

**A PRACTICAL GUIDE TO
CONDUCTING
COMMAND INVESTIGATIONS**

BY

COLONEL CHARLES A. JONES

U. S. MARINE CORPS RESERVE

2003

TABLE OF CONTENTS

INTRODUCTION.....3
CHAPTER I: THE ADMINISTRATIVE “KICK OFF”4
CHAPTER II: GATHERING INFORMATION.....7
CHAPTER III: WRITING THE REPORT21
CHAPTER IV: DISPOSITION OF THE REPORT OF INVESTIGATION.....29
CHAPTER V: REVIEWING AN INVESTIGATION.....31

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

INTRODUCTION

The genesis for this manual is threefold. One is to pass on lessons learned I learned when reviewing investigations. Another is to pass on lessons learned while I conducted investigations. The last is to keep the reader from making the same mistakes I made in reviewing and conducting those very investigations.

I also had this idea after watching the time and effort Colonel Dennis Clancey, USMC (Retired) took at MARFORLANT in briefing anyone assigned to conduct an investigation. He believed, as I do, that such briefings decrease the problems with the investigation, particularly since most people assigned one do not want the assignment.

Which brings us to attitude. The investigating officer (IO) has two options: one is looking upon the assignment as IO as torture, punishment, or burden; the other is looking upon it as a chance to learn and, via findings, opinions, and recommendations, change a large or small 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.

To prevent boredom, several passages include humor, either in the text or in the examples.

This guide is NOT intended as a substitute for reading the JAG Manual or any other authorities, such as the *Manual for Courts-Martial*. The JAG Manual and MCM are compilations of boring rules, while this guide is a practical tool for conducting investigations that includes many practical hints not included in the JAG Manual. The goal is giving the IO ideas and techniques such that when the IO talks to the witness, the witness will say, as one said to me in words to this effect: "I can tell you are giving this your undivided attention."

For the officer who does a good job investigating, the reward can be great. I helped to prove that a reserve major, who was married, was having an affair with a gunnery sergeant's wife while the gunnery sergeant was deployed. The major's lifestyle was, shall we say, compromised when I learned that the major and a woman appearing not to be Mrs. Major went to a Birthday Ball together. Birthday Ball = photographer present = photographs of couples = enclosure (12) = board of inquiry = officer's change in status from USMCR to "former Marine." The gunnery sergeant paid me the highest tribute when he said, "Lieutenant Colonel Jones, I'm glad you're on my side."

I would appreciate any feedback or suggestions.

C. A. JONES
COLONEL, USMCR
OCTOBER, 2003
jonesca@earthlink.net

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

CHAPTER I: THE ADMINISTRATIVE “KICK OFF”

0101: Organization of the JAG Manual for investigations.

a. Text. The JAG Manual is organized into chapters. Chapter II is the chapter on investigations.

b. Appendices. Appendices are lettered and appear at the end of Chapter II. They are marked as “A-2-a” and “A-2-b” for example. This means Appendix a or b for Chapter II (2).

0102: Types of investigations. Three different types of investigations are possible under Chapter II of the JAG Manual.

a. Command investigation.

b. Litigation-report investigation. The key here is that the attorney-client privilege protects the investigation from disclosure. In other words, the IO works under the direct supervision of a judge advocate. The report contains specific language indicating that the attorney-client privilege applies.

c. Courts and boards of inquiry.

Preceding these may be a preliminary inquiry (paragraph 0204 of this guide book), a brief investigation to inform the commander of initial findings. Based on what is found, the commander may close the case or may direct one of the more formal investigations above.

0103: Read the directions. The IO must read these parts of Chapter II of the JAG Manual:

a. Guidance about the particular type of investigation to which the IO has been assigned. See Parts C and D of Chapter II.

b. Specific guidelines for specific cases. See Part G of Chapter II of the JAG Manual for various types of cases; see Part F for death cases. See paragraphs 0126 and 0159 for national security cases.

0104: Time constraints. Inevitably, the appointing order will grant the IO an insufficient time to complete the investigation. The IO should ask for an extension if he needs one. While some general or commanding officers want answers and want them now, I would rather make the ultimate recipient of the investigation angry because the investigation took such a long time but give him a quality product than to give him a product that is shoddy due to insufficient time.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

0105: What is needed to start the investigation?

- a. Written appointing order naming the IO and providing a due date.
- b. Basic information about the complaint or the subject of the investigation.
- c. List of witnesses, if available.
- d. List of physical evidence, if available. A danger arising early on is possible: the complaint or complainant may not bother to write or to tell anyone that the person has 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.
- e. A chronology. The IO should develop a chronology form (Figure 1-1) as soon as the IO receives the case. This is a form on which the IO writes dates of events or contacts with commands or witnesses.

0106: What occurred before the current investigation? The IO needs to know if another type of investigation was done before the current investigation:

--The previous investigation may provide valuable leads.

