GUIDE TO

CONDUCTING/REVIEWING

INVESTIGATIONS

TABLE OF CONTENTS

PAGE

INTRODUCTION---------------------------------------------------5

Chapter 1 Administrative “Kick Off”

0101 Types of Investigations----------------------------------6

0102 Read the Appointing Order--------------------------------9

0103 Time Constraints-----------------------------------------9

0104 What is needed to start the investigation?--------------10

0105 What occurred before the current investigation?---------10

0106 What is occurring simultaneously with the current

investigation?------------------------------------------11

0107 Conduct during the Investigation------------------------11

Section I: Line of Duty/Misconduct Determinations

0108 Line of Duty/Misconduct Determination-------------------11

0109 Reason for LOD/Misconduct Determination-----------------11

0110 When LOD/Misconduct Determinations are required---------12

0111 What Constitutes “Line of Duty?-------------------------12

0112 Relationship between misconduct and line of duty--------12 0113 Preliminary Inquiries-----------------------------------13

0114 Command Investigations----------------------------------13

0115 Endorsing Command Investigations------------------------14

0116 Required Warnings---------------------------------------14

0117 Mental Responsibility-----------------------------------14

Section II: Special Considerations in Death Cases

0118 Special Considerations in Death Cases-------------------15

0119 Preliminary Inquiries-----------------------------------15

0120 Limited Investigations----------------------------------15

0121 Command Investigations----------------------------------16

0122 Line of Duty Determinations-----------------------------16

0123 Endorsing Command Investigation-------------------------16

Chapter 2 Gathering Information

0201 General-------------------------------------------------17

Part I: Witnesses

0202 Overview------------------------------------------------17

0203 Rules for Dealing with Witnesses------------------------17

0204 Military Witnesses--------------------------------------18

0205 Civilian Witnesses--------------------------------------20

0206 Dealing with Witnesses; Psychological Considerations----20

0207 Obtaining Statements from Witnesses---------------------22

0208 Warnings------------------------------------------------24

0209 Using Surveys-------------------------------------------26

0210 Privileges----------------------------------------------27

Part II: Documents

0211 Photographs---------------------------------------------27

0212 Obtaining Documentary Evidence--------------------------28

0213 What documents do for the IO?---------------------------29

0214 Documents may stand alone-------------------------------31

0215 Dangers-------------------------------------------------31

Part III Physical Evidence

0216 Dodging Rabbit: The importance of physical evidence----31

0217 Even More Important Than Documents----------------------32

0218 Arrange trips to the site-------------------------------32

0219 Handling Physical Evidence------------------------------32

0220 Attaching Audio/Video recordings as an enclosure--------32

Chapter 3 Writing the Report

0301 The Report----------------------------------------------33

0302 Enclosures----------------------------------------------35

0303 Executive Summary---------------------------------------36

0304 Preliminary Statement-----------------------------------37

0305 Findings of Fact (FF)-----------------------------------37

0306 Opinions (OP)-------------------------------------------38

0307 Recommendations-----------------------------------------39

Chapter 4 Disposition of Report of Investigation

0401 Final Check---------------------------------------------41

0402 Delivery and Forwarding of Report-----------------------41

0403 Releasing the Report------------------------------------41

Chapter 5 Reviewing the Investigation

0501 Review and Forwarding Command Investigation-------------43

0502 Review and Forwarding Litigation Report Investigation---45

**Figures**

**Figure 1 Preliminary Inquiry Samples**

Preliminary Inquiry Appointing Order------------------Figure 1-a

Preliminary Inquiry Report----------------------------Figure 1-b

Preliminary Inquiry Checklist-------------------------Figure 1-c

**Figure 2 Command Investigation Samples**

Command Investigation Appointing Order----------------Figure 2-a

Command Investigation Report--------------------------Figure 2-b

Command Investigation Checklist-----------------------Figure 2-c

**Figure 3 Litigation Report Investigation Samples**

Litigation Report Investigation Appointing Order------Figure 3-a

Litigation Report Investigation Format----------------Figure 3-b

Litigation Report Investigation Checklist-------------Figure 3-c

**Figure 4 Investigative Officer Toolbox Samples**

Chronology--------------------------------------------Figure 4-a

Witness Data Sheet------------------------------------Figure 4-b

Witness Statement-------------------------------------Figure 4-c

Suspect Statement w/Art 31 Language-------------------Figure 4-d

Injured Marine Statement w/Warning Language-----------Figure 4-e

Sample Warning Advisement About Statements Regarding

Origin of Disease or Injury---------------------------Figure 4-f

Suspect’s Rights and Acknowledgment/Statement---------Figure 4-g

Privacy Act Statement---------------------------------Figure 4-h

**Figure 5 Line of Duty Samples**

Line of Duty/Misconduct Checklist---------------------Figure 5-a

Preliminary Inquiry Line of Duty/Misconduct

Determination-----------------------------------------Figure 5-b

Notice/Acknowledgment of Preliminary Line of Duty/

Misconduct Determination------------------------------Figure 5-c

Beneficiary Notification of Preliminary Line of Duty/

Misconduct Determination------------------------------Figure 5-d

**Figure 6 Other Checklists**

Motor Vehicle Accident Checklist----------------------Figure 6-a

Explosions Checklist----------------------------------Figure 6-b

Fire Checklist----------------------------------------Figure 6-c

Loss/Excess of Government Funds or Property Checklist-Figure 6-d

Claims for or Against the Government Checklist--------Figure 6-e

Firearm Accidents Checklist---------------------------Figure 6-f

INTRODUCTION

The genesis of this guide is to pass on to Investigating Officers (IO) and unit representatives lessons learned while conducting and reviewing investigations.

This guide was established after watching the time and effort the Staff Judge Advocate (SJA) and Deputy Staff Judge Advocate (DSJA), Training Command took in briefing IOs assigned to conduct an investigation. The SJA and DSJA believe that these briefings decrease the number of errors and problems commonly found in investigations. So, this guide should further reduce the number of errors and problems commonly found in investigations.

As an IO you have two options:

a. Look upon the assignment as torture, punishment, or a burden; or

b. Look upon the assignment as a chance to learn and via findings of fact, opinions and recommendations, change a part of the Marine Corps for the better.

While investigations can be time consuming and unpleasant, the second choice makes for a better experience and better product.

There is nothing that will serve and protect the Navy’s interest more effectively than a thorough, comprehensive and properly documented investigation conducted as soon after the incident as possible.

**This guide is NOT intended as a substitute for reading the Manual of the Judge Advocate General (JAGMAN) or any other authorities, such as the Manual for Courts-Martial (MCM)**. The JAGMAN and MCM are compilations of rules, while this guide is a practical tool for conducting investigations that includes many practical hints not included in the JAGMAN. The goal is to give the IO ideas, techniques, and tools.

Chapter 1: Administrative “Kick Off”

**0101. Types of investigations.**

1. A preliminary inquiry (PI) may precede the below listed investigations. A PI is a quick investigative tool used to determine whether an incident is serious enough to warrant a CI. There are no set requirements on how a PI is conducted or drafted, and sometimes a complete, written PI can be used as the final investigation for minor incidents. Commanders are encouraged to consider initially utilizing the PI to determine whether a more formal CI is warranted. Use of a PI to establish the basis for disposing of allegations of misconduct or a violation of the law, policy, or regulation is highly discouraged. A PI should not be utilized to establish a record for future reference. ***JAGMAN 0203***

a. Method of inquiry. The convening authority (CA) may conduct a PI personally or appoint a member of the command to do so (**Figure 1-a**). There are no requirements nor restrictions governing how the inquiry is to be accomplished. The goal is to take a "quick look" at a particular incident (e.g., a minor fender-bender), and gather enough information so that an informed decision can be made regarding whether some sort of JAGMAN investigation is truly necessary.

b. Upon reviewing the results of the PI, the CA should take one of the following actions:

(1) **Take no further action**. Where further investigation would serve no useful purpose, there is no need to convene a command investigation. This is an appropriate course where the PI reveals that the incident is likely to be of little interest to anyone outside the immediate command or that the event will be adequately investigated under some other procedure (e.g., NCIS investigation, MLSR/survey procedure, etc.). ***JAGMAN 0204b***

(2) **Conduct a command investigation (CI)**.

(3) **Convene a litigation-report investigation (LitRep)**.

(4) **Convene a court or board of inquiry (COI/BOI)**. Only a GCMCA can convene.

c. Reporting the results of PIs. After deciding which of the command options to exercise, the CA is to report that decision to his/her immediate superior in the chain-of-command (ISIC). This does not require a special, stand-alone report; command decisions on PIs are to be relayed in the context of existing situational reporting systems. You should determine if your ISIC has issued guidance on what types of incidents should be or should not be reported. ***JAGMAN 0204d***

d. Review of command decision. The initial determination of which option to exercise is a matter of command discretion. Superiors in the chain-of-command may direct that an option be

reconsidered or that a particular course of action be taken. For example, a superior may feel that a litigation-report investigation may be the preferred method of investigating and documenting a particular incident and direct that a subordinate convene such an investigation rather than a CI.

