

ARTICLE 32 INVESTIGATING OFFICER'S GUIDE

OVERVIEW

This guide is the first of six enclosures designed to assist an Article 32 investigating officer (IO). This first enclosure discusses various aspects of the Article 32 investigation, including the source of authority and qualifications of the IO, the role of the other participants, the IO's responsibilities during the investigation, and preparation of a report. The second enclosure is an example of an Article 32 report. The third and fourth enclosures are a blank Investigating Officer's Report (DD-457) and a completed example. The fifth enclosure is an advisory letter to the accused. The final enclosure is a script for conducting an Article 32 investigation.

The Article 32 investigation is a unique component of military justice. Its function is to examine the available evidence pertaining to an allegation so that the CA may determine whether a court-martial is warranted. An Article 32 investigation is to be conducted as an impartial gathering of information rather than an adversarial proceeding. It is similar to a grand jury hearing, but an IO can only recommend a disposition; it is more than a report of investigation, but less than a complete prosecution.

Before you go on, stop and read the primary authorities that govern your investigation.

-- Article 32, UCMJ

-- RCM 405

SUGGESTED COLLATERAL READING

Schlueter, *Military Criminal Justice* (5th ed.), ch. 7, *The Article 32 Investigation and the Pretrial Advice*.

Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 Mil. L. Rev. 49 (1986).

U.S. Coast Guard Media Relations in High-Visibility Court-Martial Cases

I. AUTHORITY. Your immediate authority for conducting an investigation comes from a letter of appointment issued by the court-martial convening authority (CA) under RCM 405. This letter is your "warrant"--it gives you the authority necessary to interview witnesses, secure documents, and obtain cooperation from commanders and other military members. It also may delegate to you the CA's power to grant a continuance. Your appointment letter should inform you that the investigation is your primary duty until its completion. You must pursue it promptly and diligently through completion unless you are relieved.

II. QUALIFICATIONS OF THE INVESTIGATING OFFICER

A. STATUS. To be qualified for appointment as an IO you must be a commissioned officer. RCM 405(d)(1). According to the Discussion accompanying RCM 405(d)(1), the investigating officer should be in the grade of lieutenant commander or higher or have legal training. It is strongly recommended that the IO be a Coast Guard law specialist, and a CA should consult his or her staff judge advocate before appointing a non-law specialist. Although any commissioned officer can serve as an IO, the Court of Military Appeals disapproves of the appointment of officers junior in rank to the accused. In United States v. Reynolds, 24 MJ 261, 263 n.2 (CMA 1987), the court described the appointment of an investigating officer who was junior in rank to the accused as a "gross breach of protocol and courtesy" and something "to be avoided even if not strictly prohibited."

B. IMPARTIALITY. The Court of Military Appeals has said that an IO must be impartial, characterizing the position as that of "a quasi-judicial officer" held to a standard similar to that for military judges. United States v. Collins, 6 MJ 256 (CMA 1979), United States v. Thompson, 46 MJ 472 (CAAF 1997). Your impartiality can be questioned as a result of your knowledge of the case both before you start the investigation and by what you do during the course of the investigation.

(1) Disqualification by Prior Knowledge or Association. An accuser cannot serve as an IO. RCM 405(d)(1); United States v. Lopez, 20 USCMA 76, 42 CMR 268 (1970). Likewise, an officer who is a close personal friend of the accuser is also disqualified from serving. See United States v. Castleman, 11 MJ 562 (AFCMR 1981). Failure to disclose prior knowledge or relationships could lead an appellate court to invalidate the investigation and overturn a court-martial conviction. However, 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 MJ 801 (NMCMR 1981).

a. Investigation of related cases *seriatim*. An IO is disqualified if he or she was previously involved in inquiring into the offense(s) to be investigated in a closely related case (e.g., another accused charged in connection with the same conduct). United States v. Lopez, *supra*; United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955); United States v. Schreiber, 16 CMR 639 (AFBR 1954). However, this disqualification can be waived by an accused. United States v. Donaldson, 23 USCMA 293, 49 CMR 542 (1975); United States v. Nickel, 9 USCMA 324, 26 CMR 104 (1958).

b. Joint investigations. Unlike the case of *seriatim* investigations, a joint investigation is proper since the IO 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 members 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 IO is required to submit a separate report with separate recommendations on each member.

c. Office associations. An IO is not disqualified solely by virtue of his or her position in the legal office. In United States v. Reynolds, *supra* at 263, the court said, "There is no absolute bar to all contact between an Article 32 officer and all members of a staff judge advocate's office." However, an IO who supervises the accused's defense counsel is disqualified and should be recused. United States v. Davis, 20 MJ 61 (CMA 1985).

(2) Disqualification by Subsequent Action. Anything you do during the investigation that reasonably calls your impartiality into question may be subject to later judicial scrutiny. You must also strive to avoid any appearance of partiality. Advise the CA's staff judge advocate (SJA) if you have concerns in this area.

a. Interviewing witnesses. You may not talk with or interview witnesses *ex parte* (without notice to or participation of both government and defense counsel) on any substantive matters related to the case. United States v. Whitt, 21 MJ 658 (ACMR 1985). You may, of course, communicate for the limited purpose of arranging witness appearances and the production of evidence within the control of witnesses.

b. Legal advice. You must not obtain legal advice from the government representative or anyone connected with the prosecution. However, your duty of impartiality does not prevent you from consulting with the local SJA on any matter, including matters of substance. United States v. Grimm, 6 MJ 890 (ACMR 1979), *pet. denied*, 7 MJ 135 (CMA 1979). The local SJA has a duty to be objective and impartial and to advise you accordingly. However, United States v. Payne, 3 MJ 354 (CMA 1977), has been interpreted as holding that 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. United States v. Grimm, *supra* at 893. Failure to do so may constitute error that will be tested for prejudice if raised at trial.

c. Action on defense requests. Your response to defense requests, such as requests for a continuance, may be reviewed by appellate courts as an indicator of your impartiality.

III. QUALIFICATIONS OF OTHER PARTICIPANTS

A. GOVERNMENT REPRESENTATIVE. The appointment of a government representative may depend upon the availability of local judge advocates. However, it is common practice to appoint a government representative to present the government's side of the case.

(1) Role. The government representative's role is to establish the validity of the charges and to develop the government's case. United States v. Payne, *supra* at 357, adopting J. Ferguson's dissent in United States v. Young, 13 USCMA 134, 32 CMR 134 (1962). Additionally, the government representative provides logistic support for the IO. This aspect is essential where the IO is not stationed locally. As soon as the government representative has been appointed, he or she should contact the IO to determine what must be done to insure a smooth investigation. At a minimum, the government representative must assume responsibility

for assembling the necessary documents for the IO. At the direction of the IO, the government representative may make arrangements for the travel of witnesses.

(2) Appointment. RCM 405(d)(3) allows the commander directing the investigation (the convening authority or CA) to appoint the government representative as a matter of discretion.

B. DEFENSE COUNSEL. Pursuant to RCM 405(d)(2)(A), the accused is entitled to be represented by a defense counsel certified under Article 27(b). DD Form 457, part of the IO's report, requires you to verify that detailed defense counsel is so qualified. The attached Article 32 script specifically addresses this point. Note that the accused may request self-representation, but it is not an absolute right. United States v. Bramel, 29 MJ 958 (ACMR 1990).

C. OTHERS. The CA may detail a reporter, interpreter, and others to aid the investigation. Likewise, the CA may assign personnel for administrative support.

IV. YOUR RESPONSIBILITIES

A. 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 charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."

B. IN GENERAL. The primary purposes of an Article 32 investigation are to inquire into the truth of the allegations contained in the charges, review the form of the charges, and provide the CA with information on which to make a determination concerning appropriate disposition of the case. It also provides the accused with an opportunity for discovery. RCM 405(a) Discussion. If, during the investigation, you uncover evidence of additional misconduct, you may investigate any additional offenses and provide recommendations for disposition. However, you must inform the accused of the additional offenses under investigation and afford the same rights to cross-examine witnesses and present evidence as with the charged offenses. Article 32(d); RCM 405(e). You are not limited to examining the witnesses and evidence presented by the government representative and defense counsel. Your goal is to compile enough information so that the CA can assess whether the admissible evidence warrants trial by court-martial. Thus, if you feel that additional evidence or testimony is necessary to make a proper and thorough recommendation to the CA, you may call those witnesses yourself or direct that the evidence be presented. RCM 405(g)(1)(A).