--The previous one 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 "cleansing warning" telling the subject that previous statements made after defective Article 31 advice cannot be used against the suspect.

--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 (MCO P5800.16) and for trying to cover up any problem involving an officer. If an officer is the subject of the investigation, the IO must be alert to the "_____’s Protection Society"(fill in the grade).

0107: 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. See paragraph 0202 of Part A of Chapter II of the JAG Manual. 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, not submitting the DASH.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

0108: Conduct during the investigation. Do not talk about the investigation in casual conversation. One, something the IO says about witness or subject may get back to the witness or subject and cause problems. Two, 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 Z, the IO may be convinced that Z is guilty of stealing. The danger in telling anyone this conclusion is that on day nine of the investigation the IO may find evidence proving that Z is NOT a thief. If on day seven he said to someone that 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.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

CHAPTER II: 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 a command investigation. Generally, they can be classified into two categories:

One: witnesses who saw the event being investigated.

Two: witnesses who did not see it but who have other information and can assist by other means (hotel clerks, police officers, bureaucrats, etc.).

The key rules to remember are as follows: while cynical, they will cause the IO untold grief and loss of time if he is unaware of them.

0203: Rules in dealing with witnesses.

a. Rule One: A military or civilian witness's priority is 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.

b. 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.

These two rules combine to explain why a witness's promise to appear at 1400 for interviewing may be meaningless: the witness simply decides to go somewhere else at 1400 or simply does not want to talk.

c. Rule Three: The witness disappearing 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 again see a 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. In other words, witnesses disappear.

d. Rule Four: Witnesses lie. The IO, especially a junior or new IO, must realize that witnesses lie. Civilian witnesses lie. Law enforcement personnel lie. Junior

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

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 alert that some will.

e. Rule Five: Take any evidence or documents offered by the 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 or “I’ve changed my mind” witness).

f. 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. The Marine captain with 19 years of service who steals a government modem costing about \$140.00. The captain’s case was the “million dollar modem” case because his dismissal at a general court-martial caused his loss of retirement pay.

g. Rule Seven: The Rule of Ten: checking for past misconduct. Before interviewing a witness, try to determine the witness’s criminal history (prior or pending military or civilian convictions or NJP 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 skate.”

0204: Military witnesses.

a. 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, or separate from the service. As a captain I was stationed at Naval Legal Service Office in Norfolk as a trial counsel. Since the NLSO served the Navy, that meant that many witnesses were on ships. Phone calls to ships produced no answers, for a simple reason: the ship sailed, so no one answered the phone previously connected to the pier. The result: no ship = no witness. Ships sail frequently and for long times, so locating witnesses and determining schedules was the initial step upon receiving the case. Summary: locate military witnesses as soon as possible to determine their immediate future plans.

b. 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.

c. 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

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

witness may be afraid to talk due to fear of the grade of the IO himself or any senior officers involved in the investigation.

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 Smith is working for Major Brown and provides damaging information about the major, Smith has no assurance that he will not work for Brown again in the future. In summary, the fear of retribution is a powerful force.

One way to encourage a military witness to talk is to appeal to his 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 his 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 whistle blower laws and regulations.

d. Tactical considerations.

(1) **Visiting commands.** Generally speaking, if a large number of witnesses are in one command, call a 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. See "Scattered Witnesses" above.

(2) **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 first to the witnesses? Generally, the IO should talk with the witnesses first so that the IO has a base of knowledge so that he can ask intelligent questions of the commander and also detect when the commander is lying.

(3) **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 the service, or PCSed 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 of 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.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

On the other hand, a civilian witness, particularly a clerk or business person, may go out of his or her way to help.

As with military witnesses, determine availability.

0206: Dealing with witnesses; psychological considerations.

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 not do anything wrong. Other important keys are developing trust; knowing the subject matter; and being willing to ask the hard questions.

In that regard, one difficulty is just that: “asking tough, embarrassing questions.” In investigating an adultery case, I found myself on the phone asking women about having sex with a Marine Reserve officer. I talked to the wife and to the officer’s “lover.” Neither conversation was pleasant. 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.

Another factor is ensuring the witness is differentiating between what the witness actually saw or heard vs. what the witness THOUGHT he saw or heard vs. what someone told him a third party saw or heard. The preference is obtaining firsthand information and perspectives.

Another difficulty is where to start with military or civilians: 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.

A leisure situation example will suffice. When living at Pearl Harbor, I wanted to take photographs (as a hobby) around the Shipyard, which is a high security area. I really wanted photos around the buildings, not in the Shipyard proper (the Shipyard proper was “death penalty” off limits). I approached Navy personnel and a civilian lawyer in the JAG office for permission to take photos: all I got was repetition of the official “no photos” policy and hand wringing as if I were a spy or as if no photos had ever been taken of the area (no Russian satellites passing overhead, ever?). So, I went unannounced directly to the director of security. Result: he escorted me around the building and let me

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

take the photographs. The key was that the people I initially approached talked to the director over the phone; I talked to him in person. On the phone, to him I was an abstraction; in person, I was a benign human with a military identification card. **The lesson is this: no substitute exists for making in person contact with the right person.**

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.