2. Command investigation (CI). The most common investigation is the CI. The CI is a formal investigation with strict content and format requirements. Its purpose is to search out, develop, assemble, analyze, and record all available information relative to the incident under investigation. The information contained in the CI provides the basis for various actions designed to improve command management and administration. ***JAGMAN 0209***

a. CIs are likely to be the appropriate investigative tool for incidents involving: aircraft mishaps; explosions; ship stranding or flooding; fires; loss of government funds or property; firearm accidents; security violations; injury to service members, where such injury is incurred while "not in the line of duty"; and deaths of service members where there is a "nexus," or connection, to naval service.

b. Rules on Convening. A CI will be convened, in writing, by a CA (**Figure 2-a**) ***JAGMAN 0206***. When the CA feels that the investigation of an incident is impractical or inappropriate for the command to investigate, another command may be requested to conduct the investigation. When circumstances do not allow for completion of an investigation, (e.g., deployments), requests for assistance may be directed to superiors in the chain of command. When more than one command is involved, a single investigation should be conducted and coordination/cooperation is required.

3. Litigation-Report Investigation (LitRep). The LitRep is appropriate whenever the primary purpose of the investigation is to prepare and defend the legal interests of the Navy in claims proceedings or civil litigation. The key here is that the attorney-client privilege protects the investigation from disclosure. ***JAGMAN 0210***

a. While closely resembling the CI in method of evidence collection and report preparation, there are special rules for the LitRep.

(1) A LitRep must be: convened only after consultation with a "cognizant judge advocate." (**Figure 3-a**) ***JAGMAN 0210c***;

(2) Conducted under the direction and supervision of a judge advocate;

(3) Protected from disclosure to anyone who does not have an official need to know;

(4) Conducted primarily in anticipation of claims and/or litigation; and

(5) Ultimately forwarded to the Judge Advocate General.

NOTE: When investigations are conducted in anticipation of litigation but are not conducted under the direction and supervision of a judge advocate or are handled carelessly, they cannot be legally protected from disclosure to parties whose litigation interests may be adverse to the interests of the United States.

b. The judge advocate responsible for supervising the investigation will be named in the convening order; this does not mean that the judge advocate acts as the IO, rather the judge advocate will be responsible for overseeing the conduct of the investigation and preparation of the report. The IO must consult with the supervising judge advocate and decide what the purpose and methodology of his/her investigation is before starting to collect evidence.

c. Conducting the Investigation: As with the CI, the general goal of the LitRep is to document who, what, when, where, how and why an incident occurred.

d. In handling witnesses, there are several things to keep in mind. You may obtain information by personal interview, correspondence, or telephone inquiry. The IO should never obtain signed or sworn statements during the course of a LitRep unless he/she has consulted with the supervising judge advocate.

e. Writing the Investigation: The key to writing a LitRep is organization. As IO, you must take the time to reconstruct the incident in your mind, pulling together all the evidence. You must then document the incident in a readable fashion. Remember, the CA and reviewing authorities will want to understand the incident from a reading of the facts.

(1) Often a recitation of the facts in chronological, step-by-step form is easiest to follow. Keep your findings of fact as clear and concise as possible.

(2) The IO must not draft opinions and/or recommendations unless specifically directed to by the

supervising judge advocate.

(3) The IO must properly mark the LitRep. Copies of the report, and any of the working notes of the IO, must be maintained in files marked "FOR OFFICIAL USE ONLY: LITIGATION/ ATTORNEY WORK PRODUCT" and safeguarded.

4. Courts and boards of inquiries (COI or BOI) ***JAGMAN 0211***

**0102. Read the Appointing Order**. The IO must read their appointing order to ascertain guidance about the particular type of investigation appointed. ***JAGMAN 0203, 0206, 0209, 0210***

**0103. Time constraints**. The appointing order will direct a due date. The IO should ask for an extension if needed. While some general or commanding officers may want answers and want them now, I would rather make the ultimate recipient of the investigation angry because the investigation took longer but give a quality product than to give a shoddy product due to insufficient time. Time management; manage your time wisely.

1. Thirty (30) days to conduct a CI (***JAGMAN 0206c(9)***); **twenty (20) days for death investigations, *JAGMAN 0225e***;

2. Thirty (30) days to conduct a LitRep, ***JAGMAN 0210c(7)***;

3. The General Court-Martial Convening Authority (GCMCA) will prescribe due date according to complexity and gravity of incident for COI or BOI; and

4. A PI should be completed within three calendar days. If more time is required, it means that the IO is attempting to do too much or has not been sufficiently instructed as to what issue(s) is/are to be addressed. ***JAGMAN 0203e***

**0104. What is needed to start the investigation?**

1. Written appointing order naming the IO and providing a due date.

2. Basic information about the complaint or the subject of the investigation.

3. List of witnesses, if available.

4. List of physical evidence, if available. A complainant may not bother telling anyone that they have physical evidence. For example, an officer complained about mistreatment in his work section, such as being given personal errands to do. One example was a senior officer requiring a junior officer to make personal travel reservations for the senior officer. The IO should ask the junior officer if he kept a copy of the ticket or itinerary to show that it was completely unrelated to military duties.

5. A chronology. The IO should develop a chronology form (**Figure 4-a**) as soon as they are appointed as IO. This is a form on which the IO writes down dates and events or contacts with command or witness.

**0105. What occurred before the current investigation?** The IO needs to know if another type of investigation was done before the current investigation:

1. The previous investigation may provide valuable leads.

2. The previous investigation may show where the other IO made mistakes. A key concept is whether the previous IO advised suspects PROPERLY of their Article 31 rights. If the previous IO did not do so, then the current IO must give the rights again AND add a “cleaning warning” telling the subject that previous statements made after defective Article 31 advice cannot be used against the suspect.

3. The previous investigation may be a cover up, especially if an officer was the subject of the investigation. Many do not like to have this said, but commands can be notorious for intentionally or negligently failing to report officer misconduct as required by the Legal Administration Manual and for trying to cover up any problem involving an officer. If an officer is the subject of the investigation, the IO must ensure the investigation is transparent and was conducted by the book.

**0106. What is occurring simultaneously with the current investigation?** Conflicts can arise when the IO is investigating a crime at the same time a law enforcement agency is investigating it or when the IO is investigating an aviation mishap at the same time a mishap board is meeting. ***JAGMAN 0201*.** The IO needs to know if the command’s equal opportunity advisor has sent a DASH report and any updates in cases of discrimination or sexual harassment. The IO is only responsible for investigating the incident, not submitting the DASH.

**0107. Conduct during the investigation**. Do not talk about the investigation in casual conversation. Something the IO says about a witness or subject may get back to that witness or subject and cause problems. **The IO has no obligation to report progress or findings to anyone other than the officer who appointed the IO.** For example, at day seven of the investigation of Sergeant Z, the IO may be convinced that Sergeant Z is guilty of stealing. The danger in telling anyone this conclusion is that on day nine, the IO may find evidence proving that Sergeant Z is NOT a thief. If on day seven the IO tells someone that Sergeant Z is a thief, explanations by the IO on day nine will, at a minimum, be awkward and embarrassing. In summary, the IO’s report is the IO’s voice; anything said by the IO before the report is complete may return to haunt the IO.

Section I: Line of Duty/Misconduct Determinations

**0108.** **Line of Duty/Misconduct Determinations**. To assist in the administration of naval personnel issues, the commanding officer is required to inquire into certain cases of injury or disease incurred by members of his or her command. When these inquiries are conducted, the commanding officer is required to make what is referred to as a line of duty (LOD)/misconduct determination. As in most matters, the type of inquiry and the degree of formality of the report will depend upon the circumstances of the case.

**0109. Reason for LOD/misconduct determinations**. Adverse LOD/ misconduct determinations can affect several benefits and/or rights administered by the Department of the Navy, including:

extension of enlistment; withholding of longevity and retirement multipliers for the time missed, and; denial of disability retirement and/or severance pay. ***JAGMAN 0213***

**0110. When LOD/misconduct determinations are required**. Findings concerning LOD/misconduct must be made in every case in which a member of the naval service incurs a disease or injury that:

1. Might result in permanent disability; or

2. Results in the physical inability to perform duty for a period exceeding 24 hours (as distinguished from a period of hospitalization for evaluation or observation).

3. Death. ***JAGMAN 0212***

**0111. What constitutes "line of duty?"** Injury or disease incurred by naval personnel while on active duty service is presumed to have been incurred "in line of duty" unless there is clear and convincing evidence that it was incurred:

1. As a result of the member's own "misconduct." There must be clear and convincing evidence that the injury was intentionally incurred or the result of willful neglect which demonstrates a reckless disregard for foreseeable and likely consequences.

2. While avoiding duty by deserting.

3. While absent without leave, and such absence materially interfered with the performance of required military duties (generally, in excess of 24 hours).