C. BEFORE THE INVESTIGATION.

(1) Review the Letter of Appointment. You should 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.

(2) Review the Evidence. In preparing for the investigation, you should consider what evidence will be necessary to complete a thorough and impartial investigation. RCM 405(g)(1)(B) Discussion. To assist you in making this determination, you may read any police

reports, CGIS Reports of Investigation, or other statements. The government representative should provide this information to you prior to the hearing. CAUTION: The sole purpose of examining these materials prior to the hearing is to help you to determine what evidence will be necessary to complete a thorough and impartial investigation. See RCM 405(g) Discussion. As IO, you may not consider such matters as substantive evidence unless properly presented at the investigation and subject to cross-examination or rebuttal by the accused. RCM 405(h)(1)(B).

(3) Review the Charge Sheet. You must also read the charge sheet and make sure the information is correct and the charges are in the proper form. Compare each specification with the model specification forms found in the Military Judge's Bench Book, and Part IV of the MCM. Although RCM 603(b) prohibits an IO from making any changes to the charge sheet--even minor ones--you should recommend any necessary changes in your report.

a. Corrections to the personal data. Alert the SJA or government representative to any errors you note in the accused's personal data on the face of the charge sheet. The SJA may correct administrative defects in the personal data section at any time. If pen and ink changes are made, be sure to mention them in your report.

b. Corrections to the charges. Remember that your role is to recommend, not act! If you spot obvious deficiencies in the charges and specifications, such as missing dates, etc., notify the SJA. He or she can arrange for the accuser to correct the charges before you start your investigation. RCM 603(a). It would be best if you were not present when the changes were made to avoid the appearance of any impropriety. Remember, you should inform the defense counsel whenever you, as the IO, communicate directly with the SJA.

(4) Arrange for the Hearing.

a. Time and date. If the appointment letter does not set a specific date and time for the investigation, 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 set the date for the Article 32 investigation soon after your appointment. Do it clearly and explicitly and in writing.

b. Public access. Ordinarily, Article 32 investigations are open to the public. Public access helps to promote public confidence in the military justice system.

(i) Potential witnesses. Although usually excluded from the proceedings prior to their testimony, you may permit potential witnesses, such as experts, investigators, or a parent of a child witness, to be present if you consider their presence helpful to the proceedings. See, e.g., MRE 615, and RCM 405(h)(3)b.

(ii) Closed proceedings. The commander who ordered the investigation may, after consulting the SJA, direct that it be closed to the public, especially if classified information may be involved. If you do not receive any instructions from the commander, the decision to restrict public access to all or part of the proceedings is within your discretion. RCM 405(h)(3). Closing the proceeding may encourage a witness to testify more fully. However, closing an Article 32 investigation to the public over defense objection may deprive the accused of a substantial pretrial right. Any decision to close the proceeding should be

made on a witness-by-witness, circumstance-by-circumstance basis and the reasons for the closure should be specifically noted in your report. See, e.g. ABC v. Powell, 47 MJ 363 (CAAF 1997).

(iii) Media access. As members of the public, representatives of the media may attend the proceeding. However, to ensure that the hearing is conducted in a fair and orderly manner, you may prohibit news media or other spectators from tape recording, video taping, or taking photographs of the testimony or other parts of the hearing. If you receive inquiries from the media, you should decline to comment, refer them to the local public affairs officer, and immediately notify the SJA or CA. See RCM 405(h)(3).

c. Delay. An IO can grant a continuance only if the appointment letter delegates that authority. RCM 707(c)(1) Discussion. As IO, you should not attempt to exclude time from the government's speedy trial clock under RCM 707 even if you grant a continuance based on a defense request unless the convening authority has specifically delegated to you the authority to exclude delay in the appointing order. In United States v. Thompson, *supra* the court implied that an IO has no inherent, independent authority to exclude such delay from the government's speedy trial clock.

(i) A defense request for a continuance creates a potential dilemma for IOs caught between the need for speedy disposition of charges (see Articles 10 and 33, UCMJ; RCM 707) and a defense counsel's legitimate need for more preparation time. What you must do in those 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 determine if it is well-founded. You should then discuss the request with the CA's SJA to obtain the command's policy. Remember to give prior notice of this communication to all parties. If the CA is not opposed to a well-supported request, you probably should grant the continuance if you are authorized to do so.

(ii) If the command is opposed, then you should have defense counsel describe in writing, "on the record," the facts that support a conclusion that the continuance is needed. At a minimum, you should ascertain and include in your report when defense counsel first learned of the case, when he or she received the case file, and why he or she is unable to proceed at the appointed time. If defense alleges that other cases require attention, find out what other cases have prevented or will prevent adequate preparation. If, after you review defense's position, you conclude that he or she needs more time in the interests of justice, then you should grant the continuance if you are so authorized. United States v. Miro, 22 MJ 509 (AFCMR 1986), held that an IO's refusal to grant a defense request for a continuance due to inadequate preparation time (less than 24 hours) was reversible error that required a new Article 32 investigation. All the command can reasonably ask is that you do your job impartially and balance the interest of timely justice against the interests of the accused.

(iii) Always remember, however, that granting a defense or government request for a continuance is not the same as excluding the delay from the government's speedy trial clock. United States v. Thompson, *supra*. While you may be authorized to grant a continuance in your investigation, only the CA or the military judge may exclude the time from the government's speedy trial clock (unless the authority has been delegated to you). RCM 707(c), United States v. Kossman, 38 MJ 258 (CMA 1993). Any exclusion of delay by the CA or you should be in writing signed before the excludable delay begins. You must be

especially aware of the requirement to proceed with due diligence under Article 10 whenever the accused is in confinement (see, e.g., U.S. v. Laminman, 41 MJ 518 (CGCCA 1994)).

(5) Advise the Accused of His Rights. If time permits, you should write the accused in advance of the hearing to advise the accused of his rights during the investigation. This will also be an opportunity to advise the accused of the date, time, location and uniform for the hearing. A sample letter is accompanies enclosure (2), the sample report.

(6) Arrange for Witnesses.

a. With a government representative. If a government representative has been detailed, work through him or her to obtain witnesses. Be careful to limit your conversations with the government representative to administrative matters only. Don't discuss *ex parte* the details of any witness' expected testimony--this could result in your disqualification.

b. Without a government representative. If there is no government representative, then you will have to arrange for the presence of witnesses yourself. It is best to 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' presence. If you do contact a witness yourself, don't discuss the substance of the expected testimony.

c. Reluctant witnesses. Military members may be ordered to attend the proceeding. Civilian government employees, in some cases, may be required to attend an Article 32 as a condition of their employment. However, you do not have authority to subpoena witnesses or evidence. RCM 703(e)(2)(C). Your only tools for dealing with reluctant civilian witnesses are persuasion and invitational travel orders. RCM 405(g); RCM 703 (e)(2) Discussion.

D. CONDUCTING THE INVESTIGATION.

(1) Advice, Inquiries. To begin, use the Article 32 script at Part II of this guide and a copy of DD Form 457, Investigating Officer's Report, to conduct your investigation. The script covers all the important points required on the DD Form 457 and you can check them off as you go along during your inquiry of the accused.

a. Waiver. Although the language of Article 32 appears to require a pretrial investigation prior to referral of any case to a GCM, military courts have held that the accused may waive the right to a pre-trial investigation. United States v. Donaldson, 23 CMA 293 (1975); RCM 405(k). If the accused indicates a desire to waive the Article 32, you should immediately notify the CA. However, the government is not required to accept accused's waiver request, and the CA may direct that the investigation proceed.

b. Substitutes for the investigation. When the accused has been afforded the rights of a party before a formal board or a Court of Inquiry under the Administrative Investigations Manual, COMDTINST M5830.1 (series), such investigation may be used in lieu of an Article 32. However, the accused has the right to request additional investigation or to recall witnesses for further examination. If the accused asserts these rights, the Article 32 is the proper forum in which to perform the additional investigation. Article 32(c); United States v. Gandy, 9 CMA 355 (1958); RCM 405(b).

