

Article 32(b) Officer's Guide

1. **Purpose.** This memorandum is intended to serve as initial guidance for those appointed as investigating officers (IO) under article 32(b) of the Uniform Code of Military Justice (UCMJ). It is not intended as a substitute for consulting with DA Pamphlet 27-17, Procedural Guide for Article 32(b) Investigating Officer, 16 Sep 90, Article 32 of UCMJ, Rules for Court-Martial (RCM) 405, or a judge advocate. See Annex 1 and 2.
2. **Function Of The IO.** The two primary functions of the IO is to thoroughly investigate all charges and specifications alleged in the charge sheet(s) and to complete this investigation impartially. The article 32(b) investigation is a judicial proceeding and plays a necessary role in military due process of law. The investigation is subject to subsequent review at trial, if there is a trial, and on appeal. The ultimate outcome of the case may depend upon whether you properly perform your duties in making certain the accused is fully informed of and afforded all applicable rights in connection with the investigation.
3. **Involved Parties.**
 - a. **Counsel For The Accused.** The accused will be represented by a civilian or military defense attorney, or both.
 - b. **Counsel For The Government.** The Government will be represented by a criminal law attorney.
 - c. **IO Legal Advisor.** Your legal advisor will NOT be a criminal law attorney. Since you are an impartial investigator, your legal advisor will be an Administrative Law Attorney who has no direct interest in the outcome of the proceedings.
 - d. **Administrative Support Staff.** The 27Ds (legal assistants) at the Consolidated Legal Center (Cells) will assist you in preparing memorandum and correspondence, arranging for witness appearances, and making logistical arrangements as needed. They will also be the recorder at the 32(b) hearing.
 - e. **Victim/Witness Liaison.** Each victim/witness of an alleged crime is assigned a victim/witness liaison to assist them through the judicial process. Liaisons' duties include coordinating witness interviews with the Government and defense counsel, keeping the alleged victim informed of the status of the case, explaining the sequence of events in a court-martial and acting as a middle-man between the Government, defense counsel, and the judge. Normally, the liaison is a judge advocate. The liaison is not the attorney for the victim/witness, therefore no confidentiality exists between the two.
 - f. **Convening Authority.** The person that appointed you as the 32(b) investigating officer. Usually this is the brigade level commander. Also the person that decides delay requests or any written motion from either the Government or defense. When you receive a motion or request from the Government or defense counsel, you should consult with your legal advisor first, then

brief the convening authority so they can make a decision. Your legal advisor will assist in preparing any memorandum on behalf of the convening authority for matters related to the 32(b) investigation.

g. **Ex Parte Communications.** Prior to the hearing, you must avoid discussing the case with the Government or defense judge advocate and potential witnesses. Such discussions give the appearance of partiality toward either side regardless of the motivations of the IO. Your discussion with both the Government and the defense attorneys should be to take care of administrative business only, such as time and location of the hearing. Always courtesy copy (cc) both the Government and defense attorney when responding to email or correspondence of either party.

4. **Initiation Of The Investigation.** The investigation will normally be initiated with a written memorandum from the court-martial convening authority. The IO should start by reviewing the packet that the Criminal Law Branch Cells have prepared for you, including the charge sheet, background documentary evidence, Manual for Court-Martial, and DA Pamphlet 27-17. Your assignment as an IO takes precedence over all other military duties.

5. **Time Table.** Usually the officer appointing you will set a date for completion of the report. If you cannot comply with that date, promptly report this fact in writing to the convening authority that appointed you and explain the cause for the delay. Delays may cause the accused gross injustice. **Time is of the essence, particularly if the accused has been placed in pre-trial confinement.** At trial, if it appears as if either the IO or the Government did not move forward with the 32(b) hearing in a timely manner, the charges may be dismissed.

a. **Requests For Delays By The Accused/Defense.** Requests for delays by the accused must be in writing and must be attached to the report of investigation. The Government should be allowed an opportunity to respond to the defense delay request. Any reasonable request for delay by the accused should be granted.

b. **Requests For Delays By The Government.** Requests for delays and reasons for the request by the Government should be in writing. You should review Rules for Court-Martial (RCM) 707 and consult with your legal advisor before ruling on the Government's request. Prior to making a ruling, you may hold a hearing where both defense and the Government can present evidence and argument on the request. The Government must always establish the request is for a reasonable period of delay. Always document the evidence you considered and reason(s) for granting the delay because defense counsel may ask the judge to review the decision. In short, you must hear evidence and arguments from both sides, approve only reasonable delays, have an evidentiary basis for granting the request, and explain the reason(s) for the decision and include this information in your report.