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:

--Has the witness given consistent information that is independently verifiable? If the husband says his wife's boyfriend's number is (808) 456-9872 and that is in fact his number, then the husband looks credible.

--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?

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. 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."

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 a court-martial"

With the preceding warnings in mind, the IO should keep the witness apprised of 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 any 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.

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

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

the 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.

a. Questioning and writing the statement. The basic rule is simple: **WRITE THE STATEMENT FOR THE WITNESS.**

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 the questions. This procedure ensures that the interviewer asks everyone the same or nearly the same questions. See Figure 2-1.

From the notes the interviewer types a statement with an opening paragraph reciting that 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 signs the statement under oath administered by the IO. Article 136(b) of the UCMJ grants an officer appointed to conduct an investigation the authority to administer an oath.

In this guidebook, see Figures 2-2 for a statement form without Article 31(b) warnings and Figure 2-3 for a statement form with Article 31(b) warnings. Both figures include two other types of warnings that may be needed (source of injury or disease, and nature of JAG Manual investigation vs. aviation mishap board).

To reiterate: **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 result will be this:

[UNDATED]

I Lcpl Johnny B. Canofbeans was DNCO the night that sgt wilkins fell off of 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 BASIC questions such as:

- When did you first find out about him 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?

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

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

Obtaining sworn statements is best but generally not required. The act of being sworn may impress upon the witness the seriousness of the matter.

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.

b. Keeping notes made during questioning of witnesses. A law called the "Jencks Act" (Section 3500 of Title 18, U.S. Code) 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 commands' SJA.

0208: Warnings.

a. **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.

(1) Injuries or illness. JAG Man paragraph 0221 requires this warning, which must be given before questioning a member about his or her injuries or illness.

(2) 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 0208b, c, and d below.

(3) Aviation mishaps: JAG Man paragraph 0242 requires this warning for a witness who may be interviewed both by the IO and by an aviation mishap board. The warning tells the witness the differences in the two procedures. The JAG Manual, concerned with personnel, property, claims, litigation, and disciplinary issues, offers its witnesses no promise of confidentiality, and what they say can be used for any reason. The mishap board, concerned with accident prevention, needs to know what happened in fact during the mishap, so it encourages full disclosure by witnesses by giving them confidentiality, which encourages honesty.

(4) Privacy Act but only if asking the person for (a) his 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

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

usually not, it can be obtained from the service record without a Privacy Act warning. The IO should not just try to piece a Privacy Act statement together from the various parts in the JAG Manual; the IO should obtain the statement form from the Office of the SJA.

b. When to give warnings and telling the accused what you will be asking.

This may be commonsensical, **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 WARNINGS--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.

One tactic the IO may or may not like is providing the witness, at the same time as the rights form is provided, a list of questions the IO intends to ask. 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 questioner 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.

Empathy is important here on the IO's part with Article 31 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 if the witness faces 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 suspected you of an offense. But just because I suspect you of an offense does not mean that you committed it."

c. Article 31(b) is not for everyone. Lawyers have probably seen cases where every witness, from the most innocent simpleton to the biggest criminal on base, receives Article 31(b) warnings. **THEY ARE ONLY REQUIRED WHEN THE IO SUSPECTS THE WITNESS OF A CRIME.**

d. 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 Smith, who either asked for a lawyer or invoked

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

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 responses, he may be jeopardizing the case by questioning Major Smith with or without warnings. The proper response is to halt the interview of Major Smith and seek the advice of a judge advocate.

e. Write the statement for the warned witness. Once over the warnings hurdle, the mechanics of taking the statement are the same for those for other witnesses although the beginning paragraph should recite the general nature of any warnings given and refer to the warnings 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:

--Have you ever been treated at the XYZ dental clinic on base? YES // NO

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

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

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

--Any other comments about dental care on the base? _____.

BE CAREFUL DISTRIBUTING SURVEYS THAT ASK COMMAND MEMBERS TO EVALUATE SPECIFIC INDIVIDUALS. For examples, surveys that include questions such as "Has the 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. The IO should be aware that 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 revealed to the IO. Other

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

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.

See also MREs 508-512.

Three things should be noted here. One, read the privilege carefully—do not just assume it applies because the investigation involves, for example, a husband and wife. Two, look for exceptions in the MRE to the privilege that permit or require information to be revealed. 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.

a. General rule. A picture may not only be worth a 1,000 words; it may be worth NJP. So, treat photos like statements: 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.

b. Injured and 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. See paragraph 0241 of the JAG Manual.