(2) Presentation of Evidence. The Military Rules of Evidence do not apply to Article 32 investigations, except for rules 301 (right against self-incrimination), 302 (use of statements made during mental competency exams), 303 (prohibition on degrading questions), 305 (use of statements obtained without proper rights advisement), 412 (victim's prior sexual history) and section V (privileges). RCM 405(i); MRE 1101(d). This means, quite simply, that, subject only to the evidentiary provisions of RCM 405(g), you may consider hearsay or other evidence that would be inadmissible at a court-martial. United States v. Matthews, 15 MJ 622 (NMCMR 1982). It also means that you do not rule on evidentiary objections. If a party requests, such objections must be noted in your report. Exhibits should be sequentially marked as IO Exhibit 1, 2, 3, etc. in the order in which they are received etc. using arabic numerals. A copy of the charge sheet is always Exhibit 1 – the CA should retain the original charge sheet for potential referral for trial by court-martial. Exhibit 2 is always your appointing letter. Put page numbers on exhibits that have multiple pages (e.g., "Page 1 of 4").

(3) Testimony. With the exception of the accused, all witnesses are required to testify under oath. The accused may make an unsworn statement. The actual oath to be administered to witnesses is found in the discussion to RCM 405(h)(1)(A) and is included in the enclosed IO's Article 32 script. The IO has broad discretion in conducting the hearing, including the manner in which the witnesses are questioned. The IO should generally permit the government representative to question witnesses and present evidence, but may choose to question witnesses and receive evidence directly.

a. Taking testimony. While the IO need not perfect the case, he or she should either conduct a thorough direct examination of witnesses or ensure the counsel do so. A witness should not simply be brought to the hearing, shown a prior statement, asked to adopt the statement, and then allowed to be cross-examined by the defense. See United States v. Connor, 27 MJ 378 (CMA 1989). This process contributes nothing to the development of information that can be considered by the CA.

b. Reducing the testimony to writing. The IO is required to include a summary of the substance of all testimony in the report of investigation. You should take notes as each witness testifies. After the hearing, you should prepare a summary of the key points of each witness' testimony. In some cases, if time permits, it may be advisable to obtain the witness's signature attesting to the truth of the summary.

c. Verbatim transcripts. Generally, Coast Guard Article 32 investigations are not transcribed or recorded. However, a CA may direct that a verbatim transcript be prepared or that the investigation be recorded on video or audiotape. If so, the government representative should coordinate the transcription or taping. Any request from the defense to record the proceedings or a request for a verbatim transcript should be forwarded to the CA for action. As IO, you do not have authority to override the CA's decision. The transcript or tapes, if prepared, should be included as enclosures to the report of investigation and are, of course, subject to defense discovery. United States v. Marsh, 21 MJ 445 (CMA 1986).

d. Tape recordings by others. While there is no specific law on this subject, you may prohibit spectators or news media from tape recording, videotaping, or filming the testimony or other parts of the hearing. This can be based on the prohibition of recording testimony in federal courts or under your statutory authority to conduct the hearing in a fair and orderly manner.

(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. However, 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' testimony in an alternative form. RCM 405(g)(4) allows you to consider alternatives to testimony under the circumstances described below.

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

- (i) Sworn statements;
- (ii) 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' identity is as claimed;
- (iii) Prior testimony under oath;
- (iv) Depositions;
- (v) Stipulations of fact or expected testimony;
- (vi) Unsworn statements; and
- (vii) Offers of proof of expected testimony of a witness.

b. When defense objects. You are allowed to consider certain alternatives to testimony over defense objection. The key to consideration of these alternatives is the "reasonable availability" of the witness. RCM 405(g)(1)(A) provides that a witness is "reasonably available" when he or she is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. There is no *per se* rule making witnesses beyond 100 miles from the site of the investigation unavailable. United States v. Marrie, 43 MJ 35 (1995). For a witness outside the 100-mile radius, the same balancing rule applies. Additionally, if a witness is unavailable under MRE 804(a)(1)-(6), that witness is also not "reasonably available." If your determination is that the witness is not reasonably available, inform all the parties. Then be sure to note this determination in your report. RCM 405(g)(2) divides witnesses into two categories for deciding availability.

(i) Military witnesses. You, as IO, make an initial determination whether a military witness is "reasonably available." If you decide that a witness is "reasonably available," you should request the witness' commanding officer to make the witness available. The witness' commanding officer then makes a final determination on the witness' availability. You may discuss factors affecting reasonable availability with the witness' immediate commander and with others, such as the local SJA.

(A) If the witness' immediate commander determines that the witness is not reasonably available, he or she is required to give the reasons for that determination to the IO. See RCM 405(g)(2)(A) Discussion. If given in writing, include that writing as an attachment to your report. If the commander does not give the reasons in writing, you must make a detailed memo for the record of the reasons and include it in your report. Although the commander's determination is not subject to appeal by the accused, it may be reviewed by the military judge under RCM 906(b)(3). The reported reasons must show how the balancing test of RCM 405(g)(1)(A) applies.

(B) If you think that a witness' commanding officer did not provide adequate justification for a determination that a witness is not reasonably available, immediately notify the SJA.

(ii) 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 using the balancing test in RCM 405. You (or government counsel, if appointed) then invite those witnesses determined to be reasonably available to appear and, when appropriate, inform them that their necessary expenses will be paid. RCM 405(g)(3) and Discussion. If the witness refuses to appear or to testify, the witness is then not reasonably available because you cannot compel the witness to attend the pretrial investigation.

c. Alternatives to testimony for unavailable witnesses. After you (or the military commander of a military witness whom you initially found to be reasonably available) determine a witness is unavailable, you may consider over defense objection the following alternatives to that witness' testimony:

(i) Sworn statements;

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

(iii) Depositions of that witness;

(iv) In time of war, unsworn statements; and

(v) Prior testimony under oath.

d. Depositions. If an essential civilian witness refuses to appear or an essential military witness is not reasonably available, and there are no alternatives to that witness' testimony, you may suggest that the government representative or defense counsel ask the CA to order a deposition under RCM 702. If the request is approved, the CA will detail a deposition officer. Under RCM 703(e)(2)(c), a deposition officer has authority to issue a subpoena compelling a witness' attendance at a deposition. Additionally, if a witness is located at a great distance from the Article 32 investigation and the expense or delay involved in bringing the witness to the site of the investigation is prohibitive, a deposition may be taken by an officer at the witness' location. See RCM 702. Testimony from a deposition is an admissible alternative to testimony.

(5) Documents and Other Evidence. RCM 405(g)(1)(B) allows you to consider all available evidence, including documents and physical evidence that are relevant and not cumulative. "Documents" as used here does not include a prior statement of a witness (a prior statement may be considered over defense objection only if it qualifies as an alternative to testimony as discussed above). You are required to tell the parties what documents or other evidence you will consider in conducting your investigation. (This requirement is incorporated in the script at Part II of this guide.) Then you must let all parties examine this evidence. To save time, the government representative should provide the defense counsel copies of documents and an opportunity to examine any physical evidence prior to the hearing. If counsel objects to your consideration of a document or evidence, ask for the basis of the objection. Remember, hearsay rules do not apply at an Art. 32, and you may consider hearsay evidence. In evaluating the evidence, however, you must assign it whatever weight you think it deserves.

a. Accused's admissions or confession. The longstanding practice under Article 32, UCMJ, and RCM 405 is that an accused's written admissions or confession qualifies as a "document or other physical evidence" that may be considered by an IO. Admittedly, a confession doesn't qualify as an alternative to testimony under RCM 405(g)(4)(B). However, the discussion to RCM 405(e) makes it clear that an IO is often required to look into the admissibility of a confession as part of the investigation.

b. Reports. Reports are documents, notwithstanding their hearsay nature. Thus, you treat them as "other evidence" under RCM 405(h)(1)(B).