6. **Consulting With Your Legal Advisor.** After reviewing the case packet the OSJA Criminal Law Division has provided for you and the applicable punitive article(s) in the UCMJ, you must make an appointment to see your legal advisor. To make an appointment, call the Administrative Law Division of the Office of the Staff Judge Advocate (OSJA) at 526-0538.

a. **Role Of Your Legal Advisor.** Although you will receive advice from a legal advisor, the conclusions drawn from the evidence of the case and the recommendations concerning the case are solely within your judgment and are your responsibility.

b. **Informing Parties of Your Legal Advice.** You should inform counsel for the accused and counsel for the Government of all matters discussed with your legal advisor in your initial briefing. If you later seek advice from your legal advisor, you must give prior notice to counsel and must provide these parties with an opportunity to respond to the advice you received. As a general rule, you should keep a record of the dates of consultation with your legal advisor, the matters discussed, when parties were notified, and any response by counsel to your legal advisor's advice.

7. **Preparing For The Investigation.**

a. **Informing The Accused Of The Investigation And The Right To Counsel.** You should arrange through the accused's commanding officer or the confinement officer, if the accused is in pre-trial confinement, to meet with accused for the purpose of providing the preliminary advice and information concerning the investigation. See Figure 2-1 of DA Pam 27-17. If the accused is represented by counsel, the notice should be sent to them, otherwise, you should personally deliver the notice to the accused, read its contents, explain it and answer any questions. This meeting is used to introduce yourself, explain that you have been detailed as an IO, and explain the purpose of the investigation. You must prohibit any attempt by the accused to discuss the facts of the case with you at this time. Once the accused requests counsel or has counsel representation, you should not have any communication with the accused without counsel present.

b. **Determine What Evidence To Examine.** You must determine what evidence, including documents and physical evidence should be examined at the hearing and whether the evidence is reasonably available for the hearing. See RCM 405(g). You may decide to consider alternatives to examining the actual physical evidence, for example, testimony describing it or photographs depicting it. Copies of original documents should be authenticated by witnesses with firsthand knowledge of its contents. You should make every effort to ensure that witnesses in possession of essential documentary and real evidence are present at the investigation. Examine but do not take possession of real evidence. Your receipting for evidence might create admissibility problems at a later court-martial. You may visit the scene of the alleged crime, however you must inform all parties in advance and give them an opportunity to accompany you; otherwise, inform them afterward that you have visited the scene.

c. **Determine What Witnesses To Call.** After reviewing the file, you should know the names of prospective witnesses. To avoid any perception of bias or impropriety, have the administrative staff support at the cells call your witnesses to arrange appearance at the hearing. Once you decide what witnesses to call, you must determine if they are reasonably available to attend the 32(b) hearing. That requires you to balance the significance of the expected testimony and personal appearance of the witness against the difficulty, expense, delay, and effect on

military operations of obtaining the witness's presence at the investigation. See RCM 405(g)(1)(A).

(1) **“Reasonably Available” Witness.** A witness is “reasonably available” when the witness is located within 100 miles of the hearing and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness appearance. See RCM 405(g)(1)(A). An unavailable witness may include:

- (a) a witness exempted by a ruling of a military judge on the grounds of a privilege communication;
- (b) a witness who persists in refusing to testify concerning the subject matter of a statement despite an order of the military judge to do so;
- (c) a witness who testifies to a lack of memory of the subject matter;
- (d) a witness who is unable to be present or to testify at the hearing because of death or an existing physical or mental illness or infirmity;
- (e) a witness who is absent from the hearing after being notified or ordered to testify;
- (f) a witness by reason of death, age sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the hearing; and
- (g) a civilian witness who refuses to testify.

(2) **Defense Objections To Unavailable Witnesses.** If defense objects to your determination that a witness is unavailable, you must attach a statement of reasons for your determination in the report of the investigation. You may communicate by phone with a prospective witness to determine his or her availability, however, you should not discuss the facts of the case. You should only hear the testimony of a witness at the 32(b) hearing.

d. **Securing The Attendance Of Witnesses**

(1) **Military Witnesses And Government Civilian Employees.** Military witnesses may be ordered to appear at the investigation. If you determine a witness to be reasonably available, you should ask the witness's immediate commander to make the witness available. If the commander decides the witness is not reasonably available, you must abide by the decision and consider alternatives to live testimony by the witness. If this occurs, ask the commander to provide written reasons for denying the request and attach to your report. You should ask the supervisors of Government civilian employees to arrange for their attendance.