4. While confined under sentence of a court-martial that included an unremitted dishonorable discharge.

5. While confined under sentence of civil court following conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted. ***JAGMAN 0215***

**0112. Relationship between misconduct and line of duty**

1. For purposes outlined in the JAGMAN, "misconduct" can never be "in line of duty." Hence, a finding or determination that an injury was incurred as a result of the member's own misconduct must be accompanied by a finding or determination that the member's injury was incurred "not in line of

duty." It is permissible, however, to find that an injury was incurred "not as a result of misconduct" and "not in line of duty." As an example, a member who is absent without authority may be injured by a felonious assault or struck by a vehicle driven by a drunken driver. Obviously, the injury was

incurred through no fault of the member, but if the unauthorized absence interfered with the performance of the member’s required military duties, a finding of "not in line of duty" must result. ***JAGMAN 0217***

2. Possible findings. The only possible combinations of findings are:

a. "In line of duty" and "not due to the member's own misconduct;"

b. "Not in line of duty" and "not due to the member's own

misconduct;" and

c. "Not in line of duty" and "due to the member's own misconduct."

**0113. Preliminary Inquiries (PI)**. Each injury or disease requiring LOD/misconduct determinations must be reviewed through use of a PI. Upon completion of the PI, the command is to report the results to the GCMCA through use of the Personnel Casualty Report system. A copy of the PI report is delivered to the appropriate medical department for inclusion in the health or dental record. If the medical officer and the commanding officer are of the opinion that the injury or disease was incurred "in line of duty" and "not as a result of the member's own misconduct," then appropriate entries stating such are entered in the health record. **No further investigation** is required, unless directed by the GCMCA. ***JAGMAN 0222a (1)***

**0114. Command Investigations (CI)**. As noted above, use of the PI and health record entries will provide sufficient documentation where injuries or disease are found to have occurred while in the line of duty, not due to misconduct. CI's (**Figure 2-a**) are only required when:

1. The injury or disease was incurred in such a way that suggests a finding of "misconduct" or "not in line of duty";

2. There is a reasonable chance of permanent disability and the CA considers an investigation essential to ensuring an adequate official record;

3. The injury involves a Naval or Marine Reservist and the CA considers an investigation essential to ensuring an adequate official record. ***JAGMAN 0222d***

**0115. Endorsing CI**. The CA must specifically comment on the LOD/misconduct opinion and take one of the following actions:

1. If the CA concludes that the injury or disease was incurred "in line of duty" and "not due to a member's own misconduct," that shall be expressed (regardless of whether it differs from or concurs with the IO's opinion).

2. If, upon review of the report or record, the convening (or higher) authority believes the injury or disease was incurred **not** "in line of duty" or "due to the member's own misconduct,"

the member **must** be informed of the preliminary determination and afforded an opportunity, not to exceed 10 days, to submit any desired information to try and convince the CA otherwise. The

member may be permitted to review the investigative report before providing any information. If the member decides to present information, it shall be considered by the CA and appended to the record. If the member elects not to provide information, or the 10 day period lapses without submission, then such shall be noted in the endorsement. The CI is forwarded to a GCMCA with an assigned judge advocate. The GCMCA shall indicate approval, disapproval or modification of conclusions concerning misconduct and line of duty. A copy of such action will be returned to the CA so that appropriate entries may be made in the member's service and medical records. (**Figures 5-a, 5-b, and 2-b**) ***JAGMAN 0223***

**0116. Required warning**. Any person in the Armed Forces, prior to being asked to make or sign any statement relating to the origin, incidence, or aggravation of any disease or injury that he or she has suffered, shall be advised of the right not to make such a statement. (**Figure 4-f**) ***JAGMAN 0212c***

**0117. Mental responsibility**. Suicide and a bona-fidesuicide attempt, as distinguished from a suicide gesture, creates a strong inference of a lack of mental responsibility. As such, suicides or bona-fide suicide attempts are considered as acts committed in the line of duty/not due to own misconduct in light of the fact that the member demonstrated a lack of mental responsibility, and is therefore not responsible for his or her actions. However, a self-inflicted injury, not prompted by a

serious suicidal intent, is a suicidal gesture, and is deemed to be incurred as the result of the member’s own misconduct, unless evidence establishes otherwise that the member lacked mental

responsibility. ***JAGMAN 0218***

**Section II: Special Consideration in Death Cases**

**0118. Special Consideration in Death Cases.**  The circumstances surrounding the death of naval personnel, or of civilian personnel at places under military control, may be recorded in a variety of ways, such as autopsy reports, battlefield reports, and medical reports. Investigations conducted pursuant to the JAGMAN may also focus on such deaths and may incorporate other official reports as enclosures. Since reports pertaining to deaths of military member are, by law, generally releasable to family members, and since the deceased cannot contribute to the investigation process, special considerations prevail in the investigation of death cases.

**NOTE: NCIS must be notified per SECNAVINST 5430.107 series on any death case involving actual or suspected criminal conduct.**

**0119. Preliminary Inquiry (PI)**. All active duty death cases must be subject to at least a PI (***JAGMAN 0226***) in accordance with ***JAGMAN 0203***. At the conclusion of the PI, the CA must determine which of the options listed in ***JAGMAN 0204*** will be exercised, and report that decision to the next superior in the chain-of-command. A command investigation under the JAGMAN will normally **not** be conducted if the PI shows that the death:

1. Was the result of a previously known medical condition and the adequacy of military medical care is not reasonable in issue; or

2. Was the result of enemy action.

**0120. Limited Investigations**. Where the death of a servicemember occurred at a location within the U.S. and not under military control, while the member was off-duty, and there is no discernable "nexus," or connection, between the circumstances of the death and the naval service, the command need only obtain a copy of the investigation conducted by civilian authorities and retain it as an internal report. ***JAGMAN 0226c***. The command shall document, in writing, the reasons for making the determination to conduct a limited investigation, attaching the enumerated reasons to the internal report.

**0121. Command Investigations (CI)**. A CI (or in some cases, a litigation-report investigation) will be conducted if the PI shows:

1. The case involves civilian or other non-naval personnel found dead aboard an activity under military control where the death was apparently caused by suicide or other unusual

circumstances:

a. The circumstances surrounding the death places the adequacy of military medical care reasonably at issue;

b. There exists a probable "nexus," or connection, between the naval service and the circumstances of the death of a servicemember; or

c. It is unclear if enemy action caused the death, such as in possible "friendly-fire" incidents. ***JAGMAN 0226b***

**0122. Line of Duty Determinations**: A Line of Duty/Misconduct opinion will be made in all death cases (**THIS INCLUDES SUICIDES**). LOD determinations effect annuity calculations under the Uniformed Services Survivor Benefits Program. ***JAGMAN 0229***

**0123. Endorsing CI**.

1. If the CA concludes that the injury or disease was incurred "in line of duty" and "not due to a member's own misconduct," that shall be expressed (regardless of whether it differs from or concurs with the IO's opinion) in an endorsement and forwarded to the first GCMCA in the chain-of-command with an assigned SJA.

2. Before making an adverse LOD determination in a death investigation, the GCMCA or his or her SJA shall afford a known potential SBP beneficiary the opportunity to review the report of investigation and provide relevant information to the GCMCA. The known potential SBP beneficiary will normally have 30 calendar days from receipt of the report of investigation to submit information to the GCMCA. This maybe tasked down to CA. (**Figure 5-c**) ***JAGMAN 0229d***

**Chapter 2: Gathering Information**

**0201. General**. Evidence or information will be primarily in these forms: witness statements, documents; and physical evidence.

**Part I: Witnesses**

**0202. Overview**. Witnesses are the lifeblood of an investigation. Generally, they can be classified into two categories:

1. Witnesses who saw the event being investigated.

2. Witnesses who did not see the event but who have other information and can assist by other means (hotel clerk, police officers, and bureaucrats, etc.).

**0203. Rules for dealing with witnesses**

1. Rule One. A military or civilian witness’s priority are never the same as the IO’s priority. This means that witnesses have other things to do besides assisting the IO. The IO, pressured to complete the investigation in two days, hangs out to dry as the witness boards an airplane for 10 days of leave before the IO can talk to him.

2. Rule Two. The IO should not always expect cooperation: some witnesses are hostile or difficult. The classic example is the abused spouse or child who will not talk. They have learned, the hard way, that if they talk, the abuser may punish them. Another factor is that if they talk, the abuser may himself be punished, including confinement and discharge from the Marine Corps, which may mean that the family’s sole source of income vanishes. So, despite the pain of abuse, the victims may not cooperate with the IO. One countermeasure is to try to get to the witnesses before the abuser can get to them and tell them not to talk.

3. Rule Three. Witnesses often disappear after the initial interview. In light of the first two rules, the IO should have the **frame of mind that he or she may never see the witness again** or be able to contact the witness. Thus, the IO must obtain as much information as possible during the initial interview since it may be the only interview.

4. Rule Four. Witnesses lie. The IO, especially an inexperienced IO must realize that witnesses lie. Civilian witnesses lie. Law enforcement personnel lie. Junior and senior officers and enlisted lie. Race, status, background, grade, and position are all inaccurate predictors of who will lie. Fortunately, in most cases witnesses do not lie, but the IO should be on the alert that some will.

5. Rule Five. **Take any evidence or documents offered by a witness WHEN THEY ARE OFFERED**. Do not wait for another chance to get it: accept it on the spot. Take all of it without sorting through it on the spot; take it all and sort through it later. The IO should not let himself get cut down by Rule Three above, the vanishing witness.