(6) Handling Objections. Your role is that of an investigator compiling evidence, not a judge presiding over a trial. The proper response to an objection depends on the nature of the objection.

a. Procedural objections. Although not required to rule on an objection, you may take corrective action in response to an objection that some aspect of the proceeding fails to comply with the procedural requirements of RCM 405. For example, you should decline to consider alternatives to testimony for a witness who is available to testify. If an objection raises a substantial question about a matter within the authority of the CA (e.g., whether you were properly appointed), you should immediately inform the CA. Unless the CA directs otherwise, you should continue with the proceeding. You may require that objections be submitted in writing. If requested to do so by the party making the objection, you must note an objection in your report. Any written responses from the CA and any documents that were not considered because of an objection should also be attached to your report (the CA is not prohibited from considering materials outside the scope of RCM 405).

b. Evidentiary objections. As previously discussed, the Military Rules of Evidence have limited applicability at an Art. 32 investigation. Again, you should not rule on any objection. If requested to do so by the party making the objection, you must note the objection in your report. You should also identify potential evidentiary problems that could occur if the case is referred for trial.

(7) Investigating Uncharged Offenses. An Art. 32 investigation often uncovers evidence of uncharged misconduct (e.g., investigation into larceny charge uncovers evidence of theft of additional items). If such evidence is uncovered, you may investigate the additional offenses and make recommendations on disposition. You must inform the accused of the general

nature of the uncharged offense(s), and allow the same rights of cross-examination and presentation of evidence as for the charged offenses. Article 32(d); RCM 405(e). If the uncharged misconduct is completely unrelated to the charged offense(s) (e.g., investigation into larceny charge uncovers evidence of sexual assault), you should consult the CA before expanding the investigation.

(8) Reopening the Investigation. The CA may direct you to reopen the investigation if an uninvestigated charge or specification is preferred after the first investigation has been completed, if there has been a "major" change in a specification, or if additional evidence is desired. United States v. Louder, 7 MJ 548 (AFCMR 1979) petition denied 7 MJ 328 (CMA 1979).

a. Procedure. You should convene the hearing and readvise the accused of his or her rights and the nature of the new or changed charges. The second hearing should then proceed in the same manner as the first. If you are reconvening for an additional charge or specification, incorporate by reference all matters from the prior Article 32. It is not necessary to recall witnesses solely to repeat testimony relating to the original charges.

b. The report. If you did not submit the DD Form 457, Investigating Officer's Report, to the CA prior to reopening the investigation, include all matters presented in one report. If the first report was completed, you should submit the additional matters as an addendum to the original report. You should not complete a second DD Form 457.

E. PREPARING THE REPORT.

(1) Objective. Your primary objective of your investigation is to provide the CA with information to make an appropriate decision on disposition of the charges. Your report should be thorough and objective. It is not your function to serve as a sounding board for the government's case, but you should include comments on the sufficiency and apparent reliability of the evidence presented. You should also identify potential proof problems that are likely to occur at trial.

(2) Time of Submission. Under RCM 405(j)(1), you must submit a timely written report of the investigation to the CA. The time required to complete the written report depends primarily on the extent of the investigation. However, your report should be submitted as soon as possible after the close of the investigation. Time of submission is particularly important if the accused is in confinement or under restraint. See, e.g., U.S. v. Laminman, 41 MJ 518 (CGCCA 1994).

(3) Required Information. RCM 405(j)(2) specifies the required contents of a report of investigation. Several of these requirements may be satisfied solely by checking the appropriate blocks on the DD Form 457. Other requirements must be addressed in a narrative summary or other attachment to the DD Form 457. The following are required:

a. Name(s) and organization(s) of defense counsel(s), and statement that defense counsel was present throughout the taking of evidence or explanation why defense counsel was not present (see DD Form 457 blocks 5, 6, 7, 8, and 11).

b. Substance of testimony taken, including any stipulated testimony. Witnesses should be identified in block 12 of the DD Form 457. You should prepare a brief summary of the testimony of each witness, and obtain the witness' signature if time permits. If there is a verbatim transcript of the proceedings, it should be attached as an exhibit. If a written stipulation of testimony was submitted, it should also be attached as an exhibit. You should identify any significant conflicts between testimony. To assist the CA in assessing the evidence, you may also include your observations of a witness' demeanor while testifying and your opinion on the potential credibility of the witness' testimony if credibility is likely to be at issue.

c. Other statements, documents, or matters that you considered, or a brief summary of such evidence. Such items should be listed in block 13 of the DD Form 457. Statements and other documents should be attached to the report. If a statement or document is lengthy, you should also include a brief summary of the key information it contains (similar to a summary of a witness' testimony).

d. Objections raised. Upon the request of the party making an objection, you must note an objection in your report. RCM 405(h)(2). If a written objection was submitted, it should be attached. You should also note any corrective action taken in response to an objection.

e. A statement of any reasonable grounds to believe that the accused was not mentally responsible for the offense or was not competent at the time of the investigation. If mental responsibility or competency is not at issue, you may simply check "No" in block 14 of DD Form 457. However, if mental responsibility or competency issues were raised, you should summarize any relevant evidence.

f. A statement as to the availability of essential witnesses at the anticipated time of trial. Again, if witness availability will not be an issue, you may simply check "Yes" in block 15 of the DD Form 457. However, if witness availability will be an issue, you should identify any potential problems (e.g., cutter operational schedule, anticipated transfer or release from active duty).

g. An explanation of any delays in the investigation. Remember, any delays should be approved in advance by the CA. If a delay was authorized in writing, that writing should be included in your report as an exhibit. Additionally, if significant time elapsed between the time you were directed to conduct an investigation and the time you submitted your report, you should provide a chronology and identify the reason(s) for each period of delay.

h. Your conclusion whether the charges and specifications are in proper form. If the charges and specifications are in proper form, you should check "Yes" in block 17 of the DD Form 457. If you recommend that the charges or specifications should be amended, or that additional charges should be preferred, you should summarize the reasons for your recommendations. You may also recommend that one or more charges be dropped as multiplicitous, or that only a lesser-included-offense should be charged. If you recommend preferral of additional charges, you should specifically note whether or not you investigated any recommended additional charges.

i. Your conclusion whether reasonable grounds exist to believe the accused committed the alleged offense(s). In addition to checking the appropriate box in block 18 of the DD Form 457, you should list each specification and its elements, provide a reference to

the evidence that establishes the reasonable grounds for each element, and identify any elements that were not established by the evidence.

j. A recommendation for disposition. You should check the appropriate box in block 20 of the DD Form 457. Additional remarks should be included in your report.

(3) Additional recommended information. Although not expressly required under RCM 405, the following additional information helps the CA to make a decision on disposition of the charges:

a. A brief factual synopsis of the case. Generally, events should be summarized in chronological order. You should include a reference to the testimony or other evidence that provided proof of each act or event. You should also identify key factual “gaps” or conflicts. Enclosure (3) includes a sample summary.

b. Legal issues raised. Whether or not an objection was made, you may identify potential problems with the admissibility of evidence or other legal issues noted during the investigation. Those issues should be identified and briefly discussed. At a minimum, you should note the Military Rule of Evidence or RCM that applies. It is not necessary or desirable for you to prepare a full legal brief.

(4) Assembling the report. Like a record of trial, a report of investigation under Article 32, UCMJ, should be assembled in a specific order. The recommended sequence is as follows:

a. The report itself in letter format;

b. The completed DD Form 457 and supplemental pages (e.g., summaries of testimony or evidence) go immediately behind the letter report, but are not listed as exhibits.

c. Exhibits. Exhibits should be attached in the order in which they were received, with a copy of the charge sheet as Exhibit 1 and your appointing letter as Exhibit 2. A copy of the charge sheet is always IO's Exhibit 1. Do not use the original; it should be retained by the CA and later forwarded to the GCMCA if a recommendation to refer the case to a GCM is made. The IO appointment letter is attached as IO exhibit 2. Other documents and witness statements that you considered should be marked as exhibits. You should also include as exhibits any documents that you received but did not consider as evidence with a notation that you did not consider those materials.