In going through old files, I first learned of the rule and the reason for it. Marines on a field exercise were warned to avoid a train track, but the axiom "there's always somebody who does not get the word or who does not pay attention to it" was in effect, meaning a Marine got near the tracks. Questions such as "Couldn't he have heard the train?" are irrelevant when the result was a Marine who appeared to have been blown apart by TNT, with equipment and body parts (what was left of them) scattered all around the track. Most of the photos were of his equipment because nothing much was left of him. One of the photos revealed small, strange-looking isolated body part, which I finally determined to be an eye.

c. The "soon to be injured and dead." 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,

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

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.

In one case photos of an adulteress, she seemed indifferent at being caught by her husband as she drive 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 other than honorable characterization of service.

PART II: DOCUMENTS

0212: Obtaining documentary evidence.

a. **The rule.** Only two rules here:

(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) GET THEM NOW!

The reasons for these rules are that documents, like witnesses, can disappear. As explained earlier, take any documents the witness offers on the spot. Records can kill—figuratively. They can bring down the most elaborate lie the accused can tell.

b. **What to obtain?** The amounts and types of documents are limitless, but at a minimum the IO should obtain these military records: the SRB or OQR; the OMPF of the subject of investigation; the BIR (Basic Individual Record); log books; and training records. Favorite civilian records are cell phone or other phone records and motel receipts.

c. **What to read. READ THE ENTIRE RECORD OR DOCUMENT.** Adverse information may be hidden or placed anywhere. For example, a staff sergeant approached me for assistance with BCNR. I saw no problems in his OMPF in the commendatory/derogatory sections, where one would expect to find problems documented. The problem was in the administrative section of the OMPF, where HQMC had microfiched a letter from a CO relieving the Marine from duty because of a positive cocaine analysis that did not, for whatever reason, result in disciplinary action or fitness report comment.

0213: What do documents do for the IO? Documents explain events and procedures. More importantly, they can directly or indirectly exonerate or condemn the subject of the

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

investigation. Samples of documents I obtained or missed that, at a minimum, made or would have made life more difficult for Marines and Navy personnel:

a. **Phone records.** Next to incriminating photographs, phone records are the Eighth Wonder of the World for the IO, a truly efficient, nearly foolproof way of “reaching out and touching someone.” In the first place, they show calls exist, such as between an officer and the wife of an enlisted Marine. In the second place, they are almost as good as a homing device for fixing location.

For example, an officer stationed in San Diego convinces his command that he did not have an affair with a civilian’s wife in Los Vegas. The command believes him, but when the allegations resurface, the command sees the light, and it 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, having read this guidebook, has already confirmed the officer’s duty station is San Diego by looking at the page three (chronological list of duty stations) in his OQR, which reveals 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.

But, one problem with phone calls is their “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.

All the IO has is a large number of calls from the woman’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 via directory assistance or from the recruiting office. 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).

Ensure that both phone and cell phone records are obtained.

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, location of outgoing call, number called, and whose number it was.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

b. 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).

c. 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 to me that the date and number of the form were obsolete, meaning that the chief fabricated a form covering current service with an obsolete form. He was careless in selecting the form.

d. 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 I talked to 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.

e. 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.

f. 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 the Old North State and ruling in a special court-martial.

g. Fly the friendly skies: accurately. Are all the numbers representing flight hours in two pilots' logbooks accurate? No. Big indicators of fabrication are (1) white out and (2) pages cut or pasted in the book.

0214: No document is an island. 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.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

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—cuts a liar off at the pass faster than physical evidence.

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 (one BOI exhibit was a photo showing utensils hanging from the nostrils of one of the pilots at a Birthday Ball).

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 truck. He could also deduce activity from the skid marks on the pavement.

0217: No thing is an island. Even more important than with 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 officer asks for their help in determining the cause of a problem. I 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 trail chain of custody and keep the evidence in a locked container. If it is such that it cannot be released to the IO or is too large for the IO, such as the remains of a vehicle or aircraft mishap, the IO should himself video or photograph the object or have a military photographer video or photograph it.

CHAPTER III: WRITING THE REPORT

0301: The Report.

a. 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.

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 format (the appointing order probably will 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 to be in the awkward "Hotline Completion Report" format. In one case I had, the case came from CMC but the Chief of Staff directed a command investigation, which is what the I wanted since it is more "user friendly" and the IO has more leeway with format and content. After completing the command investigation, the IO can convert the findings into the Hotline Completion Report.

A sample report is at Figure 3-1.

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 product vanish on the computer, please step forward. I tried to copy a major investigation to a CD as a backup, but, of all things, the very event I was trying to prevent happened: in the process, I lost both the hard drive original and CD copies. I suggest at least two copies outside the computer on separate CDs or separate floppy disks.