(2) **Civilian Witnesses.** Non-Governmental civilian witnesses cannot be compelled to appear at the investigation. With advance approval from the general court-martial convening authority, you may arrange for the issuance of invitational travel orders for a civilian willing to testify. In the alternative you can arrange transportation for yourself, the accused, and the Government to a place convenient for the civilian witness.

e. **Arranging Location Of The Hearing.** You decide the date, time, military uniform, and location of the hearing. Secure a location of the hearing so you can provide this information to both the accused counsel and Government counsel. ACU's is an acceptable uniform for a 32(b) hearing.

f. **Second Notification to Accused/Defense Witness List.** You must prepare a memorandum with the date, time, and location of hearing, and the list of witnesses you intend to call to the hearing. See Figure 2-2 in DA Pam 27-17 for a sample memorandum. The cells can prepare this memorandum for you. The accused will have an opportunity to request witnesses, documents, or records and may have a list of witnesses at the preliminary meeting or may send you the name and addresses of any witnesses they want call after discussing the issue with defense counsel. You will have to determine if defense witnesses are reasonably available. That requires you to balance the significance of the expected testimony and personal appearance of the witness against the difficulty, expense, delay, and effect on military operations of obtaining the witness's presence at the investigation. See RCM 405(g)(1)(A). If defense objects to your determination that a witness is unavailable, you must attach a statement of reasons for your determination in the report of the investigation.

g. **Motions.** Prior to the hearing, you may receive a request or motion from either the Government or defense. Immediately notify your legal advisor and they will assist you in preparing a response, if necessary. Allow both sides copies of the motion, and allow both sides to respond in writing. Always request both sides to state their reasons for the motion or reasons why they object to the motion. The most common types of requests are for a verbatim transcript, videotaping of the hearing, closed hearing, and voir dire of the IO to determine impartiality.

(1) Verbatim Transcripts - The decision to have a summarized (standard) or verbatim transcript of the hearing is up to the person that appointed you as IO. Immediately notify the Government if defense has made this request and they will advise the Appointing Authority whether to allow it or not.

(2) Videotaping of Hearing - As the IO, you decide this issue, in almost all cases, a written transcript is reasonable and sufficient to capture the testimony at the hearing. If both sides agree that videotaping is reasonable, then videotaping may be used.

(3) Closed Hearing - In general, most hearings are open to the public. In high profile cases, media and spectators may want to attend the hearing. Depending on the circumstances of the alleged crime, spectators and media may affect the witnesses' ability to testify, particularly in violent crimes where the victim is going to testify. Therefore, you may want to close the hearing to the public, media, or certain witnesses. Let your legal advisor know your final decision so the Public Affairs Branch can notify the press. See also 8f of this Guide.

(4) Voir Dire of IO - As the IO, you are an impartial investigator. If either side attempts to challenge your impartiality in the hearing by requesting that you be questioned on the record, deny the request and direct the attorney to put any objection to the IO's impartiality in writing to the Appointing Authority. Proceed with the hearing.

8. **32(b) Hearing.**

a. **Layout Of Hearing Room.** See figure 3-1 of DA Pam 27-17 for a suggested layout. Special consideration should be given to the alleged victim/witness's location in relation to the accused. Placing the victim/witness immediately next to the accused is not recommended. Spectators, including the victim/witness liaison should be seated behind the witness.

b. **Opening Session.** The opening session begins with a script that you read stating the charges and administrative information for the record. See figure 3-2 of DA Pam 27-17 for the script. Witnesses should be outside in a witness waiting area while the opening script is read.

c. **Witnesses.**

(1) **Location Of Witnesses.** Witnesses should be located outside the hearing in a witness waiting area. Witnesses should be called one at a time into the hearing room. You should administer each witness the oath in figure 3-2 of DA Pam 27-17. Witnesses should not hear the testimony of other witnesses. Once questioning is done, witnesses should exit the hearing room. After questioning, instruct the witnesses not to discuss their testimony with other witnesses. Witnesses should remain in the witness area in case they need to be re-called back for further questioning.

(2) **Order Of Questioning.** Generally, each party should be able to ask questions of the witness. The most common order of questioning is Government, defense, then investigator. If the investigator does not feel the Government's questioning is necessary, the Government can be prevented from asking questions.