(5) Submitting the Report. RCM 405(j)(3) requires you to deliver your report to the commander who directed the investigation (CA). Use of overnight delivery service is recommended.

(6) Action by Convening Authority. The CA may ask you to clarify your report or direct you to reopen your investigation. However, the CA may not direct you to change your conclusions. The CA is required to provide a copy of the report to each accused. Any objections to the report must made to the CA within 5 days of receipt, but the CA need not wait for objections before taking action. If objections are made, the CA may direct you to reopen the investigation. The CA may dismiss the charges, refer them for trial by summary or special court-martial, or, if not a General Court-Martial Convening Authority (GCMCA), forward them to a

GCMCA recommending that they be referred for trial by general court-martial. Under Art. 34 and RCM 406, a GCMCA may not refer the charges for trial by general court-martial before receiving advice from his or her SJA.

CONCLUSION

By this point, you have fulfilled your responsibility as IO, and have completed an important step in the military justice process. You have provided the CA with critical information needed to make an appropriate decision on disposition of the charges. Hopefully, you found this guide helpful in satisfying the legal and procedural requirements.

SAMPLE INVESTIGATING OFFICER'S REPORT (LETTER)

[Command]

[Address]

Phone:

FAX:

5812

[DATE]

From: LCDR I. M. IO, USCG, Investigating Officer

To: [APPOINTING AUTHORITY]

Subj: REPORT OF ARTICLE 32 INVESTIGATION: U.S. V. SN A. B. DOE, USCG

Ref: (a) RCM 405(j), Manual for Courts Martial, 1994

1. As directed by enclosure (2), I conducted an Article 32 investigation at the *location on date* into the charges preferred against SN A. B. Doe, 555-55-5555 USCG. This report is submitted in accordance with the requirements of reference (a).

2. LT B. A. Lawyer, JAGC, USNR represented the accused during the investigation. He was qualified in accordance with RCM 405(d)(2) and RCM 502(d).

3. A summary of the sworn testimony of each witness is attached to this report. SN Robert Jones, S/A Michael Smith, and BM1 Anne Brown each signed the summary of his or her testimony. However, due to time constraints, I was unable to obtain Mr. Edward Green's signature on the summary of his testimony.

4. A list of the Exhibits received during the investigation is attached.

5. The following information is provided regarding the truth of the matters set forth in the charges and the recommended form of the charges:

a. Charge I: Violation of Art. 121, UCMJ -- Larceny

As charged, the elements of the sole **Specification of Charge I** are:

(1) That on or about 10 May 2000, in the vicinity of Coast Guard Station Great Harbor, the accused wrongfully took, obtained or withheld certain property, to wit: a Sony Compact Stereo, from the possession of the owner or of any other person;

(2) That the property belonged to another person, to wit: SN Robert Jones;

(3) That the property was of a certain value, to wit: \$350, or of some value;

and,

(4) That the taking, obtaining, or withholding by the accused was with the intent to permanently deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any other person other than the owner.

The evidence produced at the hearing relevant to this specification was as follows: On 10 May 2000, SN Jones discovered that his Sony Compact stereo was missing from his barracks room at Station Great Harbor (testimony of SN Jones). SN Jones had purchased the stereo for \$350 approximately 6 months earlier (testimony of SN Jones). He reported that the stereo was missing to BM1 Brown, who notified the officer in charge (testimonies of SN Jones and BM1 Brown). S/A Smith was later directed to investigate (testimony of S/A Smith). During his investigation, he interviewed BM3 Mark Johnson (testimony of S/A Smith). BM3 Johnson told S/A Smith that he saw the accused putting a compact stereo in the trunk of the accused's car on 10 May (testimony of S/A Smith). BM3 Johnson also told S/A Smith that the accused told BM3 Johnson that he had extra money because he pawned a stereo at a local pawnshop (testimony of S/A Smith). After further investigation, S/A Smith found a Sony Compact stereo matching the description of SN Jones' stereo at Acme Pawnshop (testimony of S/A Smith). SN Jones identified the stereo as his (testimonies of S/A Smith and SN Jones). Mr. Edward Green, a clerk at Acme Pawnshop, identified the accused as the person who had pawned the stereo for \$125 (testimony of Mr. Green).

The evidence establishes the first, second, and fourth elements. However, there was conflicting evidence as to the current value of the stereo. Were this specification to proceed to court-martial, I recommend that it be changed to read "of a value of more than \$100" vice "of a certain value, to wit: \$350 or of some value" as the exact value is not critical.

It is my opinion that reasonable grounds exist to believe the accused committed the crime of larceny as alleged. Accordingly, I recommend that this specification be referred for trial by general court-martial. The form of the charge is correct.

b. The elements of **Charge II, Specification 1** are:

(1)

(2)

The evidence produced at the hearing relevant to this specification was . . .

It is my opinion that reasonable grounds do not exist to believe that the accused committed the crime of X as alleged. Therefore, I recommend that this specification be dismissed. The form of the charge is correct.

c. During the course of the hearing, evidence was presented that the accused committed *uncharged misconduct*. I notified the accused, pursuant to RCM 405(e), that I

would be investigating the *uncharged misconduct*. Reasonable grounds do exist to believe the accused committed the *uncharged misconduct*. I recommend that a charge reflecting this *uncharged misconduct* be preferred.

6. Detailed defense counsel raised the following objections during the investigation:

a. Detailed defense counsel objected to the IO's consideration of Exhibit 14, summary portion of CGIS ROI of S/A Smith in violation of RCM 405(g)(4)(B) as an unacceptable alternative to testimony. I did not consider this document in forming my recommendations concerning the truth of the matters set forth in the charges, the form of the charges or the recommended disposition.

b. Subsequent to the admission of Exhibits 16 and 17, I limited the cross-examination of both alleged victims based on MRE 412 considerations. Detailed defense counsel then objected to my consideration of both Exhibits. I noted the objection. Detailed defense counsel had a full opportunity to cross-examine *Expert witness*, the author of Exhibits 16 and 17. I considered these reports acceptable alternatives to sworn testimony and considered the Exhibits.

c. Detailed defense counsel renewed his request for the witnesses listed in Exhibit 9. I reconsidered but stood by my initial determination of the availability of witnesses (Exhibit 12).

7. Recommended Disposition: General Court-Martial.

I. M. IO

Encl: (1) DD-457
(2) Summaries of Testimony
(3) List of Investigating Officer Exhibits
(4) Investigating Officer Exhibits

Copy: *Defense Counsel*
Government Counsel
SJA

INVESTIGATING OFFICER LIST OF EXHIBITS

- 1 Charge Sheet (4 pages)
- 2 Appointing Order (2 pages)
- 3 Investigating Officer (IO) letter to Accused dated *date* (2 pages)
- 4 IO letter to Detailed Defense Counsel (DC) dated *date* (2 pages)
- 5 IO email dated *date* (1 page)
- 6 Case package dated *date* (74 pages)*
- 7 Government Counsel (GC) letter dated *date* (1 page)
- 8 GC letter dated *date* (3 pages)
- 9 DC letter dated *date* (6 pages)
- 10 GC letter dated *date* (6 pages)
- 11 GC letter dated *date* (2 pages)
- 12 IO email dated *date* (1 page)
- 13 Statement of accused dated *date* (6 pages)
- 14 CGIS ROI dated *date* (14 pages)**
- 15 *Expert Witness's C.V.* (4 pages)
- 16 Victim's medical evaluation dated *date* (6 pages)
- 17 Victim's medical evaluation dated *date* (5 pages)
- 18 U.S. Coast Guard Sexual Harassment Prevention System, COMDTINST 5350.30A dated 24 April 1995 (16 pages)
- 19 Chapter 8.H. of Personnel Manual, COMDTINST M1000.6 with change notices (19 pages)
- 20 Defense counsel objections

* used by IO to make the initial determination of the availability of witnesses; not used in the formation of the IO's recommendations concerning the truth of the matters set forth in the charges, form or disposition of the charges.

** not used by the IO in forming recommendations concerning the truth of the matters set forth in the charges, form or disposition of the charges.