6. Rule Six. Expect the (unpleasant) unexpected. The IO may see the Marine Corps or Navy at its worst. The chaplain who molests children. The Marine lieutenant colonel who walks out of a PX with a computer he did not pay for and then tries to return it later for cash.

7. Rule Seven. Check for past misconduct. Before interviewing a witness, try to determine the witness’s criminal history (prior or pending military or civilian convictions or NJPs or any other type of adverse administrative action). If the IO is investigating criminal conduct by a Marine, chances are that the Marine has committed the same conduct previously but was never caught or was caught but previous commands “let him slide.”

**0204. Military witnesses**

1. Moving or disappearing witnesses. Dealing with military witnesses may not be as easy as it appears. First of all, military witnesses may be here today, gone tomorrow. They move PCS, go TAD, go on leave, or separate from the service.

2. Scattered witnesses. The very day the IO goes to the command, without planning ahead, to interview witnesses, he finds the following: first platoon is at a beach party; second platoon is at the rifle range; and third platoon is somewhere cutting down a forest. **Lesson: call ahead and plan for witness availability.**

3. The “fear factor.” Another problem is fear due to the military command and grade structure. In other words, mere grade alone may intimidate. The IO can never forget that a senior officer appears foreboding to junior officers and enlisted, so a military witness may be afraid to talk due to fear of the grade of the IO or any senior officers involved in the investigation.

a. Retribution may also be a fear. The commander has various powers that can be used positively or negatively, including job assignments, fitness report responsibilities, and the power to give or to recommend awards. Military witnesses know this. Also, some areas of the military are small communities (such as aviation supply) where everyone knows everyone else. If Sergeant Z is working for Major A and provides damaging information about the major, Sergeant Z has no assurance that he will not work for Major A again in the future. In summary, the fear of retribution is a powerful force.

b. One way to encourage a military witness to talk is to appeal to their obligation to the Marine Corps. The obligation is just that: to the Marine Corps, not to an individual. Why should the witness keep silent when their information could lead to the expulsion or disciplining of a bad officer or senior enlisted Marine? In other words, the Marine can prevent other Marines from suffering what he and his comrades have had to suffer. Another factor to mention is that the Marine has certain protections, such as request mast or whistleblower laws and regulations.

4. Tactical considerations.

a. Visiting commands. Generally speaking, if a large number of witnesses are in one command, call the command in advance and arrange a time for the IO to visit to meet with witnesses. This simple protocol will ensure that the commander will welcome, not reprimand, the IO. A commander does not want an IO arriving unannounced snooping around the command.

b. Whom to interview first. The IO is assigned to investigate a work section where the commander is a tyrant, abusing his subordinates. Does the IO talk first to the commander or the witnesses? Generally, the IO should talk with the witnesses first so that the IO has a base of knowledge so that he/she can ask intelligent questions of the commander and also detect when the commander is lying.

c. Do not limit questioning to local witnesses. Same case: commander abusing subordinates. Those working for the commander now, when the investigation is ongoing, may be afraid to talk. Other witnesses, however, who formerly worked in the section and who are now retired, out of service, or PCS’d elsewhere may be willing to talk now that they are “out of harm’s way.”

**0205. Civilian witnesses**. Civilian witnesses may not want to cooperate, and they may move or disappear as rapidly or more rapidly than military witnesses. Also, they may not understand the military or may hate it. And, unlike military witnesses, they have no duty for respect or obedience to military authority, so they may be abusive and nasty. In short, they may just want the IO to “go away” and may express that sentiment in less than nice language. However, some civilian witnesses, particularly a clerk or business person, may go out of their way to help. As with military witnesses, determine availability.

**0206. Dealing with witnesses; psychological considerations.**

1. In dealing with witnesses, especially during a “cold call” over the phone, the IO has to establish a personal rapport with the witness. The IO also has to be honest and keep an open mind when interviewing, even the accused. With an accused, the presumption may be “guilt” but the reality may be otherwise: the accused did nothing wrong. Other important keys are developing trust; knowing the subject matter; and being willing to ask the hard questions.

2. One difficulty is “asking tough, embarrassing questions.” While investigating an adultery case, the IO may find himself/herself on the phone asking women about having sex with a Marine. The IO has to determine which approach works best after establishing rapport: point blank, direct questions or more diplomatic questions. Assuming that most adults act as such, the direct approach may be the best.

3. Another fact is obtaining first-hand information and perspectives. The IO has to differentiate between what the witness actually saw or heard vs. what the witness THOUGHT they saw or heard vs. what some third party told him they saw or heard.

4. Another difficulty is where to start with military or civilians witnesses: interview the lowest level personnel first or the highest level? Often, the private or the lowest level worker will have the most information. If starting at entry-level positions, remember this: NEVER TAKE A LOW LEVEL “NO” ESPECIALLY FROM A BUREAUCRAT BLOCKING THE IO FROM WITNESSES OR INFORMATION HE WANTS OR NEEDS. Appeal a “no” to the next level superior. Also, regardless of what level in the hierarchy the IO is dealing with, FIND THE RIGHT PERSON, THE PERSON WHO KNOWS WHAT HE OR SHE IS TALKING ABOUT AND CAN GET THE IO WHAT IS NEEDED. Someone like this always exists in every organization-the person who can and will say “Yes.” The problem is finding that person.

5. Other considerations include the obvious: listen to the witness, even if listening means listening for one or two hours on the phone to a lot of rambling.

6. In assessing credibility and motive, consider both the tone and content of what any witness, particularly the complaining witness, writes or says. Examine the witness’s role in the conduct. Was the witness an unwilling participant, such as the victim of a crime, or a willing co-actor, such as a willing participant in adultery? Also when assessing credibility, consider the following:

a. Has the witness given information that is independently verifiable? If the husband says his wife’s boyfriend’s number is (111)111-1111 and that is in fact his number, then the husband looks credible.

b. Likewise, has the witness done what he or she said he or she would do? If the wife promises to bring the IO phone records at 1400 on Wednesday, does she do so or not?

7. Discussing remedies, such as the spectrum from no action to the most severe (GCM) is appropriate in general terms, but never promise a witness that the command will choose a specific remedy. The problem is two-fold.

a. One danger is the witness twisting what the IO says:

What the IO says: “The case may go to a general court-martial.”

What the witness hears: “The case will go to a general court-martial.”

b. The second danger is choice of forum. Even a simple “His case may” be referred to a court-martial can cause grief. When the case goes to NJP instead of a court, the witness will tell the IO, “you promised he was going to court-martial.”

With the preceding warning in mind, the IO should keep the witness apprised of the progress on the investigation. Preemptive strikes by the IO by phone or email (brief summaries of what is happening) may keep witness inquiries to a minimum. Updates cut off any attack and allegation by the witness that he or she was not kept informed. Email is a good form of communication because it provides a clear record of what was asked and answered.

8. Finally, a strong psychological factor: beware the witness who will not let the case “go” who stridently whines no matter what the subject or occasion, who is overly vindictive, and who will never be satisfied even if the Marine Corps sends the subject of investigation to the guillotine. In the end, the IO and command may just have to sever contact with the witness since the danger exists that the witness will turn against the IO.

**0207. Obtaining statements from witnesses**

1. Questioning and writing the statement. You may obtain information by personal interview, correspondence, or telephone inquiry. If a witness is unable to review and/or sign a statement, you may simply make a summary of the conversation and certify it to be accurate. ***JAGMAN 0207c***

a. Initially, the most efficient way to take a statement is to develop a questionnaire that can be used for each witness. At the top is identifying information such as name, grade, command, billet, etc. Following those items are questions about the subject of the investigation. The interviewer then takes notes on the form while asking the witness questions. This procedure ensures that the interviewer asks everyone the same or nearly the same questions.

b. From the notes the interviewer can type a statement with an opening paragraph reciting the witness is adopting this statement based on notes taken by the IO and that the IO typed the statement and provided it to the witness for inspection and correction. After the witness approves the content, he/she signs the statement under oath administered by the IO. Article 136(b), UCMJ grants an officer appointed to conduct an investigation the authority to administer oaths.

c. In this guidebook, see **Figure 4-c** for a Witness Statement without Article 31(b) warnings, **Figure 4-d** for a Suspect Statement with Article 31(b) warnings, **Figure 4-e** for an Injured Marine Statement with injury warning and Article 31(b) warnings if needed.

d. WRITE THE STATEMENT FOR THE WITNESS. The reason for this rule is simple. If the IO lets the typical junior Marine write a statement, the results will be this:

[Undated]

I LCpl Johnny B. Canofbeans was DNCO the night that Sgt Wilkins fell off the roof. I made the entry in my logbook. I then made my rounds. Cpl Jenkins relieved me at 0800.

//s// LCpl Canofbeans, J.B.

While this statement should be included in the investigation, along with it should be one prepared by the IO that answers questions such as:

-When did you first find out about Sgt Wilkins falling off the roof?

-Did you see him fall or know anyone who did?

-Did you call medical or a corpsman?

-What time did he fall?