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 "ACM" and NATOPS limitations on low-altitude maneuvering, but the SJA or the commander reviewing the investigation may not. The family and media, who may later receive copies of the investigation, may not know the terms either.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

The style should be professional. I have to monitor myself to avoid turning an otherwise good report into a primitive 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 for 18 years, having served around the world in numerous billets, I have never encountered such egregious conduct as that committed by Major Smith. The degree to which he abused the members of his command—mentally and physically—should be noted well and steps taken to ensure that he can never do so again.”

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.

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 FFPB (Field Flight Performance Board) has been held.

Finally, write with the audience in mind. That audience will include reviewing officers, who may be flag or general officers; the media; and most important, 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.

e. Presentation. The IO must decide whether to use the two-hole punch format (two-holes at top of pages) or a 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.

f. 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.

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 and 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.

Finally, 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.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

0302: Enclosures.

a. Location. Rather than to 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) See list of enclosures at the end of this report.

Enclosure (1) is then the list of enclosures:

LIST OF ENCLOSURES

Enclosure (2): Appointing order

Part I: Status of Aircraft before Mishap

Enclosure (3): List of discrepancies

Enclosure (4): Checklist

Part II: Status of Aircrew after Mishap

Enclosure (5): Report of emergency personnel

Enclosure (6): Casualty report.

ENCLOSURE (1)

Additionally, I have often printed the enclosure list on colored paper such as yellow so that the reviewer can more easily find it.

b. Managing enclosures. A good IO practices "enclosure management." This means:

(1) Enclosures are clear, complete copies;

(2) The first page of each enclosure is marked clearly "ENCLOSURE ()." To reiterate, since the problem of poorly marked enclosures lives on, enclosures must be marked on the first page with a clear "ENCLOSURE ()" stamps or label so the reader can find them easily. Mark only the first page with "ENCLOSURE ()" because if all pages are marked "ENCLOSURE ()" then the reader does not know where the enclosure begins; the enclosure mark on the first page signals the reader that the first page is the first page of that 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

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

enclosures but in fact they tear off, thus leaving the enclosure unmarked especially if the enclosure lacks a number on the page.

(3) Each page of an enclosure with more than one page is numbered, i.e., 1 of 3, 2 of 3, 3 of 3.

(4) In a long enclosure or one that is hard to read, consider highlighting important parts with a light highlighter.

c. When to mark enclosures. Mark the enclosure numbers with pencil initially since numbers inevitably change 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.

d. 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.

e. Advanced enclosure management. The officer who wants to stand out among the hundreds of other IOs will get from the unit, or fork out his own money and go to Office Max or Office Depot and buy, a set of numbered tabs (generally they go from 1 to 31). These tabs will then separate the enclosures and make enclosure location extremely easy for the reader. The best sets have a tab marked "TABLE OF CONTENTS," so the enclosure line on the first page can read as follows:

Encl: (1) See tab marked TABLE OF CONTENTS

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:

- a. Identify problems encountered.
- b. State the degree of cooperation encountered.
- c. Note that the IO did or did not know the subject of the investigation or any witnesses.
- d. 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).

a. 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: "The M-16 magazine in Private

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

Smith's rifle held 30 rounds." Enclosures 10, 13, and 21; IO's personal observation, loading 30 rounds into the magazine."

b. 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 had 23 seconds to eject."

c. Write clearly. Again, state the facts in plain English. The more the report is written in "lawyerspeak," 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)."

d. Include maps, diagrams, charts, and photos. Include these as exhibits. 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.

e. Required findings of fact. See Part E of Chapter II of the JAG Manual concerning line of duty and misconduct findings. In the past, no line of duty or misconduct finding was made in a death case. The law changed dramatically, however, and such a requirement now exists. See MARADMIN 135/03. 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.

0306: Opinions (OP).

a. 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."

b. 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

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

within or without what is usually expected; whether standards are being met; and whether what happened was anticipated or a surprise.

0307: Recommendations.

a. 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 e. They are divided into adverse administrative actions, which are not punishment, and punitive actions, which are punishment.

The report should state clear recommendations for each person who is the subject of the recommendation:

Sergeant Hankins: General court-martial for arson.

Captain Smith: NJP for dereliction of duty and disorderly conduct. I recommend that he not be processed for administrative discharge after the NJP.

Major Able: No punitive or nonpunitive action.

Lieutenant Colonel Brown: NJP followed by administrative separation processing.

b. Spectrum of recommendations. 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 question of options like adverse fitness reports, which are in fact administrative, not disciplinary, measures. Does the IO mean punitive action, such as NJP or court-martial or nonpunitive action or both? A more accurate recommendation is, "Captain Ellis should face no punitive or adverse administrative action."