SAMPLE INVESTIGATING OFFICER'S REPORT (DD-457)

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	
I. M. IO	LCDR/O-4	Maintenance & Logistics Command Lant			07/01/00	
2a. TO: (Name of Officer who directed the investigation - Last, First, MI)	b. TITLE	c. ORGANIZATION				
I. M. CO	Commander	Group Great Harbor				
3a. NAME OF ACCUSED (Last, First, MI)	b. GRADE	c. SSN	d. ORGANIZATION	e. DATE OF CHARGES		
A. B. DOE	SN/E-3	555-55-5555	Station Great Harbor	06/01/00		
(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)					X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)					X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)					X	
7a. NAME OF DEFENSE COUNSEL (Last, First, MI)	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL (If any)			b. GRADE	
B. A. LAWYER	LT					
c. ORGANIZATION (If appropriate)			c. ORGANIZATION (If appropriate)			
Naval Legal Service Office						
d. ADDRESS (If appropriate)			d. ADDRESS (If appropriate)			
Street Address						
City, ST ZIP						
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					X	
b. THE IDENTITY OF THE ACCUSER					X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31					X	
d. THE PURPOSE OF THE INVESTIGATION					X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE					X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT					X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES					X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED					X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION					X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING					X	
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.)					X	
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL						
See accompanying letter report.						
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
84 AUG

EDITION OF OCT 69 IS OBSOLETE.

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate answer)				
NAME (Last, First, MI)	GRADE (if any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
See accompanying letter report.				
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			X	
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)			
See accompanying letter report.				
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
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.)				X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (See R.C.M. 405(d)(1).)			X	
20. I RECOMMEND:			X	
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input checked="" type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> 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.)				
See accompanying letter report.				
22a. TYPED NAME OF INVESTIGATING OFFICER			b. GRADE	c. ORGANIZATION
I. M. IO			LCDR/O-4	Maintenance & Logistics Command Lant
d. SIGNATURE OF INVESTIGATING OFFICER			d. DATE	
I M IO			07/03/00	

BLANK INVESTIGATING OFFICER'S REPORT (DD-457)

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)

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)	YES	NO	
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."

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)	YES	NO

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 INVESTGATING OFFICER

d. DATE

SAMPLE ADVISORY LETTER TO ACCUSED

[Command]

[Address]

Phone:

FAX:

5812

[DATE]

From: *Lieutenant Commander I. M. Io*, USCG, Investigating Officer
To: *Seaman A. B. Doe*, USCG
Via: *Lieutenant B. A. Lawyer*, JAGC, USNR, Detailed Defense Counsel
Subj: ARTICLE 32 RIGHTS ADVISEMENT

Ref: (a) Article 32, UCMJ
(b) R.C.M. 405, Manual for Courts Martial (1998 ed.)
(c) Article 3-F, Military Justice Manual, COMDTINST M5810.1D

1. By order of *Captain I. M. Co*, USCG, Commander, *Coast Guard Group Great Harbor*, I have been appointed investigating officer under Article 32(b) of the Uniform Code of Military Justice to investigate certain charges against you. The charges allege, in general, the offenses of violation of the UCMJ, *Article 92 (violation of a lawful general order)*, *Article 120 (rape)* and *Article 121 (larceny)*. The name of the accuser is *Lieutenant I. M. Accuser*, USCG.
2. In this investigation, you have the right to be present throughout the taking of evidence so long as your conduct is not disruptive. In addition, you have the right, at the proper time, to cross-examine all available witnesses against you; the right to present anything you might desire in your own behalf, either in defense, extenuation, or mitigation; the right to have a lawyer represent you at the investigation; the right to have me examine available witnesses requested by you; the right to make a statement in any form at the proper time, to remain silent, or refuse to make any statement regarding any offense that you are accused or suspected of, or concerning that which is being investigated. Further, you are advised that any statement made by you might be used as evidence against you in a trial by court-martial. It is imperative that you understand these rights.
3. As Investigating Officer, it is my duty to thoroughly and impartially investigate the charges against you. This investigation shall include inquiries into the truth of the matter set forth in the charges, form of the charges, and the disposition which should be made of the case in the interests of justice and discipline. It is my duty to impartially evaluate and weigh all the evidence. I will examine the available witnesses against you as well as any available witnesses requested by you. You and your counsel will be given full opportunity to cross-examine witnesses against you (if they are available) and to present anything either of you may desire in your behalf, either in defense or extenuation or mitigation. I can recommend that the charges

against you be referred to a general court-martial or to a different type of court-martial, or that the charges be dismissed or disposed of other than by trial by court-martial. It is not my purpose during this investigation to act as a prosecutor, but only as an impartial fact finder. It is vital that you understand this.

4. Before I begin the formal investigation and examination of any witnesses in this case, I must inform you that you have the right to be represented at all times during this investigation by legally qualified counsel. This means that you have the right to be represented by a civilian lawyer of your choice, but at no expense to the United States; by military counsel of your own selection if that counsel is reasonably available; or by counsel detailed from the *detailing authority*. There is no cost to you for military counsel. You also have the right to waive representation by counsel. I strongly recommend that you choose to be represented. I understand that you are already represented by *Lieutenant A. B. Lawyer, JAGC, USNR*, of the Naval Legal Services Office *Jacksonville*. If you intend to have different or additional representation, notify me as soon as possible.
5. The hearing is scheduled to begin at *location* on *date*, at *time*. The uniform is tropical blue long.

I. M. IO

Copy: Trial Counsel
Convening Authority

ARTICLE 32 INVESTIGATING OFFICER'S SCRIPT**INTRODUCTION & PRELIMINARY MATTERS**

IO: This hearing will come to order. This hearing is convened by order of (*grade and name*), Commanding Officer, (*organization*)¹, to inquire into the truth of the allegations set forth on the charge sheet dated (*date of charge sheet*) in the case of (*grade and name of the accused*), examine the form of the charges, and secure information that will be helpful in determining the disposition of this case. Copies of the charge sheet and convening order have been furnished to the accused, defense counsel, and government counsel [and the reporter (if one is detailed)] .

Present at this hearing are myself (*grade and name*), the detailed investigating officer; the accused (*grade and name*); defense counsel (*grade and name, if military; Mr. / Ms. and name, if civilian*), and counsel for the government (*grade and name*), [and (*grade and name of reporter*), who has been detailed as the reporter for this hearing].

If a court-reporter has been detailed to the hearing, The investigating officer should swear in the court reporter.

IO: Do you (swear or affirm) that you will faithfully perform the duties of reporter for this investigation [so help you God]?

REP: I do.

If an interpreter has been detailed to the hearing, the investigating officer should also swear in that individual.

IO: 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: (*Grade and name of defense counsel*), do you confirm that you are qualified to serve as defense counsel in accordance with Article 27 (b) and that you have been previously sworn under Article 42 (a) of the Uniform Code of Military Justice?

DC: Yes, sir.

¹ The identity and organization of the convening authority may be ascertained from the appointing order.

If the accused is represented by a civilian lawyer, the investigating officer should ascertain by inquiry whether such lawyer is a member of the bar of a Federal court or the highest court of a state, and that he / she is currently licensed to practice.

IO: Would civilian counsel representing the accused please identify yourself for the record and state your qualifications?

CIV: I am (Mr/Ms). I am a civilian 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.

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.

IO: It appears that counsel representing the accused has/have the requisite qualifications under RCM 405(d)(2).

IO: 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. Is the accused or counsel for either side aware of any grounds that might disqualify me from conducting this investigation?

GC: The government is aware of none.

DC: The defense is aware of none.

PRELIMINARY ADVICE

IO: (*Grade and name of accused*), I going to explain to you the purpose of the hearing and the rights that you have at this hearing. If you do not understand what I am telling you, let me know and I will explain it again until you and I are both satisfied that you understand.