-Did you tell any officer or SNCO about the incident?

e. Obtaining sworn statements is best but generally not required. The act of being sworn may impress upon the witness the seriousness of the matter. ***JAGMAN 0207c(1)(c)*** and ***0209d***

f. If the IO cannot interview the witness in person due to distance, the IO can call the witness and summarize the call; the summary then becomes an enclosure. Or, in these days of email, email may be the best alternative if the witness is at a far distance from the IO. Email is a good form of communication because it provides a clear record of what was asked and answered and can be printed and used as an enclosure. Again, the IO should send the witness specific questions but allow the witness to add any narrative he or she wants.

g. Keeping notes made during questioning of witnesses. A law called the “Jencks Act” (Section 3500, Title 18, U.S.C.) requires the government to produce notes taken by a government agent during witness interviews. Therefore, the IO should retain such notes until advised to the contrary by the command’s SJA.

h. Let the witness tell what happened; don't ask questions that suggest answers. Ask for clarification if the witness is speaking in broad or vague terms (e.g., "He was drunk"; "What gave you that impression?"; "He had an odor of alcohol about

him, his eyes were bloodshot, he was slurring his speech and unable to maintain his balance"). Try to obtain as much information during the interview as possible; the relevance of a particular fact may not become clear until later in the investigation.

**0208. Warnings**

1. First: evaluate the need for warnings. The initial step is to consider the battery of warnings a witness should receive. These warnings apply to all witnesses when they fit the situation of the witness.

a. Injuries or illness. ***JAGMAN 0212c*** requires this warning, which must be given before questioning a member about his or her injuries or illness. (**Figure 4-f**)

b. Criminal conduct. Article 31(b), UCMJ requires certain warnings if the IO suspects possible criminal conduct on the part of the subject. A more complete set of warnings, including the Article 31(b) warnings, is found at Military Rule of Evidence 305. Although MRE 305 is the more accurate name for these warnings, they are still called in practice “Article 31(b) warnings.” See paragraphs 0208.1d, e, and f below. (**Figure 4-g**) ***JAGMAN 0207c(2)***

c. Only do a Privacy Act Warning when asking a person for: (a) SSN; or (b) about personal information as opposed to information about military duties. Giving a Privacy Act warning and then asking for the SSN is needless; if the SSN is needed, **and it is usually not,** it can be obtained from the service record without a Privacy Act warning. (**Figure 4-h**) ***JAGMAN 0207e***

d. When to give warnings and telling the accused what you will be asking. This may be common sense, BUT READ THE WARNINGS TO THE WITNESS BEFORE ASKING THE QUESTIONS. The only exception is if the IO does not initially suspect the witness of a crime but later the witness says something indicating he may have violated the UCMJ. At that point, stop the interview and read the warnings. Also, ALWAYS USE WRITTEN WARNINGS-NOT ORAL WARNING—REQUIRING THE SUBJECT TO INITIAL CHOICES AND TO SIGN AND DATE THE FORM. Written warnings eliminate any doubt concerning if the warnings were given and what the warnings were.

(1) One tactic the IO may consider is to provide the witness with a list of questions the IO intends to ask concurrent to the provision of the rights form. This may scare the witness, inducing him to remain silent or to request a lawyer, or it may encourage him to talk since he knows the details to be covered in the interview (after all, Article 31(b) only requires the interviewer to inform the suspect of the misconduct of which he is suspected). In other words, the warnings do not give the suspect a complete factual basis for the questioning. If he sees the questions and refuses to answer them, then the IO knows he may be on target since people generally talk if they have nothing to hide.

(2) Empathy is important here on the IO’s part with Article 31(b) warnings: imagine what the witness feels upon receiving Article 31(b) rights. Some may be calm; some may feel insulted and fly into a rage, especially officers. The dilemma is this: if the IO gives the rights, the witness may feel a chilling effect and not talk, thus depriving the IO of the information the witness may have; if the IO does not give the rights, he may receive the information but, if the witness incriminates himself in the process, the statement will likely be inadmissible at a court-martial. The better policy is to administer the warning with accurate but minimal explanation: “The law requires that you receive this warning since I suspect you of an offense. But just because I suspect you of an offense does not mean that you committed it.”

e. Article 31(b) is not for everyone. We have have seen cases where every witness, from the most innocent Marine to the biggest criminal on base, received Article 31(b) warnings. THEY ARE ONLY REQUIRED WHEN THE IO SUSPECTS THE WITNESS OF A CRIME.

f. Previous Article 31(b) warnings. An overlooked danger here is whether the subject has been warned previously and if so, whether the previous warning was correct. The IO can find this out by asking the witness if he has previously made a statement. For example, before the command investigation begins an investigation required by the Supply Manual has been conducted. The officer conducting that investigation may have issued Article 31(b) warnings to Major A, who either asked for a lawyer or invoked his right to remain silent; also, the warnings may have been deficient. If the IO later conducting the command investigation does not know about the previous warnings and response, he may be jeopardizing the case by questioning Major A with or without warnings. The proper response is to halt the interview of Major A and seek the advice of a judge advocate.

g. Write the statement for the warned witness. Once over the warnings hurdle, the mechanics of taking the statement are the same as for other witnesses although the beginning paragraph should recite the general nature of any warnings given and refer to the warning form. Before having the witness review and sign the statement, however, offer the witness the opportunity to read the warnings again.

**0209. Using surveys.** One last method for obtaining information from witnesses is using a survey prepared by the IO. For example, if a complaint alleges racial discrimination, give each member a survey with questions asking about discrimination in general and in particular. If investigating a dental clinic, the IO may want to ask these questions:

a. Have you ever been treated at the XYZ dental clinic on Base? YES / NO

b. Have you ever been treated at any other dental clinic on base? YES / NO

c. Have you ever intentionally avoided treatment at any dental clinic on base? If yes, why?

d. Do you know anyone who has ever intentionally avoided treatment at any dental clinic on base? If yes, why?

e. Any other comments about dental care on base?

NOTE: BE CAREFUL DISTRIBUTING SURVEYS THAT ASK COMMAND MEMBERS TO EVALUATE SPECIFIC INDIVIDUALS. For example, surveys that include questions such as “Has your commanding officer ever mistreated you?” Most individuals who are subjects of such surveys will find such surveys distasteful and upsetting; they feel slighted that a junior is “evaluating” a senior.

The IO must decide if the surveys will be anonymous or signed.

**0210. Privileges**

1. The IO should be aware the military, state, or federal law or regulations may grant a privilege of confidentiality that prevents the witness from disclosing information to the IO. The classic case is the aviation mishap board, where statements made by aircrew cannot be used against them or be revealed to the IO. Other privileges are in the Military Rules of Evidence (MRE), as found in the Manual for Courts-Martial:

MRE 501: General

MRE 502: Lawyer-Client

MRE 503: Clergy

MRE 504: Husband-Wife

MRE 505: Classified Information

MRE 506: Unclassified Government Information

MRE 507: Identity of Informant

MRE 512: Psychotherapist-Patient

Also see MREs 508-511.

2. Three things should be noted here.

a. One, read the privilege carefully-do not just assume it applies because the investigation involves, for example, a husband and wife.

b. Two, look for exceptions in the MRE to the privilege that permit or require information to be revealed.

c. Three, ask the person being investigated to authorize (in writing) the release of the information. One caution: if the IO is a lawyer, the IO must make the request through the subject’s lawyer rather than asking the subject himself.

**0211. Photographs**

1. General rule. A picture may not only be worth a thousand words; it may be worth NJP. So, treat photos like statement: they should be identified as to source and content. They should be dated. In these days of computer imagery, they should be examined for computer alteration or fabrication. ***JAGMAN 0207b*** and ***0210e(3)***

a. In an adultery case, ask the complaining witness if he or she has photographs of the adulterers at play or “in action.” In one case, a Marine major was suspected of an affair with a civilian. The IO found photographs of the couple on the beach having a great time. Ultimately, the trip from the beach to commanding general’s NJP was a quick one.

b. In another adultery case, the adulteress seemed indifferent at being caught by her husband as she drove her boyfriend’s truck. The boyfriend, who was caught by the husband in the bathroom of the couple’s house early in the morning, is now what is called a “former Marine officer” with an under other than honorable characterization of service.

2. Injured or dead. A photo may be worth a thousand words, but for the IO it may be worth a thousand reprimands if not handled correctly. The average photo is no problem, but gruesome photos of injured and dead people can be a big problem. Such photos require special packaging, labeled to warn the viewer about the graphic nature of the photos inside. ***JAGMAN 0207b(4)(c)***.

**Part II: Documents**

**0212. Obtaining documentary evidence**

1. GET THE PHOTOS OF THE OFFICER AND THE ADULTRESS TAKEN BY THE OFFICER’S WIFE HIDDEN IN A CAR. GET THE INVENTORY SHEETS SHOWING THE SERGEANT WAS STEALING. GET THE INCRIMINATING LOVE NOTES AND PHONE RECORDS BETWEEN THE FEMALE SERGEANT AND MALE WARRANT OFFICER WHO ARE FLIRTING IN THE ADMIN OFFICE.