(3) **Right Warning Procedure/Waiver Certificate.** Ordinarily, it is not necessary to give witnesses article 31 warnings, however, if, before or during the testimony, a military witness is suspected of committing any offense, stop and advise the witness of article 31 rights. If any witness remains silent after giving them their rights, stop all questioning until they can speak to their attorney. Use DA Form 3881 (Rights Warning Procedure/Waiver Certificate) when advising military and civilian witnesses. See Annex 4 for a sample DA Form 3881.

(4) **Refusal To Testify.** If a military witness refuses to testify and the statement does not appear that the statement is incriminating, allow the witness to consult with a judge advocate legal assistance attorney. If, after consulting a legal assistance attorney, the witness persists on refusing to testify, you may order them to do so. Failure to comply with this order could result in disciplinary action. You may use previously sworn statements of the refusing witness as a substitute for their testimony.

(5) **Alternatives To Testimony.** Substitutes for the testimony of a witness may be considered depending on the availability of the witness and whether the accused objects. See RCM 405(g)(4).

a. **Non-Available Witnesses.** If a witness is not reasonably available, you may consider sworn statements, statements under oath taken by telephone provided each party can question the witness, prior testimony taken under oath, deposition of the witness.

b. Unless the defense objects, the following can be considered as evidence regardless of the availability of the witness: sworn statements, statements under oath taken by telephone provided each party can question the witness, prior testimony under oath, depositions, stipulations of fact, and unsworn statements.

d. **Non -Witness Evidence.** Documents and objects that you consider as evidence at the hearing should be assigned identifying numbers so they can be accurately referred to when you complete your Investigator's Report on DD Form 457.

e. **Scope of Investigation.** RCM 405(e). You should inquire into the truth and form of the charges on the charge sheet. Additionally, you may inquire into uncharged offenses if evidence during the investigation indicates that the accused committed an uncharged offense. You may investigate and make a recommendation on uncharged offenses so long as the accused has all the rights noted in RCM 405(f), including cross-examination of witnesses and offering evidence related to the uncharged offense(s).

f. **Spectators.** Normally, the hearing is open to the public however you or the authority who directed the investigation may close it to the public. Closing the hearing may be necessary in high-profile cases where the spectators might interfere and disrupt the integrity of the hearing. This is particularly true in cases with classified information or where the spectators may be disruptive to the witnesses' ability to testify. The victim/witness liaison may accompany the victim/witness in the hearing.

g. **Defense Objections.** If the defense objects to any of your decisions on procedures or defects in the investigation, you are not required to rule on objections. Request all parties put objections in writing and attach to your investigator's report. You may take corrective action in response to an objection. If an objection raises a substantial question about the propriety of your conducting the investigation (challenging impartiality), you should consult with your legal advisor and inform the appointing authority of the objection.

h. **Length of Hearing.** The hearing can last anywhere from a few hours to several days. You determine when comfort breaks are allowed, when to recess for the day, and when the hearing is closed.

9. Closing The Investigation.

a. **When to Close.** After you receive all the evidence and the accused has indicated that they have no further evidence to offer, inform the accused you do not contemplate calling any more witnesses or receiving other evidence unless the accused has other evidence or argument to make. If no further evidence is offered, you should declare the hearing closed on the record.

b. **Final Statements.** Allow the accused or counsel and the Government to make a statement of what they consider an appropriate recommendation concerning the disposition of the case. You should remind the accused that your recommendation is advisory only and the officer who directed the investigation is not bound by your decision.

10. **Completion Of The Investigation Officer's Report.**

a. **Recommendations.** You can recommend trial by court-martial or dismissal of any charge or specification. In order to recommend the charges and specifications be referred to trial, you must have reasonable grounds to believe that the accused committed the offense(s) alleged. If you recommend trial, you must choose what type of court-martial, including, summary, special, or general court-martial. See Annex 3 for a summary of the different types of courts-martial in the U.S. Army.

b. **Report.** Your report will be completed on DD Form 457. See figure 4-1 of DA Pam 27-17 for a sample DD Form 457. Five copies of each document should be in the file. In many cases, you will make your recommendation as soon as the investigation closes. However, do not announce your findings and recommendation at the close of the hearing. If you are unable to make a decision immediately, you may have the testimony transcribed and review it before coming to a conclusion.

c. **Forwarding The Report.** You should attach all papers furnished to you, together with all evidence produced at the investigation to the DD Form 457. If practicable, hand carry your report to the officer who appointed the investigation. Furnishing a copy of the report to the accused is not your responsibility, however you may note in the remarks section of DD Form 457 that defense requests a copy.