IO: The purpose of this hearing is to investigate the charges made against you and to recommend to (*grade and name of CA*) what disposition should be taken. I know nothing at all about your case except for the information contained in the charge sheet and in the order that appointed me to investigate these charges², and I have formed no opinion as to what I will

² If the investigating officer has had pre-hearing discussions with counsel or reviewed investigatory material in order to make witness and evidentiary determinations, the investigating officer should add: ". . . except that I have met with your counsel and with Government counsel to discuss some of the legal issues that may arise during this hearing, to identify the witnesses who are expected to testify, and to mark the exhibits that may be offered. . . ." and/or ". . . except that I have reviewed _____ in order to make initial determinations regarding the availability of witnesses and

recommend. I will make my recommendation to (*grade and name of CA*) solely on the basis of the evidence that is introduced and I receive during this hearing.

I can make any one of a number of recommendations. I can recommend that you be tried by general court-martial; by special court-martial; by summary court-martial; that these charges be referred for disposition at a hearing convened under Article 15 of the Uniform Code of Military Justice that is, Captain's Mast, or I can recommend that all of the charges, or some of them, be dismissed and that you not undergo a trial or a mast at all.

(*Grade and name of CA*) is not bound by my recommendation. For example, if I recommend that a charge against you should be dismissed, he / she may still decide to send that charge to a court-martial.

Do you have any questions about what I have just told you?

ACC: No, sir.

IO SHOULD CHECK OFF BLOCK 10D ON FORM DD-457

IO: I will now advise you of the nature of the charges against you as set forth on the charge sheet. They are (*describe charges in plain language that the accused will understand*):

IO: The charges were preferred by (*grade, name and organization of the accuser*), a person subject to the Uniform Code of Military Justice.

Do you have any questions about what I have just told you?

ACC: No, sir.

IO SHOULD CHECK OFF BLOCK 10A & B ON FORM DD-457

IO: One of the rights you have at this hearing is the right to be represented, at no cost to you, by a military lawyer who has been detailed to represent you. (*Grade and name of CA*) has detailed (*grade and name of detailed defense counsel*) to represent you at this hearing.

You also have the right to ask for another free military lawyer, either to work with (*grade and name of detailed defense counsel*), or to represent you *instead of* (*grade and name of detailed defense counsel*). However, that other military lawyer must be reasonably available, and the determination of availability will be made by (*grade and name of CA*), and the commanding officer of that other military lawyer.

evidence for this hearing . . . "

Finally, you have the right to be represented by a civilian lawyer, at your own expense. This civilian lawyer may work *with* (*grade and name of detailed defense counsel*) or represent you *instead of* (*grade and name of detailed defense counsel*).

Do you have any questions about what I have just told you?

ACC: No, sir.

IO: By whom do you want to be represented at this hearing?

ACC: (*Grade and name of detailed defense counsel*), sir.

If the accused desires civilian counsel and has not yet been able to secure such counsel, or if the accused desires a military lawyer other than the one who has been detailed to represent the accused at the Article 32 hearing, the investigating officer should adjourn the hearing for a reasonable time in order for the accused to retain civilian counsel or for the accused or his detailed counsel to submit the request for individual military counsel through the trial counsel to the CA.³

If the accused is not represented by counsel or insists on proceeding *pro se*, the investigating officer should caution the accused as follows:

IO: (*Grade and name of accused*) I caution you that the charge(s) against you are very serious and it is important that you understand all of your rights as well as the procedures that control this hearing. I suggest to you that you need the assistance of a lawyer to properly protect your rights and to otherwise help you. As I explained earlier, you have an absolute right to a qualified, free military lawyer who will provide that assistance. You are, of course, completely free to give up this right and to decide that you do not want a lawyer to assist you. But I again warn you that if you decide to proceed in this hearing without a lawyer, you do so at your peril and may, without meaning to do so, jeopardize your case.

Do you understand what I have just told you?

ACC: Yes, sir.

IO: Do you wish to have a lawyer to represent you, or not?

ACC: I don't want a lawyer.

If the investigating officer is satisfied that the accused has made a knowing and intelligent waiver of the right to counsel, the officer should complete blocks 9(a) and 9(b) of the DD Form 457, and ask the accused to sign the form in block 9(c), indicating the fact of the waiver. If the accused refuses to sign, the investigating officer will explain the refusal in block 21 of the form.

³ See Article 38(b)(3), UCMJ and RCM 506(b)(2).

If the investigating officer is not satisfied that the accused has knowingly and intelligently waived the right to counsel, the officer should proceed as follows:

IO: (*Grade and name of accused*) I am not satisfied that you fully appreciate the consequences of not having a lawyer at this hearing. Therefore, I will direct (*grade and name of detailed defense counsel*) to continue to act as your counsel.

IO: You also have the right to remain silent at this hearing and to say nothing at all about the charge(s) against you. If you decide not to make any statement, I will not hold that against you in any way.

If you wish, you may make a statement. You may make that statement orally, that is, by taking the witness stand, or you may write it out and give it to me, or you may do both.

You may make any such statement under oath, but you do not have to do so. If you make it under oath, then Government counsel, (*name and grade of Government counsel*), may cross-examine you on its contents, and I may ask you questions about its contents. If you make an unsworn statement, then neither Government counsel nor I can question you concerning its contents.

Do you have any questions about what I have just told you?

ACC: No, sir.

IO: You may, in any such statement, present facts that you believe constitute a defense to the charge(s), or you may present facts in what we call extenuation or mitigation. By "extenuation," I mean circumstances that might explain why the charged offense(s) happened and furnish a partial excuse. By mitigation, I mean circumstances that indicate that the charged offense(s) ought not to be treated as seriously as they might be under normal circumstances.

However, if you make any statement - sworn, unsworn, written or oral - the contents of that statement may lawfully be used against you in any court-martial or mast proceeding. Before you make any statement, you may consult with your counsel.

Do you have any questions about what I have just told you?

IO SHOULD CHECK OFF BLOCK 10C & J ON FORM DD-457

ACC: No, sir.

IO: As I understand, the persons who will testify at this hearing are (*identify all witnesses of whom the investigating officer is aware*):

IO: Other evidence may be presented in the form of exhibits. You have the right to examine all of these exhibits and make appropriate objections, through your defense counsel, as to my consideration of any of these exhibits.

You have the right to be present throughout the hearing unless you decide not to be here or if I decide that your conduct is disruptive. You have the right to cross-examine all witnesses who testify for the Government, and that right will be exercised for you by your defense counsel.

Do you have any questions about what I have just told you?

ACC: No, sir.

IO SHOULD CHECK OFF BLOCK 10E, F& G ON FORM DD-457

IO: You have the right to call any reasonably available witnesses whom you think may have anything relevant to say with respect to these charges, and to offer any other reasonably available evidence that you think may be relevant. I will determine whether any witness you wish to call, or other evidence that you wish to offer, is reasonably available or not.⁴

Do you have any questions about what I have just told you?

ACC: No, sir.

IO SHOULD CHECK OFF BLOCK 10H & I ON FORM DD-457

IO: Do you have any questions at all about your rights at this hearing, or about anything that I have said so far?

ACC: No, sir.

THE INVESTIGATING OFFICER HAS NOW COMPLETED HIS REQUIRED ADVICE TO THE ACCUSED. ALL BOXES UNDER BLOCK 10 SHOULD NOW BE CHECKED "YES" ON THE DD FORM 457

MENTAL RESPONSIBILITY

IO: (*Grade and name of defense counsel*), are there grounds to assert that the accused was not mentally responsible for his / her actions at the time of the offense(s) charged or that the accused is mentally incompetent to participate in the defense of his / her case?

DC: No, sir.

⁴ If the accused objects to the investigating officer's determination that a witness is unavailable, the investigating officer must give the reasons for determining unavailability in the report to the convening authority. RCM 405(g)(2)(D).

An affirmative answer to this question does not necessarily furnish a basis for recommending the accused be referred to a psychiatric board (RCM 706) and thereby delay the investigation. There must be some reasonable grounds for the answer other than a bare assertion, by the accused or counsel, of lack of mental responsibility or incompetence to participate in the hearing. Such grounds might include a preliminary diagnosis by a medical officer, coupled with a recommendation for a psychiatric evaluation. If the investigating officer finds that such grounds exist, based on appropriate evidence, such officer should mark the "Yes" box in block 14, explain the reasons therefor in block 21, adjourn (*not* close) the hearing and refer the matter to the CA. If the investigating officer receives a written medical report into evidence on the issue of mental responsibility or competency to participate in the hearing, that report should be attached to the referral letter.