2. What to obtain? The amount and types of documents are limitless, but at a minimum the IO should obtain these military records: SRB/OQR; the OMPF of the subject of investigation; the BIR/BTR; and log books. Favorite civilian records are phone records (cell or hard line) and receipts (motel, restaurant, etc.)

3. What to read, READ THE ENTIRE RECORD OR DOCUMENT. Adverse information may be hidden or placed anywhere. For example, a staff sergeant requests assistance with BCNR. There did not appear to be any problem in the commendatory/derogatory sections of the OMPF, where one would expect to find problems. However, the problem was in the administrative section, where HQMC had microfiched a letter from a CO relieving the Marine from duty because of a positive cocaine urinalysis that did not, for whatever reason, result in disciplinary action or fitness report comment.

**0213. What documents do for the IO?** Documents explain events and procedures. More importantly, they can directly or indirectly exonerate or condemn the subject of the investigation. ***JAGMAN 0207***. Samples of documents obtained or missed that, at a minimum, made or would have made life more difficult for Marines and Navy personnel:

1. Phone records. Next to incriminating photographs, phone records are truly efficient, nearly foolproof way of “reaching out and touching someone.” They show calls exist, between an officer and the wife of an enlisted Marine. And they are almost as good as a homing device for fixing location.

a. For example, an officer stationed in San Diego convinces his command that he did not have an affair with a civilian’s wife in Las Vegas. The command believed him, but when the allegation resurfaces, the command sees the light, and orders an investigation. The IO gets the phone bills from the civilian’s husband, showing numerous calls from his home to a number in San Diego, calls the husband did not make. The dates and times of the calls can fix the recipient’s location in San Diego because the IO has already confirmed the officer’s duty station is San Diego by looking at the chronological list of duty stations in 3270, which revealed the duty station as a Marine recruiting office in San Diego. So the IO suspects calls by the woman to the recruiting office or to the officer’s home.

b. But, one problem with the phone calls is there “one-sided” nature. Unless witnesses from both sides of an adultery case provide records, the IO only gets “one-side” (from the cooperating witness or the participant’s spouse) since he lacks subpoena power. So, the IO cannot determine if the officer is calling the woman at home since, generally, phone bills only show calls that are outgoing, not incoming. Business phone records, however, may show both incoming and outgoing calls, especially to 800 numbers. So, if the Marine makes all his calls to his girlfriend from his home, he may refuse to provide the IO his phone bills, thus leaving the IO with no proof that the Marine made the calls.

c. All the IO has is a large number of calls from the women’s house to a number in San Diego. So, the IO easily finds the phone number of the recruiting office in San Diego to determine from her home records if she is calling him there. If she is not calling him at the office, the IO then tries to find the officer’s home number. If he is married, the number may be on his Record of Emergency data form (assuming his girlfriend calls him when his wife is not home).

d. Ensure that both home phone and cell phone records are obtained.

2. Include the phone records themselves as an enclosure, highlighting the incriminating calls. If the number of calls is large, prepare a summary giving the date, time, locations of outgoing call, number called, and whose number it was.

3. Records indicating when motel rooms have been entered. Now that most hotels use cards, not keys, to enter rooms, the card or the lock in the door may reveal when the door was opened. In one case, proving entry into the room was critical, for a female Marine alleged that a male Marine obtained an extra key to enter her room. The problem was that by the time I received the case the memory in the card or door was erased (automatically every 30 days).

4. Fitness reports purportedly showing the outstanding service of a Navy chief. The suspicion was that the chief had written his own reports and forged reporting senior signatures. The proof was in the small print: in tiny print at the bottom of the form was the date and number of the form. A yeoman proved the date and number of the form were obsolete, meaning the chief fabricated a form covering current service with an obsolete form. He was careless in selecting the form.

5. The “cancel the reservation and use lost receipts” trick. Marines going from New Orleans to Dallas on TAD have the unit make reservations for a hotel. Unknown to the administrative section, the Marines call the hotel and cancel the reservations to avoid a one-night charge on their credit cards. The Marines then stay with family or friends to avoid paying for the hotel but, claiming lost receipts, submit a travel claim with the hotel room listed as an expense. The scheme unraveled when a very nice woman at the hotel who explained that her records showed the reservations made were canceled (the unit had no reason to cancel them) and the absence of records showing the Marines stayed at the hotel.

6. Photographs taken by a suspicious Marine husband who followed his wife around. The photographs showed the woman, the wife of an enlisted Marine, gleefully driving the truck of a Marine Officer.

7. Was I urinating or on TAD that day? Things looked good for the defense of a Norfolk Marine accused of filing a false claim for TAD to North Carolina until someone suggested looking at the urine collection log, which indicated he submitted a urine sample at the Norfolk unit that day, ruling out a TAD trip to North Carolina.

8. Fly the friendly skies: accurately. Are all the numbers representing flight hours in the two pilots’ log books accurate? No. Big indicator of fabrication are: (1) white out; and (2) pages cut or pasted in the book.

**0214. Documents may stand alone**, i.e., explain themselves without any outside references needed. But, some documents may be so complicated that a witness must be present to explain them. Thus, the IO may need to obtain a witness statement discussing how the document was obtained and what it means. In particular, obtain a translation of a document that is not in English.

**0215. Dangers.** Documents may be, at best, inaccurate and, at worst intentionally fabricated or modified. Always confirm independently the contents of a document if possible.

**Part III: Physical Evidence**

**0216. “Dodging rabbits”:** The importance of physical evidence. Nothing - not documents or witnesses - cut a liar off at the pass faster than physical evidence. ***JAGMAN 0207b(2)***

1. For example, some intrepid USMCR aviators were in a van at 29 Palms driving from the airfield to the PX. As a joke, someone kept pulling the emergency brake until finally it unexpectedly stuck, causing an accident and ejecting some of the pilots from the vehicle. Rather than tell the truth and end the matter relatively painlessly, they lied, stating that the driver hit the brakes to avoid a rabbit. The story fell apart due to some reason, and the results were NJPs and BOIs.

2. What was important for the IO was that one of the enlisted reservists at 29 Palms was, of all things, an accident reconstruction expert in civilian life. He could show details about seat belts (indicating whether they were used or not used) and show hair and blood at the junction of windows and body, indicating where heads scraped, leaving blood and hair as the pilots were ejected from the van. He could also deduce activity from the skid marks on the pavement.

**0217. Even more important than documents, find a witness who can explain the physical evidence**. For example, if the evidence is a firearm, have an armorer discuss each operating mechanism and safety feature.

**0218. Arrange trips to the site of the activity being investigated and arrange demonstrations or reenactments**. Visit the site of the accident or mishap. If a Marine died while firing a mortar, have a corporal explain the use of a mortar, demonstrate how it works, and what its safety procedures are (do not use live ammo here). Also ask his opinion concerning how the accident may have happened. Marines feel pride and importance when an IO asks for their help in determining the cause of a problem. One IO once did a ground taxi at night wearing NVGs to determine how a pilot taking a shortcut in the cockpit caused a mishap killing three Marines. In other words, without causing an injury or fatality that will mean yet another investigation, try to reconstruct or reenact the events leading to the subject of the investigation.

**0219. Handling physical evidence.** Maintain a paper chain of custody and keep the evidence in a locked container. If it cannot be released, such as the remains of a vehicle, the IO should either himself or have a military photographer video or photograph it.

**0220. Attaching Audio/Video recordings as an enclosure.**

1. Audio recordings. A verbatim transcript will accompany the audio recording. IOs will reference time stamps when using an audio recording to support a finding of fact.

2. Video recording. A written description of the video will accompany the video recording. The description will detail the contents of the video and will include: the hour and date video was taken; full name, rank of videographer; full name and addresses of persons present when recorded; type of camera; distance from object. IOs will reference time stamps when using a video recording to support a finding of fact. ***JAGMAN 0207b(4)*** and ***0210e(3)***

**Chapter III. Writing the Report**

**0301. The Report**

1. What type of format? The goal of the report is a coherent, logical version of events, in context, of value to the command in learning what happened and of use to the commander in making decisions. ***JAGMAN 0208***

a. Usually, this means a narrative format, but yet another irritant in the investigation process is having CMC IG dictate the type of investigation format. If the CMC IG is not involved, say a prayer of thanks and review the appointing order carefully for guidance on the Commander’s intent of investigation (the appointing order probably will probably not address format). If, however, CMC IG sends the command the case, read the cover letter carefully because it will most likely require the final product be in the awkward “Hotline Completion Report” format. In one case, the case came from CMC but the Chief of Staff directed a command investigation, which is what the IO wanted since it was more “user friendly” and the IO had more leeway with format and content. After completing the command investigation, the IO can convert the findings into the Hotline Completion Report. (**Figure 2-b**)

b. Contents of command investigation. I recommend that the report comprise the following:

Enclosure (1) [list of enclosures]

Executive summary

Preliminary Statement

Findings of Fact (FF)

Opinions (OP)

Recommendations (R)

Concluding Observations (if any; optional)

c. Safety: Outwitting the word processor. Anyone who likes to work on a project for a day and then have the day’s work vanish on the computer, please step forward. One IO tried to copy a major investigation to a CD as a backup, but of all things, the very event the IO was trying to prevent happened: in the process, the IO lost both the hard drive original and CD copy. I suggest at least two copies outside the computer on separate CDs or separate storage devices.

d. Style. The key is to write the report as if the reader has no background in the subject; this means explaining the basics. An aviator IO may know all about “AMC” and NATOPS limitations on low-altitude maneuvering, but the SJA or the commander reviewing the investigation may not. The family and media, who later receive copies of the investigation, may not know the terms either.