"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.

c. 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. So, if the IO is investigating in 2003 an event occurring

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

in 2000, 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, it is five years).

d. Proof. To state the obvious, no measure should be recommended unless proof is available to support its recommendation. As a frustrated vice admiral once said at a press conference when asked why certain measures were not taken: “Proof is a requirement.”

e. 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.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

Option 1: No Action or Dismiss the Case

Option 2: Nonpunitive Measures

Administrative withholding of privileges

Extra military instruction

Nonpunitive censure (informal counseling; nonpunitive letter)

Formal counseling (recorded in record book)

Adverse matter inserted into OMPF

Fitness report (adverse or marginal comments)

Administrative separation (discharge, retirement, transfer to the retired reserve, or transfer to the FMCR, with reduced grade possible for all but discharge)

Relief or transfer for cause

Transfer to the IRR

Promotion (withholding or removal) or defrocking

Mental health evaluations (only if legitimate and not a tool for retribution; consult an attorney before recommending or ordering one)

Administrative reduction for incompetence or misconduct (enlisted only)

Revoking awards

Field Flight Performance Board (aviation matters)

Revoking security clearance

Professional (lawyer, physician) discipline and loss or suspension of credentials

Dropping from the rolls (DFR)(officers only, when confined or absent without authority)

Child Removal Orders and Military Protective Orders

Option 3: Punitive Measures

Nonjudicial punishment (NJP or “office hours”)

Judicial punishment (summary, special, or general court-martial)

Vacating suspended nonjudicial or judicial punishment

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

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

CHAPTER IV: DISPOSITION OF REPORT OF INVESTIGATION

0401: Final check. Before turning the report over to the person who appointed the IO, the IO should make one final check:

- a. All enclosures marked legibly
- b. All enclosures included
- c. All pages numbered in an enclosure
- d. All FF supported by enclosure(s)
- e. All OP supported by FF(s)
- f. Recommendations included
- g. IO signs and dates report

0402: Delivery and forwarding of report.

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

Ensure the proper addressee is used. Also discuss with the appointing officer any concerns about operational control vs. administrative control. For example, if the Marine the subject of the 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. Releasing a copy of the investigation is not a matter for the IO but for the convening authority or higher headquarters, including OJAG, the Office of the Judge Advocate General of the Navy. See paragraphs 0202 and 0220 of the JAG Manual. In other words, because of the danger of releasing all or part of the investigation, for emphasis here is the rule:

**THE IO DOES NOT AND CANNOT RELEASE THE
INVESTIGATION OR ANY PART OF IT TO THE FAMILY, THE
FAMILY'S LAWYERS, THE MEDIA, OR TO ANYONE OTHER
THAN JAG OR THE NEXT LEVEL OF THE CHAIN OF
COMMAND.**

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

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

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.

I learned this lesson, but fortunately not the hard way. When reporting as a new first lieutenant with very little experience to a Marine Amphibious Unit for deployment, I found a letter from an attorney requesting a copy of an investigation into a helicopter crash from the previous deployment. Fortunately, I sensed that I could or should not release the investigation. I checked the JAG Manual and did not release the information.

DRAFT ONLY; NOT FOR RELEASE. OCTOBER 2003

CHAPTER IV: REVIEWING THE INVESTIGATION

0501: Initial check. The reviewing officers should check the “mechanics” of the investigation. Notwithstanding the checklist offered the IO in Chapter III, the reviewer should check the same points:

- a. All enclosures marked legibly
- b. All enclosures included
- c. All page numbers marked in an enclosure
- d. All FF supported by enclosure(s)
- e. All OP supported by FF(s)
- f. Recommendations included
- g. IO signs and dates report
- h. Report’s content covers what the appointing order directed the IO to cover
- i. Report offers logical explanations for the conduct in question
- j. Report explains all abbreviations or uncommon terms used.

QUESTIONNAIRE: MAJOR _____ CASE [DATE: _____]

Name: _____ Grade: _____ // __USMC/ __USMCR

Unit: _____

Phone: _____ Fax: _____

When did you report to the unit? _____ Current billet _____

How long have you known Major _____? What is his billet _____?

How do you know him? _____

General opinion of him? _____

Opinion and knowledge of the allegations that he sold government property to private persons?

Other comments:

FIGURE 2-1

STATEMENT OF CORPORAL JOHN D. SMITH, USMC

Date: _____ 20__

I have been asked by the investigating officer, _____, to provide a statement concerning _____. The basis for this statement is information I provided the investigating officer, who typed the statement for me and gave me the opportunity to make corrections or additions. I understand that this is a sworn statement that I give voluntarily and that the contents of the statement are true to the best of my knowledge and belief.

[Add if necessary:]

[WITNESS INJURED OR HAS A DISEASE: Additionally, I have been warned by a separate form of my rights under paragraph 0221 of the Manual for the Judge Advocate General of the Navy to the effect that I do not have to sign a statement concerning the origin, incidence, or aggravation of any disease or injury that I have suffered.]

