961 (2013). This revision does not incorporate the word "submitted" from section 1706(b), in order to afford greater protection to the victim by prohibiting convening authority consideration of any evidence of a victim's character not admitted into evidence at trial, no matter the source."

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