(1) The style should be professional. Don’t turn an otherwise good report into a novel, expressing sentiments that probably should not be expressed. But, if the investigation is such that it is emotionally laden or proves something extraordinarily out of bounds, the IO should express that factor, for the convening authority ought to know it. These remarks should be saved for the “Concluding observations.” For example, the IO may write: “As a Marine Corps Officer, I have never encountered such egregious conduct as that committed. Steps should be taken to ensure that this Marine can never do this again.”

(2) Another important idea is to write in clear English. This means short, declarative sentences with simple words. Define medical, technical, and legal terms. This is especially important for aviation mishap investigations. Again, the ultimate audience may be family and media.

e. The IO should account for any disciplinary or adverse administrative actions already held. For example, for an aviation mishap case, the IO should note whether or not a FFBP (Field Flight Performance Board) has been held.

f. Write with the audience in mind. That audience will include reviewing officers, who may be flag or general officers; the media; and most importantly, the family. The media and family-especially the family-will read every word and examine every detail, finding of fact, opinion, and recommendation. Any discrepancy may be seen as incompetence or cover up.

g. Presentation. The IO must decide whether to use the two-hole punch format (two holes at top of page) or three hole notebook. The two hole punch format is more difficult to read if the investigation has numerous pages since the pages have to be bent backward as they are read.

h. Content. The goal of the report, in particular the findings of fact, is to give the reader a complete, basic picture of events in which all parties and locations are identified.

i. For the IO, putting it all together can be an overwhelming, daunting task, a lot of difficult work with many moving parts. In this regard, Zen has a saying: you cannot get out of a trap unless you first get into it. Translation: the IO cannot avoid getting into the trap of doing the hard work of analyzing and assembling all the data in an organized, coherent format and then writing the report. The IO has to do the hard work by getting into the trap of examining the facts and reaching conclusions. As a general rule, the correct explanation is the simplest, most logical explanation, although Marines will do crazy things that defy logic.

j. The IO may not be able to answer every question raised by the investigation. If that is the case, the IO should say so in the report.

k. The report should be written in **Courier New font, 12 pitch**.

**0302. Enclosures**

1. Location. Rather than distract the reader and clutter the first and second pages with a list of enclosures, make enclosure (1) a separate page that is a list of enclosures and list the enclosures there. Another advantage of this method is that enclosure (1) can be removed and used like an index as a handy reference in finding other enclosures. Also, the enclosures can be organized by topic. For example:

Cover page: Encl: (1) List of enclosures

LIST of ENCLOSURES

Encl (1) Appointing Order

Part I: Status of Aircraft before Mishap

Encl (2) List of Discrepancies

Encl (3) Checklists

Part II: Status of Aircrew after Mishap

Encl (4) Report of emergency personnel

Encl (5) Casualty Report

Enclosure (1)

2. Managing enclosures. Enclosures should be in the order they are referenced within the investigation. Additionally, a good IO practices “enclosure management.” This means:

a. Enclosures are clear, complete copies;

b. The first page of each enclosure is marked clearly “ENCLOSURE ().” Mark only the first page with “ENCLOSURE()”. ALWAYS USE A STAMP OR PERMANENT LABEL; DO NOT USE “STICKY LABELS” THAT STICK OUT, ESPECIALLY IF THE ENCLOSURE IS OTHERWISE UNMARKED. They may seem helpful in finding enclosures but in fact they tear off, thus leaving the enclosure unmarked.

c. Each page of enclosure should be numbered in the lower right hand corner of each page and reflect the page number and number of pages in the enclosure (i.e., 1 of 3, 2 of 3, 3 or 3).

d. In a long enclosure or one that is hard to read, consider highlighting important parts with a highlighter. Or when referencing an enclosure in a finding of fact, you can state page 10 of enclosure (3).

3. When to mark enclosures. Mark the enclosure numbers with pencil initially since numbers inevitably changes as the report is written. Do not mark them with ink until after the report is completed. Premature marking may mean that numbers of other enclosures may have to be changed on the enclosures themselves as well as in the text. Re-marking enclosures is a time-consuming, irritating process.

4. Types of enclosures. Use summaries and charts, especially if the subject matter of the investigation is complex (such as an aviation mishap). Print them on colored paper for effect and ease of finding them.

5. Advanced enclosure management. The officer who wants to stand out among hundreds of other IOs will get a set of tab page dividers. These tabs will separate enclosures and make enclosure location extremely easy for the reader.

**0303. Executive Summary.** If the report is long, place a summary at the first paragraph, summarizing facts, opinions and recommendations.

**0304. Preliminary statement.** This is the place to accomplish several things:

1. Identify problems encountered.

a. Reason for extension;

b. State any delays or difficulties encountered, including non-availability of evidence or failure to interview relevant witnesses; and

c. Explain conflicts in evidence, which evidence is considered more reliable and why

2. State the degree of cooperation encountered.

3. Note that the IO did or did not know the subject of the investigation or any witnesses.

4. Note the IO’s qualifications and experience. If the investigation concerns dental malpractice, the reader should know whether or not the IO is a dentist.

**0305. Findings of Fact (FF)**

1. Purpose of FF. One or more identified enclosures must support each FF. If the IO operates a machine or performs a process during the investigation to learn how it works, the IO can cite personal observation: Example: xx. The M-16 magazine in Private Smith’s rifle held 30 rounds. Encls (10),(13),(21) and IO personal observation of loading 30 rounds into a magazine

2. FF vs. Opinion. A very important point: ensure that FF are facts, not opinions. For example, “The pilot had 23 seconds to eject” is an opinion. The correct FF is “The NATOPS manual states that the pilot had 23 seconds to eject.” The logical opinion is, “The pilot has 23 seconds to eject.”

3. Write clearly. Again, state the facts in plain English. The more the report is written in “lawyer speak,” the worse it reads. If you are writing like a lawyer: STOP IT. If you are writing like someone at the DoD level, especially a technocrat: STOP IT. The reader must understand your report without undue references to dictionaries or asking other people for translations. The report should stand on its own. Notwithstanding instructions or warnings to the contrary, no rule requires each FF to start with “That.” Repeated use of “That” makes for stilted, legalistic, annoying reading; the FF read like an indictment, not a list of FF. The first time an abbreviation is used, explain what it stands for before using it: “The accused’s case was referred to a general court-martial (GCM).”

4. Include maps, diagrams, charts, and photos. Include these as enclosures. Use wire diagrams to show command relationships. Establishing everyone’s place in the investigation is crucial. If a diagram or map is used, ensure that relevant sites are identified and that north is indicated.

5. When referencing a person for the first time within the investigation, introduce them to the reader. Provide the complete name (First, Middle Initial, Last), billet (student, Class #), Unit, contact information.

**0306. Opinions (OP)**

1. Purpose of OP. The OP is a conclusion based on a FF. One or more FF must support each OP. Example: “The Marine would not have fallen if the guide rope were properly secured. FF 10, 13, and 21”

2. Context. If placed in context, opinions can be important in detecting good or bad trends. For example, the IO may express an opinion that Unit A does not place as much emphasis on safety as Unit B. Opinions can tell whether activity or process is within or without what is usually expected; whether standards are being met; and whether what happened was anticipated or a surprise.

3. Required opinion. See ***JAGMAN 0212b***, concerning line of duty and misconduct. In the past, no line of duty or misconduct finding was made in death cases. The law changed dramatically, however, and such a requirement now exists. In short, the Marine’s family receives money in the form of a “Survivor Benefit Plan” if he dies short of retirement and his death was in the line of duty. He is presumed to have died in the line of duty unless certain exceptions apply. The IO may experience pressure to find the Marine in the line of duty so that the family does not lose the money that would be lost if the Marine is found not in the line of duty. The IO, however, should “call it as he sees it” and make an objective finding about line of duty without regard to the monetary payment to the family.

**0307. Recommendations**

1. Clear recommendations for everyone involved. The IO should have some idea of the possible disciplinary actions he or she can recommend. Those options follow below in paragraph 0307.5. They are divided into adverse administrative actions, which are not punishment, and punitive actions, which are punishment.

2. Spectrum of recommendations.

a. The average recommendation commonly overlooks the entire spectrum of adverse actions, both punitive and nonpunitive, that might be visited upon those the IO found guilty of misconduct. For example, the recommendation usually is, “Captain Ellis should face no disciplinary action.” The problem here is that the IO had not defined “disciplinary action.” Simply saying “no disciplinary action” leaves open the questions of options like adverse fitness reports, which are in fact administrative, not disciplinary measures. Does the IO mean punitive action, such as court-martial? A more accurate recommendation is, “Captain Ellis should face no punitive or adverse administrative action.”

b. “Spectrum” also brings up another point. The IO can make specific recommendations covering narrow matters, such as how to punish Sergeant McHenry, but he can also make “global” recommendations, i.e., recommendations concerning overall process and process improvement. Along these lines, the IO can recommend whether corrections can be made “in house” or whether assistance from an outside agency is needed to fix the problem.