WITNESS MAY GIVE A STATEMENT TO AN AVIATION MISHAP BOARD AND TO A JAG MANUAL INVESTIGATING OFFICER: Additionally, since I may give testimony to an aviation mishap board as well as to the JAG Manual investigating officer, I have been warned by the investigating officer that a JAG Manual investigation has a different purpose than the mishap board in that the JAG Manual investigation is concerned with death and property damage while the mishap board is accident prevention; the procedures of both vary; the need to preserve the privileged nature of the mishap board investigation; and statements provided to the mishap board will not be available to the JAG Manual investigating officer from any official source.]

[BEGIN STATEMENT]

SIGNED

DATE

Sworn and subscribed before me _____ 2003. Authority: Section 136(b) of Title 10, U.S. Code.

SIGNED (INVESTIGATING OFFICER)

GRADE

DATE

STATEMENT OF CORPORAL JOHIN D. SMITH, USMC

Date: _____ 20__

I have been asked by the investigating officer, _____, to provide a statement concerning _____. The basis for this statement is information I provided the investigating officer, who typed the statement for me and gave me the opportunity to make corrections or additions. I understand that this is a sworn statement that I give voluntarily and that the contents of the statement are true to the best of my knowledge and belief. Before I talked to the investigating officer, he provided warnings under Article 31(b) of the UCMJ on a separate form. I waived (gave up) those rights and decided to provide the investigating officer the information in this statement with no lawyer present on my behalf. I understand that I still have the protections of the Article 31(b) rights but I again waive them and will sign this statement.

[Add if necessary:]

[WITNESS INJURED OR HAS A DISEASE: Additionally, I have been warned by a separate form of my rights under paragraph 0221 of the Manual for the Judge Advocate General of the Navy to the effect that I do not have to sign a statement concerning the origin, incidence, or aggravation of any disease or injury that I have suffered.]

WITNESS MAY GIVE A STATEMENT TO AN AVIATION MISHAP BOARD AND TO A JAG MANUAL INVESTIGATING OFFICER: Additionally, since I may give testimony to an aviation mishap board as well as to the JAG Manual investigating officer, I have been warned by the investigating officer that a JAG Manual investigation has a different purpose than the mishap board in that the JAG Manual investigation is concerned with death and property damage while the mishap board is accident prevention; the procedures of both vary; the need to preserve the privileged nature of the mishap board investigation; and statements provided to the mishap board will not be available to the JAG Manual investigating officer from any official source.]

[BEGIN STATEMENT]

SIGNED

DATE

Sworn and subscribed before me _____ 2003. Authority: Section 136(b) of Title 10, U.S. Code.

SIGNED (INVESTIGATING OFFICER)

GRADE

DATE

FIGURE 2-3

5800
SJA

From: Colonel C.A. Jones, USMCR
To: Commander, MARFORRES

Subj: COMMAND INVESTIGATION INTO ALLEGATIONS RAISED BY MAJOR A. B.
SMITH AT REQUEST MAST HELD 1 JULY 2003

Ref: See list (yellow pages) at tab marked TABLE OF CONTENTS

Encl: See list (green pages) at tab marked TABLE OF CONTENTS

1. **ORGANIZATION OF REPORT OF INVESTIGATION.**

(a) Paragraph 2 (PAGE 1): Executive Summary

(b) Paragraph 3 (PAGE 2): Organizations of Enclosures

(c) Paragraph 4 (PAGE 4): Preliminary Statement.

(d) Paragraph 5 (PAGE 7): Findings of fact, opinions, and recommendations: the ABC Controversy. (incidents occurring in 2002 and 2003).

(e) Paragraph 6 (PAGE 8): Findings of fact, opinions, and recommendations: the XYZ Controversy (incident occurring in 2003)

(f) Paragraph 7 (PAGE 23): Other observations and recommendations.

2. **EXECUTIVE SUMMARY AND OVERVIEW OF INCIDENTS LEADING TO THIS INVESTIGATION.** [put executive summary here]

a. **The ABC Controversy.** Blah, blah, blah.

b. **The XYZ Controversys.** Blah, blah, blah.

FIGURE 3-1

3. **ORGANIZATION OF ENCLOSURES.** See yellow pages at tab marked TABLE OF CONTENTS. The following are included to assist the reader:

- (a) **List of enclosures (enclosure (1))**
- (b) **Appointing order (enclosure (2))**
- (c) **Diagram of significant events (enclosure (3));**
- (d) **“Dramatis Personae” (list of personnel involved)(enclosure (4));**
- (e) **Command relationships (diagram)(enclosure (5));**
- (f) **Chronology of events (enclosure (6)); and**
- (g) **Summary of previous investigations and actions (enclosure (7)).**
- (h) **List of Punitive and Adverse Administrative Measures (enclosure (8)).**

4. **PRELIMINARY STATEMENT.**

- a. **Background of investigating officer.**
- b. **Methodology.**

(1) **Gathering new information vs. organizing information on hand.** I initially read the preliminary inquiry by Lieutenant Colonel R. B. Cragg, USMC. Using that inquiry as a starting point, I began collecting other information and contacting other witnesses not in the Cragg inquiry.