On receipt of a negative answer, the investigating officer should mark the "No" box in block 14 on DD Form 457.

ARTICLE 32 PROCEDURES

IO: Now, let me go over with you the procedures I will use to conduct this investigation.

First, I / government counsel will call any available witnesses and produce any available documents that 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. 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 that are relevant to this investigation. Any defense witness will be subject to questioning by government counsel and me.

HANDLING OBJECTIONS

IO: I will handle any objections in the following fashion. I am not a judge. I do not rule on the admissibility of evidence. I am entitled to consider any evidence that qualifies for my consideration under RCM 405. That includes testimony and other evidence, or their alternatives, if permitted under RCM 405(g)(4)&(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 the rights afforded by Article 31 before being questioned, the rules on privileges contained in Section V of the Military Rules of Evidence, and the rule regarding evidence of prior sexual behavior by the victim of a sexual offense. Thus, I can and will consider hearsay evidence unless there is some other reason to prevent me from doing so.

Now that I have said that I am 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 RCM 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 alternatives to testimony 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. I am also allowed to require that a party making an objection file the objection with me in writing. So, here is the rule we will follow for these proceedings: 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.

EXAMINATION OF WITNESSES AND EXHIBITS

The investigating officer may now direct the government counsel to proceed and call the first witness for the government. The investigating officer or government counsel will administer the oath as follows:

IO/GC: Do you swear (or affirm) that the evidence that you are about to give in the case now in hearing will be the truth, the whole truth and nothing but the truth [, so help you God]?

WIT: I do.

It is customary for the government counsel to conduct the initial examination of all government witnesses. The investigating officer may conduct the initial examination and *must* do so in the unusual circumstance where no government counsel has been detailed. The defense counsel may then cross-examine (if more than one defense counsel appears, the investigating officer should permit only one to conduct the cross-examination)⁵, and the investigating officer may then pose questions. The usual rules apply to redirect and recross examination.

Counsel should ask each witness to identify himself or herself by name, rate and duty station (or, in the case of civilian witnesses, address and occupation).

⁵ RCM 405(h)(1)(A) requires that the investigating officer afford the defense "wide latitude" in cross-examination during Article 32 hearings.

Documentary evidence, and real evidence (e.g., guns, knives, drugs), should be marked for identification. The investigating officer should ensure that counsel give copies of documents, offered in evidence, to opposing counsel.

The investigating officer should keep a copy of each piece of evidence to be submitted with his or her report. Originals of all evidence, while available for inspection by the investigating officer and opposing counsel at the hearing, are retained by the counsel introducing the evidence and not the investigating officer. For example, the government may put Special Agent Jones on the stand to verify that a baggie of marijuana was found on the accused's person. The marijuana should be available at the Article 32 hearing for inspection by the investigating officer and defense counsel. A photocopy of the baggie should be made by the investigating officer to include in his or her report. Government counsel or Special Agent Jones will retain custody of the baggie of marijuana.

If government counsel offers a confession or admission of the accused, the investigating officer must look into the circumstances to determine whether the accused received proper *Miranda-Tempia* warnings and knowingly and intelligently waived his or her rights against self-incrimination prior to making the confession or admission.⁶

After all available witnesses called by the government counsel have testified, the investigating officer should then consider any sworn statements of witnesses who have been determined to be not reasonably available. The investigating officer may only consider unsworn statements with the consent of the accused. If such a determination has been made with respect to a prosecution witness, the investigating officer should proceed as follows:⁷

IO: I do not intend to call (*grade, if applicable, and name of witness*) because (*I have*) or (*his / her commanding officer has*) determined that he / she is not reasonably available due to (*describe circumstances; e.g., illness, deployment*).⁸ However, I will consider the (*UNSWORN statement of*) (*grade, if applicable, and name of witness*) but only with the consent of the accused. **** SWORN statements may be considered over the objection of accused if witness is not reasonably available **** (*Grade and name of Government counsel*), please show a copy of this statement to the accused and his/her counsel. (*After the accused and counsel have had the opportunity to examine the statement, then inquire:*) Do you consent to my consideration of this statement as an alternative to the testimony in person of (*grade, if applicable, and name of witness*)?

⁶ For a guide to the scope of the inquiry, the questions that the investigating officer should ask, and the standards for determining admissibility of a confession or other pretrial statement of an accused when the Government offers such a statement to prove an element of the offense charged, *see Military Judges' Bench book* (DA Pam 27-9), chapter 4; *see also* Military Rules of Evidence 304.

⁷ *See* RCM 405(g)(4)(A) and 405(g)(4)(B).

⁸ *See* footnote 7, *supra*.

DEFENSE EVIDENCE

The defense may now present matters in defense, extenuation, and mitigation. Remember that the limitations in RCM 405 place limits on the form of evidence the government can offer. The defense may offer evidence in any form it chooses.

If the accused presents witnesses, the investigating officer will swear each of them. Defense counsel (or one of them, if more than one defense counsel) will examine each witness and the government counsel (or one of them, if more than one government counsel) will cross-examine. The investigating officer may then inquire of the witness.

If a requested defense witness has been determined to be not reasonably available, the investigating officer should put the following statement on the record:

IO: (*Grade and name of accused*), you requested that (*grade, if applicable, and name of witness*) be called as a witness in your behalf. Despite your request, I do not intend to call this individual as a witness because (*I have*)(*his / her commanding officer has*) determined that he / she is not reasonably available due to (*state reasons for determining unavailability*).⁹ Do you wish to present any alternative to the live testimony of this witness?

DC: (Yes, sir.)(No, sir.)

IO: Do you desire that any witnesses, other than those whom you previously requested, or other evidence be produced at this time? If so, I will adjourn this hearing in order to determine whether they are reasonably available and, if they are, I will arrange for their appearance.

ACC: (Yes, sir.)(No, sir.)

If the accused requests the production of additional witnesses or other evidence, the investigating officer should adjourn the hearing for a reasonable time to make availability determinations and assemble the witnesses and evidence requested.

After government counsel and defense counsel have rested, the investigating officer should inquire whether the accused desires to exercise his or her right to make a statement.

IO: (*Grade and name of accused*), I previously advised you that, while you cannot be *compelled* to make any statement, you have the *right* to make a statement in any form you desire. Bearing that advice in mind, consult with your counsel and advise me whether you wish to make a statement at this time or not.

ACC: I do / do not desire to make a statement.

⁹ See footnote 7, *supra*.

If the accused makes an oral statement, the investigating officer should summarize it (if there is no reporter detailed to the hearing) and append it to the DD Form 457 as an exhibit. Any written statement by the accused should be similarly appended.

CLOSING

IO: Does the Government wish to comment on the evidence?

GC: (Comments or declines to comment.)

IO: Does the defense wish to comment on the evidence?

DC: (Comments or declines to comment.)

IO: Government counsel, do you anticipate that all of your witnesses will be available in the event of trial?

In the event of a negative response from counsel, the investigating officer should inquire further into the circumstances and report the results of the inquiry to the CA (see blocks 16 and 21 on the DD Form 457) so the CA may arrange to depose, if possible, those witnesses expected to be absent at the time of trial.

IO: This investigation is closed.

If a reporter will prepare a verbatim or summarized transcript of the hearing, the investigating officer should await a copy of such transcript and review it, together with any notes that the officer may have taken during the hearing, before completing the DD Form 457. If no reporter is detailed to the hearing, the investigating officer should, using his notes, summarize in writing the testimony of each witness. Such summaries should be signed by the witness, if such signature can be obtained without delaying the investigation, and attached to the DD 457 as exhibits of the investigating officer.

After completing the DD Form 457, the investigating officer should forward it, together with a copy of the transcript (or the summaries of testimony prepared by the officer) and all documentary exhibits, to the CA via the CA's staff judge advocate. Although it is the CA's responsibility to furnish a complete copy of the report to the accused [see RCM 405(j)(3)], the preferred practice is for the investigating officer to furnish such copies to both government counsel and to defense counsel.