3. Statutes of limitation. One factor to consider when recommending NJP or court-martial is the statute of limitations, i.e., the time within which a person must be brought to NJP or to court-martial. Ask for assistance from a lawyer here and read any statute of limitations carefully. For example, under Article 43 of the UCMJ, the limitation on NJP is two years and in most cases the limitation on court-martial is five years. So, if the IO is investigating in 2014 and event that occurred in 2011, NJP cannot be awarded since more than two years have passed between offense and the soonest date the NJP could occur. Additionally, administrative separations may have a time limit for officers (five years).

4. Proof. To state the obvious, no measures should be recommended unless proof is available to support recommendation.

5. Specific recommendations for punitive and nonpunitive actions. The IO can choose from this list. These options are valid for officers as well as enlisted except that an officer cannot be tried at a summary court-martial and an officer cannot be administratively reduced by a competency review board; however, grade can be reduced upon officer retirement or enlisted retirement or transfer to the FMCR.

a. **Option 1: No action or dismiss the case**

b. **Option 2: Nonpunitive Measures**

(1) Administrative withholding of privileges

(2) Extra military instruction

(3) Nonpunitive censure (informal counseling;

nonpunitive letter)

(4) Formal Counseling (recorded in service record)

(5) Adverse matter inserted into OMPF

(6) Fitness Report (adverse or marginal comments)

(7) Administrative separation (discharge, retirement,

transfer to the retired reserve, or transfer to the

FMCR, with reduced grade possible for all but

discharge)

(8) Relief or transfer for cause

(9) Transfer to the IRR

(10) Promotion (withholding or removal) or defrocking

(11) Mental health evaluations (only if legitimate and

not a tool for retribution; consult SJA

(12) Administrative reduction (enlisted only)

(13) Revoking awards

(14) Field Flight Performance Board (aviation)

(15) Revoking security clearance

(16) Professional (lawyer, physician) discipline and

loss or suspension of credentials

(17) Dropping from the rolls (DFR)(officers only, when

confined or absent without authority)

(18) Child Removal Orders and Military Protective Orders

c**.**  **Option 3: Punitive Measures**

(1) Nonjudicial punishment

(2) Judicial punishment (court-martial–SCM, SPCM or GCM)

(3) Vacating suspended nonjudicial or judicial

punishment

(4) Censure (punitive from NJP or a court-martial, or

from SECNAV)

**CHAPTER IV: INVESTIGATING OFFICER FINAL REVIEW**

**0401. Final Check**

1. Before turning the report over to the person who appointed the IO, the IO should make one final check:

a. Format is in accordance with Correspondence Manual

b. All enclosures marked legibly

c. All enclosures are included and in the correct order

d. Each listed enclosure supports at least one FF

e. All pages numbered in an enclosure

f. All FF supported by enclosures

g. All OP supported by FF(s)

h. Recommendations (if needed)

i. IO signed and dated report

**0402. Delivery and forwarding of report**

1. The IO should remember that his or her FF, OP, and recommendations are subject to CA’s modification, additions, or disapproval. This is one reason why the IO cannot release or comment on the report.

2. Ensure the proper addressee is used. Also discuss with the CA any concerns about operational control vs. administrative control. For example, if the Marine subject of investigation is with Marine Unit One for operational control but part of Marine Unit Two for administrative control, ensure all commanders know where the investigation is headed and all of them have either the original or a copy.

**0403. Releasing the report.** The IO does not and cannot release the investigation or any part of an investigation to the family, the family’s lawyer, the media, or to anyone other than OJAG or the next legal of the chain of command. Releasing a copy of the investigation is a matter for the general court-martial convening authority (GCMCA). ***JAGMAN 0209i and 0225f***.

A corollary of this rule is that the IO does not inform, orally or in writing, the family, lawyers, or the media of any FF, OP, or recommendations. The danger of the recipient of the information misconstruing oral or written explanations – particularly oral – is just too great. Also, the IO may say “X” only to have the convening authority say “Y” setting up a conflict between IO and CA that will upset the family and cause it to doubt the investigation.

**CHAPTER V: REVIEWING THE INVESTIGATION**

**0501. Review and forwarding CI**.

1. Upon completing the investigative report, the IO will submit the report to the CA, who reviews it and takes one of the following actions:

a. Return the report to the IO for further inquiry or corrective action, noting any incomplete, ambiguous, or erroneous action of the IO as noted below;

(1) Format is in accordance with Correspondence Manual.

(2) All enclosures marked legibly.

(3) All enclosures are included and in the correct order.

(4) Each listed enclosure supports at least one FF.

(5) All pages numbered in an enclosure.

(6) All FF supported by enclosures.

(7) All OP supported by FF(s).

(8) Recommendations included.

(9) IO signed and dated report.

(10) Report’s content covers what the appointing order directed the IO to cover.

(11) Report offers logical explanations for the conduct in question.

(12) Report explains all abbreviations or uncommon terms used.

b. Determines that the investigation is of no interest to anyone outside the command and chooses to file the investigation, without further forwarding, as an internal report;

c. Transmits the report by endorsement to the next appropriate superior officer, typically to the GCMCA over the CA. The CA's endorsement will set forth appropriate comments, recording approval or disapproval in whole or in part, of the investigation's proceedings, findings, opinions, and recommendations. In line of duty/misconduct investigations, the CA is required to specifically approve or disapprove the line of duty/misconduct opinion. ***JAGMAN 0209f***

(1) If the CA corrects, adds, or disapproves findings of fact, opinions, or recommendations, the following language would be used in the endorsement as appropriate;

(a) The finds of fact are hereby modified as follows: (modification)

(b) The following additional findings of fact are added: (numbers start after the last findings of fact in the basic investigation).

(c) Opinion \_\_\_ in the basic correspondence is not substantiated by the findings of fact because \_\_\_\_\_\_\_\_\_\_and is therefore disapproved (modified to read as follows: \_\_\_\_\_\_\_\_).

(d) The following additional opinions are added: (numbers start after the last opinions in the basic investigation).

(e) Recommendation \_\_\_\_ is not appropriate for action at this command; however, a copy of this investigation is being furnished to \_\_\_\_\_\_\_\_ for such action as deemed appropriate.

(f) Additional recommendations: (numbers start after the last recommendation in the basic investigation).

(g) The action recommended in recommendation \_\_\_\_ has been accomplished by (has been forwarded to \_\_\_\_\_\_\_\_ for action; etc.).

(2) The CA's endorsement must specifically indicate what corrective action, if any, is warranted and has been or will be taken. Whenever punitive or nonpunitive action is contemplated or taken as the result of the incident under inquiry, such action should be noted in the endorsement. CA's can expect superior commanders to require subsequent reports on how lessons learned have been implemented; if administrative investigations are to be effective tools, "tenacious follow-up action is required."

(3) Punitive letters, or copies of recommended drafts, shall be included as enclosures. Nonpunitive letters are **not** to be mentioned in endorsements or included as enclosures.

2. Routing the CI. Upon completion of the endorsement, the CA forwards the investigative report through the chain-of-command to the GCMCA over the CA.

3. Release of CI's. The GCMCA to whom the CI is ultimately forwarded is the authority who decides whether release under the Freedom of Information Act or Privacy Act will be made. ***JAGMAN 0209i***

**0502. Review and forwarding LitRep**.

1. Upon receiving the LitRep, the CA reviews the documents and takes one of the following actions:

a. Return the investigation to the supervisory judge advocate for further inquiry or corrective action, noting any incomplete, ambiguous, or erroneous action of the IO as noted below;

(1) Format is in accordance with Correspondence Manual.

(2) All enclosures marked legibly.

(3) All enclosures are included and in the correct order.

(4) Each listed enclosure supports at least one FF.

(5) All pages numbered in an enclosure.

(6) All FF supported by enclosures.

(7) IO and Supervisory Judge Advocate signed and dated report.

(8) Report’s content covers what the appointing order directed the IO to cover.

(9) Report offers logical explanations for the conduct in question.

(10) Report explains all abbreviations or uncommon terms used.

b. Endorse and forward the report. Unlike the endorsement of a CI, the CA may only make limited comments in endorsing LitRep. The CA may comment on those aspects of the report which bear on the administration or management of the command, including any corrective action taken. The CA shall **not** normally approve or disapprove the findings of fact. The CA's

endorsement must be marked "FOR OFFICIAL USE ONLY: LITIGATION/ ATTORNEY WORK PRODUCT." ***JAGMAN 0210f***

2. Routing the LitRep. Upon completion of the endorsement, the CA forwards the original investigative report to the Judge Advocate General (Code 15), via the Staff Judge Advocate of the GCMCA in the chain of command. Dissemination of the report **shall not** otherwise be made without first consulting the Staff Judge Advocate.

3. Release of LitRep. For all litigation-report investigations, the Judge Advocate General retains release authority. Convening and reviewing authorities are **not authorized** to release litigation report investigations or their contents. ***JAGMAN 0210h***