(2) **Witnesses.**

(a) **General.** I was able to discuss this case in person with the following officers stationed at MARFORRES: Due to the geographical spread of witnesses and their location outside MARFORRES Headquarters in New Orleans, I necessarily conducted many interviews over the phone followed up, in most cases, by sending the witness a “questionnaire” and a draft of a statement and having the witness return the statement to me by telefax. I tried to obtain sworn statements where possible. I cite information from witnesses by referencing my phone conversations with them or by including their written statements as enclosures or both. I have notes of all phone interviews. Since most witness statements cover a variety of topics, I grouped them near the beginning of the investigation as enclosures (9) through (34) rather than trying to include them under a specific topic.

(b) **Errors in enclosures.** In his report of investigation (enclosure (37)), Lt Col Cragg lists as enclosure (11) statements from Sgt Maj Lee dated 3 and 25 June; only a 25

Junc statement is included. Possibly, the reference is to the sergeant major's 3 June e-mail (a copy of which cannot be found).

(3) **Connection with previous investigations.** No other investigations were occurring while I was conducting this investigation.

(4) **Management of enclosures.** Some enclosures to this investigation include letters that themselves have enclosures; in some cases, I note that I have eliminated duplicate enclosures within the letters or have moved the enclosures for organizational purposes. I numbered the pages in some lengthy enclosures that lacked page numbers; this numbers have my initials beside them.

(5) **Privacy Act and Article 31, UCMJ, advice.** Since this investigation involved official duties and no requests for Social Security numbers, I did not obtain Privacy Act statements from witnesses. Paragraph 0216a of the JAG Manual states, "Requests for information about what a Government officer, employee, or member did, observed, or thought while performing official duties does not require a Privacy Act statement." This investigation only concerns official duties. On 26 November, I advised Lt Col M of his "Article 31" rights over the phone using Appendix A-1-m from the JAG Manual.

(6) **Scope of investigation.** The scope of the investigation concerned allegations by Major Smith that Lieutenant Colonel M was derelict in his duty during the ABC controversy in 2002 and 2003 and during the XYZ controversy in 2003.

(8) **Findings of fact.** I number them based on my paragraph numbers. For example, FF 8a(1) refers to paragraph 8a(1) of the investigation.

c. **Current duty stations of major parties involved in these matters.**

- (1) Maj Gen T:
- (2) Col T: MARFORLANT.
- (3) Col B: retired
- (4) Lt Col M: MARFORPAC
- (5) Maj Smith: MARFORRES

5. **FINDINGS OF FACT, OPINIONS, AND RECOMMENDATIONS: THE ABC CONTROVERSY (incidents occurring in 2002 and 2003).** Maj Smith complains that blah blah blah.

a. **Findings of fact--Lieutenant Colonel M:**

- (1) Blah Blah Blah. Enclosure (9).
- (2) Blah Blah Blah. Enclosure (9).

I. 2002 INCIDENT

(3) Blah Blah Blah. Page 7, paragraph II.7 of enclosure (57).

(4) Blah Blah Blah. Page 7, paragraph II.7 of enclosure (57).

II. 2003 INCIDENT

(5) Blah Blah Blah. Page 7, paragraph II.7 of enclosure (57).

(6) Blah Blah Blah. Page 7, paragraph II.7 of enclosure (57).

b. Opinions--Lieutenant Colonel M:

(1) Blah Blah Blah FF 7b; 9a(5)-(12), (29), (30), and (31).

(2) Blah Blah Blah FF 7b; 9a(5)-(12), (29), (30), and (31).

c. Recommendations--Lt Col M:

(1) No further action (punitive or adverse administrative action) should be taken against Lt Col M in this matter.

6. FINDINGS OF FACT, OPINIONS, AND RECOMMENDATIONS: THE XYZ CONTROVERSY (incidents occurring in 2003). Maj Smith complains that blah blah

a. Findings of fact--Lieutenant Colonel M:

(1) Blah Blah Blah. Enclosure (9).

(2) Blah Blah Blah. Enclosure (9).

b. Opinions--Lieutenant Colonel M:

(1) Blah Blah Blah FF 7b; 9a(5)-(12), (29), (30), and (31).

c. Recommendations--Lt Col M:

(1) Lt Col M's case should be referred to nonjudicial punishment.

7. Other observations and recommendations. Any last editorial thoughts by the IO.

C. A. JONES,
COL, USMCR